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THE
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I.L.R., 23 BOMBAY.

ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji.

1898
JULY 28.

ORIGINAL CIVIL.

23 B. 1.

NATHA KERRA (*Plaintiff*) *v.* DHUNBAIJI AND OTHERS (*Defendants*).*
[23rd, 25th and 28th July, 1898.]

Will—Construction— Bequest to wife with obligation of maintaining and educating children—Interest taken under such bequest—Decree against wife—Attachment of interest under will—Civil Procedure Code (Act XIV of 1882), s. 274—Fraudulent conveyance—Transfer of Property Act (IV of 1882), s. 53.

Bomanji Darasha Captain died in 1891 leaving a widow Dhunbaiji (defendant No. 1) and two sons, Perozsha and Darasha (defendants Nos. 4 and 5). By his will he bequeathed the residue of his property to trustees (of whom Dhunbaiji was one) in trust to pay the rents and income thereof to his wife Dhunbaiji for life, "she thereout maintaining, educating and bringing up" his children in a manner suitable to their degree in life. After his death the property, moveable and immoveable, was to be divided among his sons equally when Darasha should attain the age of twenty-five. He attained majority in October, 1895. At the date of suit, Darasha was eighteen years old and Perozsha was twenty-five. It was contended that Dhunbaiji was only a trustee of the rents for the benefit of her sons Perozsha and Darasha.

Held, that under the will Dhunbaiji took a life-interest in the rents subject to the obligation of maintaining, educating and bringing up the children. The only two surviving children (Perozsha and Darasha) having attained majority and having received property under the will of an uncle were now no longer in need of being maintained by Dhunbaiji. The obligation imposed upon her, therefore, by her husband's will was discharged, and she was now entitled to a life-interest free from all further obligation to maintain his children.

On the 13th June, 1895, the plaintiffs obtained a decree for Rs. 3,976-10-10 against Dhunbaiji and her son Perozsha. In execution of that decree they attached under an order dated 2nd July, 1895, the immoveable properties which had belonged to the testator's estate, on the ground that both Dhunbaiji and **[2]** Perozsha had an interest in them. The attachment was issued under s. 274 of the Civil Procedure Code (Act XIV of 1882). The defendants contended that Dhunbaiji had no attachable interest at all in the said properties, she being under the will merely a trustee as above mentioned for her sons, and that, if she had, it

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was an interest in moveable property, which should have been attached under s. 268 of the Code, and that the attachment under s. 274 was ineffectual and inoperative. They further alleged that by an assignment dated the 20th February, 1896, Dhunbaiji had assigned and surrendered her life-interest to her son Darasha, and that such interest was, therefore, not available to satisfy the plaintiff's decree against her. As to Perozsha's interest, the defendants alleged that by a deed of settlement dated the 9th February, 1895, it was validly settled for the benefit of himself and his family and that, therefore, he had no interest in him which could be attached under the order of the 2nd July, 1895.

Held, (1) that Dhunbaiji had an attachable interest in the property.

(2) That her interest was an interest in immoveable property and was validly attached under s. 274 of the Civil Procedure Code.

(3) That her assignment of the 20th February, 1896, was invalid as against the plaintiffs under s. 276 of the Civil Procedure Code.

(4) That even independently of the attachment, her assignment to her own son Darasha was invalid as against the plaintiffs under s. 53 of the Transfer of Property Act (IV of 1882). The object of that assignment was to protect the property from the creditors, and it was designed to defeat the plaintiff's decree, and it was, therefore, fraudulent and void as against the plaintiffs.

(5) That the deed of settlement by Perozsha of the 9th February, 1895, was void as against the plaintiffs under s. 53 of the Transfer of Property Act (IV of 1882).

(6) That the plaintiffs were entitled to realize the shares and interest both of Dhunbaiji and of Perozsha so far as might be necessary to satisfy their decree of 13th June, 1895.

[Cons., 13 C.P.L.R. 180 (184); **Expl.**, 25 B. 202 (207).**]**

THE plaintiff's firm of Natha Kerra & Co. obtained a decree against the defendant Dhunbaiji and her son Perozsha (defendant No. 4) for Rs. 3,976-10-10 on the 13th June, 1895, in suit No. 177 of 1895. In execution of that decree they attached certain properties, but on a summons taken out by the defendants that attachment was set aside on the 21st September, 1895, on the ground that Dhunbaiji had no beneficial interest in the properties attached.

The question of Dhunbaiji's interest in the said properties depended on the construction of her deceased husband's will, and [3] the plaintiff brought this suit (*inter alia*) to have the said will construed and her interest under it ascertained and declared liable to satisfy the decree in suit No. 177 of 1895.

The plaint stated that Dhunbaiji's husband Bomanji Darasha Captain died in 1891 leaving a considerable amount of property both moveable and immoveable; *inter alia* a half share of certain immoveable properties in Bombay specified in the schedule to the plaint. He left, him surviving, his widow Dhunbaiji (defendant No. 1), two sons Perozsha and Darasha (defendants, Nos. 4 and 5) and one daughter since deceased. By his will dated 21st July, 1887, he bequeathed the residue of his property to trustees, *viz.*, Dhunbaiji and one Jivaji Darasha Ghandy (defendant No. 2), upon certain trusts duly set forth therein. The following are the material parts of the will :—

"7. I further direct that my said trustees shall permit my said wife, if she desires, to occupy and enjoy free of any occupation or other rent that portion of my family dwelling-house situate in No. 12, Church Gate Street, Fort, in Bombay in which I at present live, and to use and enjoy the household furniture, effects and things belonging to me therein and during the term of her natural life.

"8. I further direct my said trustees to hold the balance of the property vested in them by this my will after setting apart the sums hereinbefore bequeathed to my said daughters (but subject to the payment

thereout at the proper time or times of the marriage expenses and dower of my daughters and the marriage expenses of my sons, if they or either of them should be unmarried at the date of my death hereinbefore directed) upon trust to pay the rents, profits, interest, dividend and produce of so much thereof as shall from time to time under the provisions of this my will shall remain or be in their hands, unto my wife during the term of her natural life, she thereout maintaining, educating and bringing up my children in a manner suitable to their degree in life.

"9. I further direct that from and immediately after the decease of my said wife then as well as to the immoveable and moveable estate and the capital of the personal estate which may then be or thereafter come into the hands of my said trustees under and subject to the provisions of this my will and as also to the rents, issues, profits, interests, dividends and produce thereof upon trust for such of my sons now born or hereafter to be born to me who either before or after the decease of my said wife shall attain the age of eighteen years to be divided between them equally, on my son Darasha attaining the age of twenty-five years or in the event of his death before attaining the said age at the end of twenty-five years to be completed from the date of his brith, and in case there shall be but one son, then upon trust for such one son.

[4] "10. And I hereby direct that if any of my sons shall die without having received payment or acquired a vested interest in my said trust estate, stocks, funds and securities leaving a child or children surviving him or them, then and in such case such last mentioned child or children who being a son or sons shall attain the age of eighteen years, or who being a daughter or daughters shall attain that age or marry, shall take and be entitled to such and the same shares of and in my said trust estate, moneys, stocks, funds and securities and with and subject to the provisions for their, his or her maintenance and advancement provided by law as his, her or their deceased parent would have been entitled to in case such parent had received and attained the age of eighteen years, and in the event of all my sons dying without leaving any issue who shall be able to take the share or shares given to their respective fathers, then and in that case I direct that the property which shall then form the residue of my estate shall be divided among these persons who shall be entitled thereto under the provisions of the Parsi Intestate Succession Act."

Probate of the will was granted to the two trustees Dhunbaiji (defendant No. 1) and Jivaji Darasha (defendant No. 2), and in accordance with the 8th clause of the will they had paid one moiety of the rents of the immoveable property to the first defendant Dhunbaiji.

The plaint further stated that Perozsha (defendant No. 4) was twenty-five years of age and Darasha (defendant No. 5) was eighteen years of age.

By a Judge's order made in the above-mentioned suit No. 177 of 1895 the plaintiff was appointed receiver, under s. 503 of the Civil Procedure Code (Act XIV of 1882), of the attached properties with power to sue for the realization thereof.

The following paragraphs of the plaint set forth the plaintiff's case :—

"12. The said firm contend that upon the true construction of the said will the said Dhunbaiji is entitled to a life interest in the whole of the rents of one moiety of said properties specified in the said list A and that the said Perozsha has now a vested interest in remainder upon the death of the said Dhunbaiji in one moiety of the said moiety.

"13. The defendants, however, contend that the said Dhunbaiji is

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under the 8th clause of the said will a bare trustee of the rents of the said moiety for the benefit of her sons the said Perozsha and Darasha, and that she is entitled to apply the whole of the rents handed over to her for the benefit of the said Darasha. The said firm, however, contend that if upon the correct construction of the said will the said Dhunbaiji is a bare trustee as contended by the defendants, the said Perozsha is entitled to a half share in the said moiety absolutely."

[5] The defendants alleged that by a deed of settlement dated 9th February, 1895, the defendant Perozsha had conveyed all his interest in his father's estate and also in the estate of his uncle to trustees (defendants Nos. 6 and 7) on certain trusts, and that by a deed of assignment dated the 20th February, 1896, Dhunbaiji had released all her life-interest in the residuary estate of her husband to her son Darasha (defendant No. 5). The plaintiff contended that these deeds were executed with intent to defeat and delay creditors and were not binding on them.

This suit was filed on the 11th September, 1896. The plaint prayed that the will of Bomanji Darasha Captain should be construed and the rights of the defendant Dhunbai and Perozsha themselves ascertained and declared; (2) that a receiver should be appointed to receive the moiety of the rents and to set apart the share therein of Dhunbai or Perozsha or both, and to pay the same to the plaintiff in satisfaction of the decree in suit No. 177 of 1895 until the same was fully satisfied; (3) if necessary for administration of the estate of the said testator; and (4) if necessary for a declaration that the deeds of the 9th February, 1895, and of 20th February, 1896, were inoperative against the plaintiffs, &c., &c.

The defendants contended that Dhunbai had herself no beneficial interest under the will, but that she was bound to apply the income paid to her by the trustees towards the maintenance and education of her sons Perozsha and Darasha, and that she had a discretion to apply the larger part towards the maintenance of the younger son Darasha, and that the income was barely sufficient for the purpose. They also set up the two deeds above mentioned.

The main questions raised at the hearing were (1) as to the interests taken by Dhunbaiji and Perozsha under the testator's will; (2) as to the validity of the deeds of 9th February, 1895, and 20th February, 1896, as against the plaintiffs (creditors); (3) as to whether the attachment levied by the plaintiff in September, 1895, was valid.

Raikes (with *Scott*), for plaintiff:—Under the will, Dhunbai took an absolute beneficial interest for life not subject to any [6] obligation—*Leigh* v. *Leigh* (1); *Byne* v. *Blackburn* (2); *Mackett* v. *Mackett* (3); *Lambe* v. *Eames* (4); *In re Hamilton* (5); White and Tudor's Leading Cases (7th Ed.), Vol. II, p. 340. The settlement of 9th February, 1895, is void as against the plaintiff—s. 53 of the Transfer of Property Act (IV of 1882); *Norendra* v. *Kamalbasini* (6). So also was Dhunbai's assignment of 20th February, 1896—*Fatima Bibi* v. *Debnauth* (7); *Kashiba* v. *Shripat* (8); May on Fraudulent Conveyances, pp. 81-82; *Ex parte Eyre* (9); *Ishan Chunder* v. *Bishu Sirdar* (10); Civil Procedure Code (Act XIV of 1882), s: 276. Dhunbaiji's interest was moveable property and was rightly attached under s. 268.

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(1) (1848) 12 Jur. 907.
(2) (1858) 27 L.J. (Ch.) 783.
(3) (1872) L.R. 14 Eq. 49.
(4) (1871) L. R. 6 Ch. 597.
(5) (1895) 2 Ch. 370.
(6) 23 C. 563 (571).
(7) 20 C. 508 (512).
(8) 19 B. 697.
(9) (1881) 44 L. T. (N.S.) 922.
(10) 24 C. 825.

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Macpherson and *Rivett Carnac*, for the trustees of the settlement:—The settlement is good. It was not a voluntary deed—*In re Johnson* (1); *Holmes* v *Penney* (2); *Freeman* v. *Pope* (3); *Thompson* v. *Webster* (4). The attachment was subsequent to the settlement and, therefore, ineffectual.

Lowndes with *Lang* (Advocate-General) for defendants Nos. 1, 4 and 5 (Dhunbai, Perozsha and Darasha).—As to Dhunbai's interest under the will—Theobald on Wills, pp. 403, 404, 408; *In re Booth* (5); *Wetherell* v. *Wilson* (6); *Gilbert* v *Bennett* (7); *In re Coleman* (8); Jarman on Wills, p. 371. Her assignment of the 20th February, 1896, was good. It was made not to defeat creditors, but to pay them—*Middleton* v. *Pollock* (9). There was no valid attachment of Dhunbai's interest. That being so, the plaintiff's suit against her does not lie.

JUDGMENT.

TYABJI, J.—The circumstances under which this suit is filed are as follows:—One Bomanji Darasha Captain died in 1891 possessed of considerable property, both moveable and immoveable, of the aggregate value of about two lakhs of rupees. Bomanji [7] left, him surviving, his widow the defendant Dhunbaiji, his two sons the defendants Perozsha and Darasha, and one daughter Meherbai, who has since died.

Bomanji left a will dated 21st July, 1887, probate of which was obtained by two of his executors and trustees, namely, the defendants Dhunbaiji and Jivaji Dinsha Ghandy. The will (Ex. D) contains various provisions for the benefit of the testator's widow, sons, and daughter, and after giving various legacies disposes of the residue of his estate as follows:—In the 8th clause he says (His Lordship read the clause, see *supra*, and continued:—)

The testator's son Perozsha attained his majority some years ago and his son Darasha attained majority in the month of October, 1895.

By decree (Ex. A) dated 13th day of June, 1895, and passed in suit No. 177 of 1895, in which the plaintiff's firm of Natha Kerra & Co. were plaintiffs and the defendants Dhunbaiji and Perozsha were defendants, the defendants were ordered to pay to the plaintiff's firm the sum of Rs. 3,976-10-10 and interest thereon at the rate of six per cent. per annum till payment. By an order dated 1st August, 1895, the plaintiff's firm, in execution of the said decree, attached the "rents payable to the defendant Dhunbaiji for the month of July, 1895, by the executors of her husband's estate in terms of the will of her husband" under s. 268 of the Civil Procedure Code (Act XIV of 1882).

The first and second defendants as the trustees of the said will thereupon took out a Judge's summons to set aside the said attachment. This summons was made absolute by Mr. Justice Starling on 21st September, 1895 (see Ex. 17), and the attachment was set aside upon the ground that Dhunbaiji was a bare trustee and took no beneficial interest in the rents.

Under an order dated 2nd July, 1895, and made in pursuance of s. 274 of the Civil Procedure Code (Act XIV of 1882), the plaintiff's firm attached the immoveable properties belonging to the estate of the said testator on the ground that both the judgment-debtors had an interest therein.

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(1) (1881) 20 Ch. D. 389 (399).
(2) (1856) 3 Kay and J. 90.
(3) (1870) L. R. 5 Ch. 538.
(4) (1859) 4 Drew 628.
(5) (1894) 2 Ch. 282.
(6) (1836) 1 Keen. 80.
(7) (1839) 10 Sim. 371.
(8) (1888) 39 Ch. D. 443.
(9) (1876) 2 Ch. D. 104.

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By a Judge's order (Ex. C) made in the said suit No. 177 of 1895, and dated the 25th August, 1896, the plaintiff was [8] appointed receiver, under s. 503 of the Civil Procedure Code, of the attached properties, with power to bring suits, as such receiver, for the realization and collection thereof or otherwise as he may be advised.

This suit has accordingly been filed by the plaintiff as receiver under the above-mentioned order (Ex. C) praying that the testator's will may be construed and the rights of Dhunbaiji and Perozsha therein may be ascertained and declared, and that the shares of Dhunbaiji and Perozsha in the rents may be paid to the plaintiff in satisfaction of his decree, and that if necessary the estate of the testator may be administered and that the shares of Dhunbaiji and Perozsha may be sold, and the proceeds thereof may be applied in or towards satisfaction of the plaintiff's decree.

The suit was originally filed against the two executors and the two sons of the testator only, but as it appeared from the defendant's written statement that they relied upon an indenture of settlement (Ex. 13) dated 9th February, 1895, and executed by Perozsha whereby he settled all his share and interest in the estate both of his father and of his uncle Dinsha upon certain trusts, I directed that the trustees of such settlement —that is to say, the sixth and seventh defendants—should be added as defendants. This has accordingly been done.

The defendants also alleged by their written statement that the defendant Dhunbaiji by an assignment (Ex. 8) executed by her, and dated the 20th February, 1896, surrendered and released her life-interest in favour of the defendant Darasha, and that such interest is not now available for satisfying the plaintiff's decree. The defendants also contended that as a matter of fact, upon the true construction of the will, Dhunbaiji took no interest at all (under the 8th clause) in the testator's immoveable property, and that if she did, such interest has never been validly attached. In other words, the defendants contend that Dhunbaiji under the 8th clause of her husband's will took no beneficial interest at all, but that she was a bare trustee for her children, and that if she did take any interest under that clause it was an interest in moveable property which should have been [9] attached under s. 268 of the Civil Procedure Code (Act XIV of 1882); and that it was not an interest in immoveable property, and that, therefore, the attachment under s. 274 of the Civil Procedure Code was ineffectual and inoperative.

The defendants, therefore, contended that either Dhunbaiji had no attachable interest at all, or that, if she had, it has now become validly vested in the defendant Darasha by reason of the assignment of the 20th February, 1896 (Ex. 8).

As to Perozsha's interest, the defendants contended that it was validly settled for the benefit of himself and his family under the deed of 9th February, 1895 (Ex. 13), and that, therefore, he had no interest in him which could be attached under the order of the 2nd July, 1895 (Ex. B) and that the plaintiff's suit should, therefore, be dismissed.

The plaintiff on the other hand contends that Dhunbaiji took a life-interest in the rents of the testator's estate; that such interest is an interest in immoveable property; that it was, therefore, validly attached under s. 274 by the order (Ex. B) and that the assignment of the 20th February, 1896 (Ex 8) is, therefore, void as against the plaintiff under s. 276 of the Civil Procedure Code. The plaintiff further contends that both the settlement of Perozsha's interest of the 9th February, 1895, and the assignment of Dhunbai's interest of the 20th February,

1896, are void against the plaintiff under s. 53 of the Transfer of Property Act (IV of 1882).

I will deal with these various contentions in their order. The first question is, did Dhunbai take any, and if so, what interest under cl. 8 of the testator's will? Numerous decisions have been cited to me on both sides, but as the construction of each will must depend upon its own language, taken in connection with all its provisions as a whole, I cannot say that any one of the cases cited to me is exactly decisive of the point I have to consider. But they clearly lay down the principles which the Court ought to bear in mind in construing provisions of this kind, and I gather from these decisions that the Court will not enforce, or treat as obligatory, a mere wish or desire or confidence or hope on the part of the testator that the donee of the fund [10] should, or would, or ought to, or is expected to apply it for the benefit of other persons. On the other hand, the Court does regard as binding and obligatory and does enforce a direction or trust in favour of third parties if such a binding obligation can be clearly ascertained from the will: see *Leigh* v. *Leigh* (1); *Byne* v. *Blackburn* (2); *Mackett* v. *Mackett* (3). In *Lambe* v. *Eames* (4) James, V. C., disapproved of various previous decisions and expressed the opinion that "the officious kindness of the Court of Chancery in interposing trusts, where in many cases the father of the family never meant to create a trust, was a very cruel kindness indeed." See also *In re Hamilton* (5); *In re Booth* (6) and *Gilbert* v. *Bennet* (7) and White and Tudor Leading Cases (7th Ed.), Vol. II, p. 340.

In the case before me there is a gift to Dhunbaiji for life, "she thereout maintaining, educating and bringing up" the children of the testator. It seems to me, on a consideration of the testator's language, and applying the principles laid down in the authorities above cited, that the testator's intentions would be best carried out by holding that the widow took a life-interest, but subject to the obligations of maintaining, educating and bringing up the children.

By the 7th clause the testator had given to his widow the use of the family dwelling-house and furniture therein for her life, but he has made no provision for her maintenance, and it is, therefore, reasonable to suppose that he provided for her expenses of living, &c., by the 8th clause of his will. Similarly he had given to his two sons the whole of the residue of his estate after the death of his widow, but he had made no provisions for their maintenance, &c., during her lifetime. By the construction I put upon the 8th clause of the will these defects are cured, and both the widow and the children are amply provided for in those respects.

It appears, however, that both the daughters of the testator are now dead, and that the only two surviving children, namely, [11] Perozsha and Darasha, have already attained the age of majority. They have both finished their education. Besides, in addition to the large property they take under the testator's will, about two lakhs of rupees, they have both obtained a very considerable fortune (about Rs. 1,56,000) under the will of their uncle Dinsha (Ex. E), and neither of them is now in any need of being maintained by Dhunbaiji. I, therefore, hold that the obligation imposed upon Dhunbaiji has now been discharged and that she is now entitled to a life-interest free from all further obligations to maintain the testator's children (see *In re Coleman* (8); Jarman on Wills, pp. 371-72).

(1) (1848) 12 Jur. 907. (2) (1858) 27 L.J. (Ch.) 788. (3) (1872) L.R. 14 Eq. 49.
(4) (1871) L.R 6 Ch 597. (5) (1895) 2 Ch. 370. (6) (1894) 2 Ch. 282.
(7) (1889) 10 Sim. 371. (8) (1888) 39 Ch. D. 443.

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As to the nature of the interest taken by Dhunbaiji, I am of opinion that it must be regarded as immoveable property as defined in s. 2, cl. 5, of the General Clauses Act (I of 1868) in so far as it is a benefit arising out of land. I do not think that it can be regarded as a mere maintenance under s. 266 of the Civil Procedure Code (Act XIV of 1882). It follows, therefore, that, in my opinion, Dhunbai's interest was properly and effectually attached on the 2nd July, 1895, by the order (Ex. B) under s. 274 of the Civil Procedure Code, and that, therefore, the assignment of the 20th February, 1896, (Ex. 8) is invalid against the plaintiff under s. 276 of the Civil Procedure Code.

I am, however, further of opinion that even independently of the attachment (Ex. B) Dhunbai's assignment to her own son Darasha must be held to be invalid as against the plaintiff under s. 53 of the Transfer of Property Act (IV of 1882). It is clear that all the parties to the deed of assignment knew of the plaintiff's decree and of his efforts to obtain satisfaction by attachment of the property of both the judgment-debtors. The express object of the assignment seems to me to have been to protect the property from creditors and that it was designed to defeat the plaintiff's decree and, therefore, I must hold it to be fraudulent and void as against the plaintiff.

Moreover, I must look upon the consideration of Rs. 12,560 stated in the deed as grossly inadequate, inasmuch as in my [12] opinion the value of Dhunbai's interest amounting to over Rs. 600 per month (see Ex. F) was worth a great deal more than the consideration paid for it. Under these circumstances I must hold that Dhunbai's interest has been validly attached and is available in satisfaction of the plaintiff's decree.

As to Perozsha's interest, it is not disputed that but for the deed of settlement of 9th February, 1895, (Ex. 13) it has been validly attached by the order of the 2nd July, 1895. Is then that deed valid against the plaintiff? The defendants contend that it is valid, because the object of the settlement was not to delay or defeat the creditors, but to make a provision for the benefit of Perozsha and his family after paying off all the then known creditors of Perozsha (see Ex. 6-A); and that the consideration of Rs. 21,703-4-0 mentioned in the deed was a sufficient valuable consideration to support the deed. I am, however, of opinion that the defendant's contention cannot be supported. The consideration in question was the proceeds of certain shares belonging to the estate of the testator (see Ex. 6) to which Perozsha and Darasha were absolutely entitled subject to the life-interest therein of Dhunbaiji herself. It is true that the shares, &c., were sold in order to pay off the debts of Perozsha. It is also true that they could not have been sold without the consent of Dhunbaiji and Darasha. It must be remembered, however, that Dhunbaiji herself was largely indebted to various creditors jointly with Perozsha, and that no less than Rs. 5,000 out of the proceeds of Rs. 21,703-4-0 went to pay debts which were due jointly by Perozsha and Dhunbaiji herself. So far, therefore, as Dhunbaiji is concerned, she cannot be regarded as having paid any appreciable valuable consideration for the settlement. As to Darasha, the utmost that he gave up was his reversionary interest in one-half of the proceeds after Dhunbaiji's death. Taking, therefore, his interest at the highest, the consideration moving from Darasha cannot be put at more than about Rs. 9,000 or Rs. 10,000. This amount I regard as grossly inadequate considering the enormous value of Perozsha's interest in the property which was made the

subject-matter of the settlement, and which at the very least cannot be worthless than rupees one lakh and twenty thousand.

[13] So far, therefore, as the valuable consideration is concerned, I consider that it was grossly inadequate. But, further, Darasha was a minor, both at the time of the sale of the shares, *i.e.*, in the latter part of 1894, and at the time of the settlement itself. In fact, he did not attain his majority till October, 1895. It is obvious, therefore, that his consent to the sale of the shares and to the provisions of the settlement was, at the time it was given, entirely futile. It is true that he ratified the settlement on the 22nd October, 1895, after attaining his majority, but that fact, I think, makes no difference, as the decree had then been brought to his knowledge. Under ss. 10 and 11 of the Indian Contract Act (IX of 1872) he was not (in February, 1895) competent to bind himself by any valid contract. *See Fatima* v. *Debnath* (1), *Kashiba* v. *Shripat* (2), which threw doubt upon the earlier decisions, *Sashi Bhusan* v. *Jadunath* (3), *Hanmant* v. *Jayarao* (4), and *Mahamed Arif* v. *Saraswati* (5). It is not, however, necessary for me to decide whether an agreement by a minor is absolutely void or only voidable at his option. It is enough for me to hold in this case that Darasha did not give sufficient consideration, and that even if he did, he was not absolutely bound by the deed of the 9th February, 1895.

Moreover, the sale of shares, &c., had taken place four or five months before the actual execution of the deed (see Ex. 6) and although there may have been a talk about the settlement about August or September, 1894, I am not satisfied that the actual terms or provisions of the settlement were discussed, much less definitely agreed upon, much before February, 1895. Perozsha was at Hyderabad up to the end of 1894, and it is apparent to me that he was a very unwilling party to the deed.

Now, it is admitted that although the plaintiff's decree (Ex. A) was not obtained till the 13th June, 1895, yet the two notes upon which it was based were signed by Perozsha and Dhunbaiji in January, 1895. Besides, there were other notes (Exs. G. H, I and J) which were also signed in January, 1895, and all of which were unpaid at the date of the settlement. It is admitted **[14]** that Perozsha and Dhunbaiji, who executed the notes, must have known that they were outstanding, and that the deed of settlement must necessarily delay or defeat the creditors. They cannot, therefore, be regarded as having acted in good faith in respect of these notes. So far as the trustees are concerned, I think, however, their action was *bona fide*, and that they had no knowledge of these debts. It is also possible that Darasha also was not aware of them. At the same time it is clear that no enquiry was made and no questions were asked either to Dhunbaiji or Perozsha. The inquiries as to the creditors were made in August-September, 1894, and considering the extravagant and reckless character of both Dhunbaiji and Perozsha I must consider the absence of further later enquiries right up to the date of the deed as an important, though perhaps a perfectly *bona fide* omission.

Under these circumstances I must hold that the deed of settlement of the 9th February, 1895, is void as against the plaintiff under s. 53 of the Transfer of Property Act, 1882. In coming to this conclusion I have, of course, not omitted from my consideration the authorities cited

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(1) 20 C. 508. (2) 19 B. 697 (700). (3) 11 C. 552. (4) 13 B. 50. (5) 18 C. 259.

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at the bar, namely, *In re Johnson* (1), *Holmes* v. *Penney* (2), *Freeman* v. *Pope* (3), *Thompson* v. *Webster* (4), all of which have a more or less strong bearing on the case before me. These authorities clearly establish that, if valuable consideration is given at the time of the execution of the deed, if the consideration is not shown to be grossly inadequate or illusory, if it is not proved that it was the direct intention of the parties to defeat or delay the creditors, if the parties were acting in perfect good faith and if there was no knowledge and much less intention on the part of the persons from whom the consideration moved to defeat any of the creditors, then the deed would be valid, otherwise not. As I have found these points against the defendants, I must hold that the deed is bad as against the plaintiff. I am, therefore, of opinion that the plaintiff is entitled to realize the share and interest both of Dhunbaiji and of Perozsha so far as may be necessary to satisfy his decree.

[15] I will now proceed to record my findings upon the issues. (Having stated his findings His Lordship continued :—) and I pass a decree for the plaintiff and I appoint the plaintiff a receiver to receive the moneys due to Dhunbaiji under the 8th clause of the will until the amount of the decree in suit No. 177 of 1895 is satisfied, and I direct that for the purpose of satisfying such decree the interest of the said Dhunbaiji and of Perozsha respectively in the estate of the testator or so much thereof as may be necessary should be sold by the Commissioner, and that the proceeds thereof should be applied in or towards the satisfaction of the plaintiff's decree and the costs of this suit. The defendants must pay the plaintiff's costs of this suit and must bear their own costs. The trustee-defendants to get their costs as between attorney and client out of their respective trust estates.

Decree for plaintiffs.

Attorneys for the plaintiffs.—Messrs. *Payne, Gilbert and Sayani.*
Attorneys for the defendants.—Messrs. *Wadia and Ghandy.*

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SMALL CAUSE COURT REFERENCE.

Before Mr. Justice Candy.

DHURAMSEY SOONDERDAS AND OTHERS, (*Plaintiffs*) *v.* AHMEDBHAI HUBIBBHOY, (*Defendant*).* [28th July, 1898.]

Landlord and tenant—Lease for a year—Whole rent paid in advance—Destruction of premises before expiration of lease—Right of tenant to a refund of rent paid in advance—Apportionment—Transfer of Property Act (IV of 1882), s. 108, cl. (e)—Contract Act (IX of 1872), s. 65.

In April 1896, the defendant let to the plaintiffs one compartment in a certain godown for storing goods for twelve months for a sum of Rs. 1,459 and a second compartment in the same godown for twelve months for Rs. 1,368. The plaintiffs entered into possession. In August, 1896, in accordance with the practice the plaintiffs paid the said two sums in advance to the defendant and got a receipt. On the 30th October, 1896, without any default of the plaintiffs the

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* Small Cause Court Case, No. $\frac{247}{7349}$ of 1897.

(1) (1881) 20 Ch. D. 389 (391).
(2) (1856) 3 K. and J. 90.
(3) (1870) L. R. 5 Ch. Ap. 538.
(4) (1859) 4 Dr. 628.

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whole godown including the said two compartments was destroyed by fire and rendered wholly unfit for the purpose of storing goods. The plaintiffs thereupon sued for a refund of a proportionate part of the money [16] paid to the defendant, relying upon s. 108, cl. (*e*) of the Transfer of Property Act (IV of 1882), and s. 65 of the Contract Act (IX of 1872).

Held, that they were entitled to recover. The consideration was for the whole year. The lease, *i.e.*, the whole contract had become void and, therefore, under s. 65 of the Contract Act (IX of 1872) the defendant, who had received the whole consideration, was bound to make compensation for that portion which had failed.

[R., 17 Ind. Cas. 894 = 23 M.L.J. 680 = 12 M.L.T. 594 = (1912) M.W.N. 1212.]

ON the 1st April, 1896, the defendant let to the plaintiffs a compartment in a certain godown known as the Nicol Mill Godown, situate at Colaba in Bombay, for twelve months (*i. e.*, from 1st April, 1896, to 31st March, 1897) for the sum of Rs. 1,459.

On the 26th April, 1896, he let to the plaintiffs a second compartment of the same godown for twelve months (*i. e.*, from 25th April, 1896, to 24th April, 1897) for the sum of Rs. 1,368. The plaintiffs entered into occupation of both the compartments.

On the 28th August, 1896, in accordance with the custom, the plaintiffs paid the said two sums (*viz.*, Rs. 1,459 and Rs. 1,368) to the defendant in advance, and the defendant passed a receipt for the amount.

On the same day the plaintiffs also paid the defendant a further sum of Rs. 213 as "tenant taxes" for the said two compartments for the above period, the same being payable to the defendant under the terms of the letting, and the defendant gave a receipt.

The plaintiffs stored their goods in the said compartments and occupied them until the 30th October, 1896, on which day the whole godown, including the said two compartments, was destroyed by fire and rendered wholly unfit for the purpose for which it was let, without any default of the plaintiffs.

On 17th November, 1896, the plaintiffs wrote to the defendant claiming a refund of part of the amount paid by them for the year's occupation of the two compartments. The defendant refused to refund any thing.

The plaintiffs thereupon brought this suit claiming to be refunded a proportionate part of the above-mentioned sums paid by them to the defendant.

They claimed a refund of Rs. 605 in respect of the first compartment of the said godown, and of Rs. 684 in respect of the [17] second, and Rs. 108 in respect of taxes. They further claimed Rs. 61 as interest at 6 per cent. from the date of the destruction of the godown, making a total of Rs. 1,458.

The suit was originally filed in the Court of Small Causes, but on application of the defendant (under s. 39 of Act XV of 1882 as amended by Act I of 1895, s. 13) it was transferred to the High Court.

Rivett-Carnac, for the plaintiffs.—The plaintiffs have paid rent for a whole year, but they have only had the use of the godown for six months. They are, therefore, entitled to be refunded part of the money they have paid to the defendant. Under cl. (*c*) of s. 108 of the Transfer of Property Act (IV of 1882), the premises being destroyed, the lease for a year became void at the plaintiffs' option on the 30th October, 1896. On the 17th November, 1896, they wrote a letter to the defendant exercising this option. Only half the term of the lease had then expired, but they had paid the defendant the rent for the whole year. Under s. 65 of the Contract Act (IX of 1872) defendant is bound to restore so much of the amount

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paid as represents the rent for the unexpired part of the term. See also s. 56 of the Contract Act. As to apportionment, see s. 36 of Act IV of 1882.

Kirkpatrick, for the defendant.—The plaintiffs are not entitled to any refund. The sections cited do not apply to a case like this. Section 108, cl. (*c*) of the Transfer of Property Act (IV of 1882), does not provide for or intend a refund. The words "shall be void" merely mean that after the time at which the lessee has exercised his option the lease shall be no longer operative or enforceable, see Contract Act (IX of 1872), s. 2, cl. (*j*). The case contemplated by the whole section is clearly that of a lease providing for occupation and for periodical and concurrent payment of rent accruing during such occupation. In such a case when the contract becomes void these rights come to an end. But the section does not apply to the case of an entire contract executed and completed like this. It does not undo what has been done. Here the plaintiffs paid a lump sum and at once fully acquired the right to use the godown for a year. **[18]** The contract was then completely executed and could not become void retrospectively. Both parties had done all that the contract required. The plaintiffs had paid the price and the defendant had handed over the godown. The fact that an accident afterwards happened, which deprived the plaintiffs of the benefit which they expected to enjoy for a year, did not affect the contract itself. The defendant did not guarantee the godown's safety for a year. Section 65 of the Contract Act does not apply. The illustrations show that it refers only to executory contracts; to cases in which something remains to be done under the contract by the person who has received the advantage and which he ought to do; in that case because he cannot do it he must restore the advantage. But here nothing remained to be done by defendant. He had done his part. He had given over the godowns to the plaintiffs. The money paid was not rent. It was the price or premium (see s. 105). The transaction was analogous to a completed sale. A buyer who bought and paid for and obtained goods to last him for a year could not recover part of the price from the seller, if after six months a large portion of them was destroyed. Section 65 of the Contract Act does not make A liable to compensate B for B's misfortune. As to English law, see Leake on Contracts (3rd Ed.), 598; *Izon* v. *Gorton*(1). Further, on the principles laid down in *Marriott* v. *Hampton* (2) the plaintiff cannot succeed. The godowns were really let for the monsoon and the plaintiffs had the benefit. After the rains the godowns were not nearly so valuable. The Court cannot apportion the rent.

Rivett-Carnac in reply.—This was not a sale but a lease, and the relationship and liabilities of landlord and tenant lasted for a year. As to what these liabilities are, see s. 108 of the Transfer of Property Act (IV of 1882). The lease was not an executed but an executory contract. There must be apportionment—Cunningham and Shephard's Notes on Contract Act (8th Ed.), p. 194. There is no evidence that these godowns are more valuable in the monsoon.

JUDGMENT.

CANDY, J.—On the first issue my finding is for the plaintiffs. There can be no doubt that the godowns were by the fire rendered **[19]** substantially and permanently unfit for the purpose of storing cotton. The

(1) (1839) 5 Bing. N. C. 501.

(2) Smith, L. C., Vol. II, 409.

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roof was completely destroyed and also part of the walls. According to defendant's own showing he claimed against his Insurance Company for a total loss, and he admitted that it would have taken one month and a half to make the building permanently fit. The engineer employed subsequently by him says three months. There is some mention in the evidence about a tarpaulin instead of a roof; no such offer was made by the defendant after the fire, and if it had been made, it would have been rightly declined by the plaintiffs. As the engineer showed, the value of a building for storing cotton with a tarpaulin instead of a proper roof would be considerably lessened.

The offer made by defendant not long after the fire was to supply accommodation in other godowns. This the plaintiffs were entitled to decline. The offer to put a suitable roof was not made till 30th November. This, as shown before, would have taken a considerable time.

I have, therefore, no doubt as to cl. (*e*) of head A of s. 108 of the Transfer of Property Act (IV of 1882) applying, and thus plaintiffs as lessees had the option of treating the lease as void. They exercised their option by their letter of 17th November, 1896, when they asked for a refund of a proportionate amount of rent. In my opinion they cannot treat the lease as void from the date of the fire (30th October). They were bound to give notice to the lessor, and this they in effect did by their letter of 17th November. They may fairly be treated as having been in occupation up to that date, for their damaged cotton in the godowns was sold by the Insurance Company on 10th November, and the purchasers would have a few days to remove what was sold to them. I do not believe that the plaintiffs continued in occupation after 17th November, 1896. The defendant's servant, Mancharji Edalji, gave his evidence badly. Even according to his own showing, he and his master's watchmen were in charge of the building.

Thus the question is, whether the plaintiffs are entitled from 17th November, 1896, to a refund of a proportionate share of what was called by the parties the "rent" of the godowns. The rent **[20]** according to the plaintiffs' letter of 9th May, 1896 was Rs. 1,600 for one godown and Rs. 1,500 for the other: total Rs. 3,100, or, as a superstitious man with his fondness for odd figures would put it, Rs. 1,601, *plus* Rs. 1,501, total Rs. 3,102. But when the bills were presented by defendant to plaintiffs in August, 1896, and full payment was made, the "rent," was split up into—

Brokerage	...	...	...	Rs.	62
Tenant taxes	...	...	...	„	213
Rent	...	...	...	„	1,459 1,368
				Rs.	3,102

And when the notice of the 17th November was made, the claim was for a refund of a proportionate amount of the rent, *viz.*, the above items excluding the brokerage. The same claim, is apparently made in the plaint, except that an item of Rs. 61 is added for interest at 6 per cent. from the date of the fire. This cannot be allowed, nor was it claimed in the notice of 17th November. We must calculate the full "rent" as Rs. 3,040, and if a refund of a proportionate amount can be decreed, the date from which the calculation must commence is 18th November 1896. In the absence of any evidence on the point, the calculation must be made according to the number of days for

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which the lease of each godown was void from and including 18th November, 1896, to the end of the year's lease. Very possibly the occupation of the godowns was more valuable to the lessees in the mansoon than in the fair weather; but no evidence had been adduced on that point. There is no material from which the Court can appreciate the difference in rental in the seasons. If, for instance, evidence had been led to show that a godown fetching an annual rental of Rs. 1,500 would be let for the monsoon only for Rs. 1,000, there would have been material on which the Court could act. But, there is none in the present case. The only course then is to calculate the number of days for which the lease of each godown was taken, and to see what part of 365 days that period comes to.

Thus the sole remaining question is whether such a refund can be claimed according to the law in India. It is of no use to look at English cases. According to English law the lease is such [21] a case as this would not become void (Woodfall's Landlord and Tenant, 15th Ed., pp. 434, 584, 627). Also it must be admitted that there is nothing in the Transfer of Property Act providing for refund of any part of the rent in such a case. But the question is whether s. 65 of the Contract Act (IX of 1872) is applicable, which provides that when a contract becomes void, any person who has received any advantage under such contract is bound to restore it, or make compensation for it, to the person from whom he received it.

On this question the learned counsel on both sides have adduced no authority. I have simply to find whether there are any circumstances which take the case out of the clear words of the section. There is no doubt that the agreement between the parties was that the consideration for the promise on defendant's part to lease the godowns for a whole year should be paid by plaintiffs to defendant in a lump sum at any time in the year when demanded. The consideration was so paid in August, 1896. That consideration was for the whole year. But the lease, that is, the whole contract—has become void. Therefore defendant, who has received the whole consideration, is bound to make compensation for that portion which has failed. The right to compensation does not depend on the possibility of apportionment (see Cunningham and Shephard's Notes to s. 65 of the Contract Act, IX of 1872). I am unable to find any principle which would take the case out of the plain language of the section. Judgment, therefore, must be for the plaintiffs with costs. Interest on Judgment at 6 per cent.

Decree for plaintiffs.

Attorneys for the plaintiffs.—Messrs. *Mansukhlal, Damodar and Jamsedji.*

Attorney for the defendant.—Mr. *M. N. Saklatwalla.*

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[22] APPELLATE CIVIL

Before Mr. Justice Parsons and Mr. Justice Ranade.

KESHAV AND OTHERS (*Original Plaintiffs*), *Appellants v.* VINAYAK AND OTHERS (*Original Defendants*), *Respondents.**

[13th December, 1897.]

Jurisdiction—Immoveable property—Civil Procedure Code (Act XIV of 1882), *s.* 16—Varshasans *charged on villages in Nizam's territory and paid in the same territory—Suit to establish title to a share in such* varshasans—*Plea of jurisdiction.*

An objection to jurisdiction may be raised at any stage of a suit, even after remand by the High Court in second appeal.

Plaintiffs filed a suit in the Court of the First Class Subordinate Judge at Nasik to establish their right to a certain share in two *varshasans* (annual allowances). The allowances were charged on the revenues of two villages in the Nizam's territory, and paid to the defendants by the treasury officers at Aurangabad in the same territory. The plaintiffs alleged that the *varshasans* were granted to a common ancestor of the parties and enjoyed as joint ancestral property, while the defendants contended that the allowances were granted to their grand father as his exclusive property to descend to his heirs, and that plaintiffs had no right to share in them.

Held, that the Nasik Court had no jurisdiction to try the suit. The *varshasans* were immoveable property, and there being a *bona fide* claim of title to them, the claim should be determined according to the law in force in the Nizam's dominions. The suit should, therefore, be brought in the Courts of the Nizam, in whose territory the *varshasans* were granted and paid.

Plaintiffs could not claim a declaration of title, or ask for a refund of the allowances in a British Court, merely because the defendants happened to be residents in British territory.

[**Appl.**, 33 B. 373=11 Bom. L.R. 353 (355); **R.**, 7 A.L.J. 675 (678)=6 Ind. Cas. 464; 19 P.R. 1903=144 P.L.R. 1903; 122 P.R. 1903=205 P.W.R. 1908; **D.**, 24 B. 407 (413).]

SECOND appeal from the decision of J. B. Alcock, District Judge of Nasik.

The plaintiffs sued for a declaration of their title to a one-third share in two ancestral *varshasans* (or annual allowances) received by the defendants from His Highness the Nizam's Government, and also to recover their share for the year 1890.

The *varshasans* were charged on the revenues of two villages situate in the Nizam's territory, and were paid to the defendants by the treasury officers at Aurangabad in the same territory.

[23] The suit was filed in 1891 in the Court of the First Class Subordinate Judge at Nasik, where the defendants happened to reside at the time.

Defendants pleaded (*inter alia*) that the Court had no jurisdiction to entertain the suit, and that the *varishasans* were the selfacquired property of their father, in which the plaintiffs were not entitled to any share.

The Subordinate Judge rejected the plaintiffs' claim, holding that they had not proved their right to the *varshasans* in suit.

On appeal the District Judge raised the following issue only :—

"Have the defendants proved their exclusive right to the *varshasans* in suit, or have the plaintiffs proved their right to share in it ?"

* Second Appeal, No. 666 of 1897.

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On this issue the District Judge found for the plaintiffs, and awarded their claim.

Thereupon the defendants preferred a second appeal to the High Court.

The appeal came on for disposal before a Division Bench (Jardine and Ranade, JJ.), which being of opinion that the case had not been properly dealt with by the District Judge, reversed his decision and remanded the case for a fresh hearing.

After remand, the District Judge raised a new issue, *viz.*, whether the Court had jurisdiction to hear this suit?

He found this issue in the negative and dismissed the suit. His reasons were as follows:—

"The allowances in dispute are a charge on the revenues of two villages in the Nizam's territory and are paid by the Nizam's Government. *Prima facie*, therefore, the Nasik Courts have no jurisdiction to entertain a suit brought to establish a title to a share in these allowances. The property in dispute is immoveable property, and under s. 16 of the Code of Civil Procedure the present suit ought to be instituted in the Court within the local limits of whose jurisdiction that property is situated. There is a proviso to that section, but the explanation appended to the section shows that the proviso can only relate to property situate in British India. There can be no doubt that the section does not extend the jurisdiction of the Nasik Courts to property situate in a Native State."

Against this decision the plaintiffs appealed to the High Court.

[24] *M. B. Chaubal*, for appellants (plaintiffs).—The Nasik Court has jurisdiction. The present suit is not one for the determination of any right or interest in immoveable property. It is really a suit to recover money, and to obtain a declaration that the plaintiffs have a right to take each year a certain sum of money from the defendants out of the cash allowances received by them. The right to draw the allowances from the Government treasury may be immoveable property, but the right to receive a share of the allowances when drawn by the defendants is not immoveable property. So far as the plaintiffs' share is concerned, it is money had and received by the defendant to plaintiff's use—*Morbhat* v. *Gangadhar* (1).

But even assuming that the suit is one relating to immoveable property the proviso to s. 16 of the Civil Procedure Code (Act XIV of 1882) would give jurisdiction to the Court at Nasik, as the defendants reside at Nasik, and the relief sought can be entirely obtained through their personal obedience. All that we seek is to make the defendants personally liable to pay us our share. We ask for a decree against the defendants personally; the Nasik Court is competent to pass that decree and enforce it against the defendants.

Lastly we contend that it was not open to the District Judge to raise the question of jurisdiction after the case had been remanded by the High Court. The case was remanded for a rehearing on the merits. It was then too late to raise the plea of jurisdiction—*Ratanshankar* v. *Gulabshankar* (2); *Temulji* v. *Fardunji* (3).

Shivram V. Bhandarkar, for respondents.—This is a suit to establish plaintiffs' title to immoveable property, the claim for arrears being merely incidental to the main relief. An interest in a *varshasan* allowance

(1) 8 B. 234. (2) 4 B.H.C.R. A. C. J. 173. (3) 5 B.H.C.R. A.C.J. 137.

is immoveable property—*Balvantrav* v. *Purshotam* (1) ; *Maharana Fatesangji* v. *Desai Kallianrayaji* (2); *Collector of Thanb* v. *Hari Sitaram* (3). That being so the suit will not lie in any Court in British India, as the *varshasans* are charged on villages situate in a Native State and payable in that [25] State. The Courts cannot entertain suits relating to immoveable property situate outside their local jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 16. The proviso to the section applies only when the property is situate in British India—*Prem Chand Dey* v. *Mokhoda Debi* (4) ; *Vithalrao* v. *Vaghoji*(5) ; *Crisp* v. *Watson*(6). As to the English rule, see *The British South Africa Company* v. *Companhia De Mocambique*(7) ; *In re Hawthorne*(8). It is objected that the question of jurisdiction was raised too late. But the point was taken by the defendants in their written statement. But even if not, the plea of jurisdiction can be raised at any stage of a suit.

M. B. Chaubal, in reply.—I admit that if this suit had been brought by the whole family to establish their title to the *varshasans* in question, the Nasik Court would have had no jurisdiction. But this is a suit by one branch of the family against another branch to recover its share of the *varshasans* after they are received from the Nizam's Government. It is thus a suit for money had and received to the plaintiff's use.

JUDGMENT.

PARSONS, J.—Two points arise for immediate decision in this appeal :—

1. Whether after remand by this Court the Judge of the lower appellate Court could dispose of the case on a point of jurisdiction ?

2. Whether the Court of first instance had jurisdiction to hear the suit ?

1. The case of *Temulji* v. *Fardunji* (9) was relied on by the appellants on the first point. That, however, was a very peculiar case, and it was only held in it that "as the case was remanded for retrial on its merits, the Judge had no authority to look into the question of jurisdiction which was then raised before him for the first time." In the present case the objection was taken in the Court of first instance and formed the subject of the 5th issue there. This Court did not remand the case for retrial on the merits, but remanded the appeal for a fresh hearing in [26] consequence of the defective and faulty hearing (see Second Appeal No. 554 of 1894, decided 26th November, 1895). It is settled law that an objection to jurisdiction may be raised at any stage of a suit, even for the first time in second appeal : see *Sayad Nyamtula* v. *Nana*(10); *Velayudam* v. *Arunachala* (11). It could only be on the ground of acquiescence or waiver that a Court would be justified in refusing to entertain an objection when raised, and there is the authority of the Privy Council to show that when a Court has no jurisdiction over the subject-matter of a suit, the parties cannot by their actual consent confer that jurisdiction upon that Court—*Meenakshi Naidoo* v. *Subramaniya Sastri*(12).

2. The suit was brought to obtain a declaration that the plaintiffs are entitled to certain share in two *varshasan* allowances charged on the revenues of the villages of Vaijpur and Thoskargaon in the territories of

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(1) 9 B H C.R. 99. (2) 10 B.H.C.R. 281. (3) 6 B. 546.
(4) 17 C. 699. (5) 17 B. 570. (6) 20 C. 689.
(7) (1893) A.C. 602. (8) (1883) 23 Ch.D. 743. (9) 5 B.H.C. R. A.C.J. 137.
(10) 13 B. 424. (11) 13 M. 273. (12) 14 I. A. 160=11 M. 26.

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His Highness the Nizam and paid by the treasury officers at Aurangabad in the same territories, and to recover the amount of that share for the year 1890 from the defendants, who are alleged to have been paid the whole of the allowances at Aurangabad. The *varshasan* allowances are immoveable property. Mr. Chaubal, for the plaintiff-appellants, admitting this and admitting also that a suit by the family to establish its right to the *varshasans* could not be brought in British India, has argued that the suit will lie against the defendants who reside in British India to recover from them the share to which the plaintiffs allege they are entitled, because the relief claimed can be entirely obtained through the personal obedience of the defendants. He relies on the proviso to s. 16 of the Code of Civil Procedure. The explanation, however, to that section shows that property in it means property situated in British India, which these *varshasans* are not. Before the plaintiffs can get a decree against the defendants for the money amount they claim, they must prove their right to the share they claim in the *varshasan* allowances themselves. They allege that right and very properly ask the Court in this suit to determine it; the suit is, therefore, one for the determination of a right to, or interest in, **[27]** immoveable property situated outside British India and it is, I think, quite clear that a Court in British India, has no jurisdiction to hear such a suit. In the case of *The British South Africa Company* v. *The Companhia De Mocambique* (1), it was decided that the Supreme Court of Judicature had no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad, and it was there admitted that the Court could not make a declaration of title or grant an injunction to restrain trespasses over such land. In the case of an estate in land or of a right annexed to such an estate, "as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the state in which it depends" (Story, Conflict of Laws (8th Ed.), s. 553 at p. 771). In *In re Hawthorne*; *Graham* v. *Massey* (2), Kay, L. J., says: "I am not aware of any case where a contested claim depending upon the title to immoveables in a foreign country strictly so called, being no part of the British dominions or possessions, has been allowed to be litigated in this country simply because the plaintiff and defendant happened to be here," and after citing some cases thus concludes: "But the case is infinitely stronger where the contested claim is based upon the right to land, where that land is situate not in Scotland but in Dresden, where the question whether the plaintiff has any claim or not must be determined by the law of Saxony as to immoveables, and where the only ground for instituting proceedings in this country is the fact that the defendants are resident here. All these circumstances concur in this case and in my opinion the Courts of Civil Judicature in *England*, which sit, as Lord Westbury said in *Cookney* v. *Anderson* (3), to administer the municipal law of this country, have no authority to determine in such a case as this whether or not the plaintiff's claim is well founded."

This decision is very apposite to the present case where the defendants are in no fiduciary relations with the plaintiffs, are not bound by contract with them, and the claim is not based upon a suggestion of fraud. It is a *bona fide* claim on both sides **[28]** of title to the *varshasan* allowances paid by the Government of the Nizam which

(1) (1893) A.C. 602. (2) (1883) 23 Ch. D. 743. (3) (1862) 1 Deg. J. & S. 365.

the plaintiffs say were granted to a common ancestor of the parties to be enjoyed as ancestral property, while the defendants say that they were granted to their grandfather as his own exclusive property to descend to him and his heirs. This claim will have to be determined according to the law in force in the Nizam's dominions. It may be that under it such *varshasans* are impartible, or that they descend to the eldest son only, or that they are subject to some other special mode of devolution or even of disbursement. It may be that, under some such form of Pensions Act as is here in force, claims to such allowances are not cognizable by the Civil Courts, but are left for the decision of the ruling power itself. In the present case that power has seen fit to pay the allowances to the defendants. I am of opinion that if the plaintiffs feel themselves aggrieved at this, they must apply to that power for redress or sue in the Courts of the country in which the *varshasans* were granted and are paid, and that they cannot claim a declaration of their title or the refund of the allowances in the Courts of this country, merely because the defendants happen now to be residents here. We confirm the decree with costs.

RANADE, J.—In this case the original suit was brought by the appellant-plaintiffs to establish their right to a specific share in two *varshasans* payable out of the revenues of two villages in the Nizam's territories, and received from the Aurangabad treasury by the respondents Nos. 1—5 as representing the eldest branch of the common family of the parties. Appellants stated that they had received their share of the allowances down to 1883-84, since which time respondents had refused to pay, and along with the establishment of their rights to share the allowances, appellants claimed a specific sum for one year's share. The respondents Nos. 1—5 denied the appellants' right to a share in the allowances, which they claimed as the self-acquisition of their own immediate ancestor; and among other objections they urged that the Nasik Court had no jurisdiction to try the suit. Though an express issue was laid down on this point of jurisdiction, the Court of first instance did not decide it, as it found that the appellants had failed to establish their right. **[29]** The District Court in appeal reversed this decree, and awarded the whole claim. In Second Appeal, (No. 554 of 1894), the decree of the District Court was reversed, and the case was remanded for a fresh hearing. In the inquiry on remand, the District Judge held that the Nasik Court had no jurisdiction to entertain the suit, and he accordingly dismissed the appeal.

In the present appeal, Mr. Chaubal has taken exception to this decision on two grounds: (1) that the question of jurisdiction should not have been raised at this late stage in the District Court; and (2) that the Nasik Court had jurisdiction, as the plaint sought to establish the personal liability of the respondents to pay to the appellants, their share in the allowances at Nasik.

I agree with Mr. Justice Parsons in holding that neither of these two contentions is well founded. As regards the first point, our attention was drawn to the ruling of this Court in *Temulji* v. *Fardunji*(1) in which it was no doubt laid down that when the High Court has remanded a suit for retrial on the merits, the lower appellate Court has no authority to raise a question of jurisdiction for the first time. The present case may, however, be distinguished on the ground that here the question of jurisdiction had not been raised for the first time in the remand inquiry. The defence had been specially pleaded in the Court of first instance at the earliest stage of the inquiry. Moreover, this Court has always held that a question of

(1) 5 B.H.C.R.A.C.J. 137.

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jurisdiction may be raised at any stage even in second appeal, and also after a remand order which directed an inquiry into the merits—*Bhai Trimbakji* v. *Tomu* (1); *Motilal* v. *Jamnadas* (2); *Krishnarao* v. *Muncherji* (3); *Ganpatrav* v. *Bai Suraj* (4). The Madras High Court has similarly ruled that the question of jurisdiction is not of such a technical character that the appellate Court can properly disregard it—*Keshava* v. *Lakshminarayana* (5); *Velayudam* v. *Arunachala* (6). This is also the view of the Calcutta and Allahabad High Courts—*Chowdhry Wahid Ali* v. *Mullick Inayet Ali* (7); *Nidhi Lal* v. *Mazhar Husain* (8). Even if the lower [30] appellate Court had not raised the question, it is plain that in the present appeal, respondents could have raised it before us, and it would have been incumbent upon us to consider it. This first point of the appellants' pleader's contention must, therefore, be overruled.

His second ground of objection, namely, that the Nasik Court had jurisdiction to try the suit, turns upon the consideration whether the appellants' claim in the Nasik Court falls under the description of the class of suits referred to in s. 16, or whether it falls under s. 17 of the Civil Procedure Code; in other words, whether it is a suit for the determination of any right or interest in immoveable property, or is a suit which seeks to fix a personal liability upon the respondents. The plaint, and the valuation of the claim which was raised to ten times the value of the appellants' share of the allowance, show clearly that the appellants sought a determination of their interest in immoveable property. The *varshasan* allowances are admittedly immoveable property, and the difference which divided the Judges in *The Collector of Thana* v. *Krishnanath Govind* (9) has no bearing in the present dispute. As the appellants' right to a share was contested by the respondents, they could only succeed by establishing their title to a share in the allowance. Where the right was not in dispute, or was otherwise established, the claim to receive any one or more years' share would certainly be a claim to fix a personal liability on the respondents, and as such maintainable in the Court within whose local jurisdiction the cause of action for money had and received arose. This was the case in the matter of the *varshasan* allowance referred to in *Ratanshankar* v. *Gulabshankar* (10) on which ruling the appellants' pleader chiefly relied. The High Court there held that there was jurisdiction to try a suit in which money due for a share in some Gaikwadi allowance was received by the defendant on his own and plaintiff's account, even though the question of title might incidentally arise. In the present case the question of title does not incidentally arise. It is the principal point in dispute, the claim for one year's allowance being only a corollary to it. The distinction noted above was affirmed in *Chintaman* v. [31] *Madhavrai* (11). The evident object of the detailed provisions of s. 16 is to limit jurisdiction in respect of claims to immoveable property to the Court within whose local jurisdiction such property may be situated, and as a rule Indian Courts have no power to decide on rights and interests in immoveable property lying outside their local jurisdiction—*Prem Chand Dey* v. *Mokhoda Debi* (12); *Sreenath* v. *Cally Doss* (13); *Srimati Kamini Soondari* v. *Kali Prosunno* (14). This same view was approved in

(1) 2 B.H.C.R. 192. (2) 2 B.H.C.R. 40. (3) P.J. (1873), p. 49.
(4) 7 B.H.C.R. A.C.J 79. (5) 6 M. 192. (6) 13 M. 273.
(7) 6 B.L.R. 52. (8) 7 A. 230. (9) 5 B. 322.
(10) 4 B.H.C.R. A.C.J. 173. (11) 6 B.H.C.R. (A.C.J. 29)
(12) 17 C. 699 (703). (13) 5 C. 82. (14) 12 I. A. 215.

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Crisp v. *Watson* (1), and in *Land Mortgage Bank* v. *Sudurudeen* (2) a claim for the specific performance of a contract relating to the sale of property outside local jurisdiction was disallowed, though such a claim was decreed by this Court on its Original Side in *Holkar* v. *Dadabhai* (3) on the analogy of the practice of Equity Courts in England. This analogy should, however, not be pressed too far. On the strength of this same analogy a suit to recover money charged on immoveable property was at one time held by this Court to be not a suit for land—*Balvantrao* v. *Purshotam* (4), but the latest decision has now established an accord between this and the other High Courts, which have held that such suits fell under s. 16—*Vithalrao* v. *Vaghoji* (5). There is no allegation of any trust in this case such as distinguished the claim in *Juggodumba* v. *Puddomoney* (6), and in respect of which relief could be claimed in equity by constraining the conscience.

On the whole, it is clear that the present suit fell within the substantive clause of s. 16, and that it is not covered by its proviso, for complete relief cannot be obtained by the personal obedience of the respondents in this case. The District Judge, therefore, very properly rejected the claim. The present appeal must, therefore, be dismissed with costs.

Appeal dismissed.

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23 B. 32.

[32] CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IN RE KRISHNAJI PANDURANG JOGLEKAR.* [13th December, 1897.]

Criminal Procedure Code (Act X of 1882), *ss.* 107, 167, *and* 344—*Remand of prisoners, in police custody—Security to keep the peace—Magistrate's power to demand such security from persons residing beyond his local jurisdiction.*

Under s. 167 of the Code of Criminal Procedure (Act X of 1882) the period for which a Magistrate can authorize the detention of the accused in police custody is fifteen days on the whole, including one or more remands.

A Magistrate cannot call upon a person residing beyond his local jurisdiction to give security against a breach of the peace within that jurisdiction.

In re Jai Prakash Lal (7); *In re Abdul Aziz* (8); *In re Rajendro Chunder Roy* (9), *Dinonath Mullik* v. *Girija* (10) and *Queen-Empress* v. *Engadu* (11), followed.

THE accused Krishnaji Pandurang Joglekar was a school-master residing in Bombay. On the 14th August, 1897, he was arrested in Bombay on suspicion of having committed murder. He was taken to Poona on the same day and placed before the City Magistrate, before whom he stated that he had been engaged for some time in collecting funds from the citizens of Poona for the purpose of getting up a rebellion, and that with this object he had come to Poona on the 30th July, 1897, and had applied to several persons for aid, but without success.

After this statement was recorded, the police applied to the Magistrate for leave to detain the accused in their custody for fourteen days for the

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* Criminal Revision No. 312 of 1897.

(1) 20 C. 689. (2) 19 C. 358. (3) 14 B. 353.
(4) 9 B. H. C. R. 99. (5) 17 B. 570. (6) 15 B.L. R. 318.
(7) 6 A. 26. (8) 14 A. 49. (9) 11 C. 737.
(10) 12 C. 133. (11) 11 M. 98.

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purpose of making further inquiries into the matter. This application was granted.

On the 25th August, 1897, the police asked for a further remand for fourteen days from the 28th August, 1897. This application was also granted, but the Magistrate did not record any reasons, nor apparently was the accused produced before the Magistrate when this application was made.

On the 1st September, 1897, the City Police Inspector laid information before the Sub-Divisional Magistrate of Poona, upon [33] which proceedings were instituted against the accused under s. 107 of the Criminal Procedure Code (Act X of 1882) and he was called upon to furnish security to keep the peace in a bond for Rs. 8,000, together with two sureties for Rs. 4,000, each.

The accused having failed to furnish the required security was committed to prison for one year.

The accused thereupon applied to the High Court in Revision to quash the whole proceedings as illegal and *ultra vires*.

M. R. Bodas, for accused.—The accused is a resident of Bombay. He did not reside either at the time of his arrest, or when information was formally laid against him, within the local jurisdiction of the Sub-Divisional Magistrate of Poona. The Magistrate had, therefore, no power to call upon him to give security to keep the peace under s. 107 of the Code of Criminal Procedure—*In the matter of the petition of Jai Prakash Lal*(1); *In the matter of the petition of Rajendro Chunder Roy* (2); *Dinonath Mullick* v. *Girija Prosonno* (3). His being in police custody at the time the information was laid against him, would not give jurisdiction to the Magistrate; the police custody was itself illegal.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.—It is admitted by the accused that he was in Poona on the 30th July, 1897, and that he was then endeavouring to collect funds for the purpose of getting up a rebellion. The information laid against him refers to this fact. And it is this circumstance which led to the present proceedings. His residence in Poona even for a single day on this occasion for the purpose of creating a public disturbance would give jurisdiction to the Magistrate under s. 107 of the Criminal Procedure Code—*Shama Charan* v. *Katu Mundal* (4). As to his detention in police custody for more than fifteen days, the Magistrate says that the remands were granted under s. 344 of the Code. If so, the detention was not illegal.

JUDGMENT.

PARSONS, J.—In this case the applicant was called on by the Magistrate to furnish security to keep the peace in his own bond for Rs, 8,000, with two sureties for the sum of Rs. 4,000 each, [34] and in default was committed to prison for a year. Before disposing of the case, we wish to draw the attention of the Magistrate to the illegality he committed in leaving the applicant in the custody of the police for so long a time. He was arrested, it appears, on the 14th August at Bombay on suspicion of having committed murder, and was placed before the Magistrate at Poona on the same day by the police, who asked for leave to detain him in their custody for fourteen days. The Magistrate granted the application. Section 167, Criminal Procedure Code, requires him to record his reasons.

(1) 6 A. 26. (2) 11 C. 737. (3) 12 C. 133. (4) 24 C. 344.

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On the 25th August the police asked that he might be detained by them in their custody for a further term of fourteen days counting from the 28th. This the Magistrate allowed, again recording no reasons. It does not appear whether the applicant was on this occasion produced before him; the law requires that he should be.

Now the period for which a Magistrate can authorize the detention of the accused in the police custody is fifteen days on the whole. This is quite clear from the words used in s. 167, and has been so ruled in the case of *Queen-Empress* v. *Engadu* (1). The Magistrate's order, therefore, of the 14th August was illegal. The Magistrate in his proceedings in the present case says that "remands were given from time to time to complete police investigation—s. 344, Criminal Procedure Code." This section, however, relates to proceedings in inquiries or trials, and has nothing to do with police investigation, and it contemplates a remand to jail and not to police custody. In the present case the reports of the police and the endorsement of the Magistrate show that the detention was asked for and granted under s. 167, so that the reference of the Magistrate to s. 344 is not quite accurate.

The present proceedings were commenced and completed against the applicant while he was in the custody of the police at Poona. It is admitted that he is a resident of Bombay. The information laid against him on the 1st September states this, and it charges him with having gone to Poona on the 30th July **[35]** and there done something with a view to commit a breach of the peace. It appears that he was only at Poona this one day, and that his mission failed. It has been ruled by both the Calcutta and the Allahabad High Courts that a Magistrate cannot call upon a person residing beyond his local jurisdiction to give security against a breach of the peace within that jurisdiction—*In the matter of the petition of Jai Prakash Lal* (2); *In the matter of the petition of Abdul Aziz* (3); *In the matter of the petition of Rajendro Chunder Roy Chowdhry* (4); *Dinonath Mullik* v. *Girija Prosonno Mookerjee* (5). We must follow these decisions. The case of *Shama Charan* v. *Katu Mundal* (6) has no application, for there was a residence at the time when the Magistrate received information and instituted proceedings. There may in the present case have been such a residence on the 30th July as would have justified proceedings then, but there was none on the 1st September and subsequent days, for we cannot hold that a detention in police custody even if legal would be residence. For this reason we reverse the order of the Magistrate at Poona.

Order reversed.

(1) 11 M. 98. (2) 6 A. 26. (3) 14 A. 49. (4) 11 C. 737.
(5) 12 C. 133. (6) 24 C. 344.

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23 B. 35.

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APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

HARI GANESH AND ANOTHER (*Original Plaintiffs*), *Appellants v.* YAMUNABAI (*Original Defendant*), *Respondent.** [14th December, 1897.]

Limitation Act (XV of 1877), art. 179, cl. 5—"Date of issuing notice" meaning of the words—Execution of decree—Orders in execution proceedings—Res judicata—*Withdrawal of application for execution—Effect of such withdrawal.*

Article 179, cl. 5, of the Limitation Act (XV of 1877) applies only where the notice under s. 248 of the Code of Civil Procedure (Act XIV of 1882) has been actually issued. If no notice is issued, time cannot be counted from the date of the order of the Court; though it may be that where a notice has [36] been issued, the date of its issue would be the date on which the Court ordered its issue.

Orders in execution proceedings, if not appealed from, are binding on the parties to the suit in all subsequent proceedings in that suit, on principles analogous to those of *res judicata* strictly so called. It is, therefore, necessary to constitute a bar that there should be a hearing and final decision.

Where an application for execution is allowed to be withdrawn, the matters in dispute are not heard and decided. There is, therefore, no *res judicata.*

[Diss., 30 M. 30 (31) = 16 M.L.J. 548 = 1 M.L.T. 395; 6 C.W.N. 656; F., 28 B. 416 = 6 Bom. L.R. 457 (459); Rel., 10 Ind. Cas. 411; App., 32 B. 296 (300) = 10 Bom. L.R. 374; D., 14 Bom. L.R. 264 = 14 Ind. Cas. 977.]

SECOND appeal from the decision of Rao Bahadur Thakurdas M., First Class Subordinate Judge at Poona, with appellate powers.

On the 13th October, 1886, the plaintiffs obtained a decree for Rs. 2,450 against Yamunabai Saheb, widow of Yeshavantrao Bhau Saheb Powar, of Maltban.

On the 12th October, 1889, the decree-holders presented a darkhast for execution of the said decree.

On the 14th October, 1889, the Court passed an order for the issue of a notice under s. 248 of the Code of Civil Procedure (Act XIV of 1882), fixing the 16th November, 1889, for the judgment-debtor to show cause why the decree should not be executed. As, however, the process-fee was not paid, the notice was not issued, and on the 16th November, 1889, the darkhast was struck off.

On the 13th October, 1892, the decree-holders presented a fresh darkhast for execution of the decree and the judgment-debtor was served with a notice under s. 248 of the Code of Civil Procedure. On the 21st October, 1892, the decree-holders informed the Court that they did not wish to proceed with the darkhast, as they had come to an amicable arrangement with the judgment-debtor. The darkhast was allowed to be withdrawn with liberty to present a fresh darkhast.

On the 12th October, 1895, the decree-holders filed a third darkhast for the execution of the decree.

This darkhast was opposed by the judgment-debtor on the ground that the darkhast of the 13th October, 1892, having been presented more than three years after the date of the first darkhast, (*viz.*, 12th October, 1889) was barred by limitation, and that being the case, the present darkhast was also time-barred.

" [37] The Court of first instance disallowed this contention, and ordered execution to issue.

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* Second Appeal No. 984 of 1897.

On appeal, the Judge held that the case fell under cl. 4, and not under cl. 5, of art. 179 of the Limitation Act (XV of 1877), and that the darkhast was barred by limitation. The darkhast was, therefore, rejected.

The decree-holders thereupon appealed to the High Court.

M. B. Chaubal, for appellants.—The darkhast of 1892 was not barred by time, as it was made within three years from the 14th October, 1889, that is, the date on which the Court had made an order in the first darkhast proceeding for notice to issue under s. 248 of the Code of Civil Procedure. This date should be taken as the date of issuing the notice, and limitation runs from this date under cl. 5 of art. 179 of the Limitation Act (1877). The expression "date of issuing notice" in this clause means the date on which the order directing the issue of the notice is made by the Court—*Udit Narain* v. *Rampartab Singh* (1). Even assuming that the darkhast of 1892 was presented after the prescribed period, it is not open to the judgment-debtor to raise this objection in the present proceeding. He might and ought to have taken the objection in the previous execution proceeding. But he did not do so. The question of limitation is, therefore, *res judicata*.

Ganpat Sadashiv Rao, for respondent.—The present case does not fall within cl. 5 of art. 179 of the Limitation Act. To bring a case within that clause, it is not enough to show that there was an order by the Court for notice to issue under s. 248 of the Code of Civil Procedure. It must also be shown that the notice was actually issued. In the present case no notice was issued, as the process-fee was not paid. Clause 5, therefore, does not apply. But cl. 4 applies, and under that clause time runs from the date of the previous darkhast. That being so, the second darkhast, having been filed more than three years after the date of the first darkhast, was time-barred. It follows that the present darkhast is also time-barred. As to the question of *res judicata*, the second darkhast having been withdrawn, **[38]** it must be treated as if it was not made at all, and all matters in issue remained unheard and undecided. There could, therefore, be no *res judicata*—*Manjunath* v. *Venkatesh* (2).

JUDGMENT.

PARSONS, J.—In this darkhast presented on 12th October, 1895, the defendants took the objection that execution was time-barred, because there had been no step taken in aid of execution within three years from the 12th October, 1889, which was the date of the first darkhast. There had been a darkhast (No. 613) presented on the 13th October, 1892, but that was withdrawn on the 21st December, 1893, liberty being given to present a fresh darkhast.

Two arguments have been addressed to us why the objection should be overruled: 1, that the darkhast of 1892 was in time, and 2, that if not, the point was *res judicata* and could not be taken by the defendants.

1. There was an order passed by the Court on the 14th October, 1889, on the darkhast of 1889 to issue notice under s. 248 of the Code of Civil Procedure, and it is argued that time runs from that order. In point of fact, however, no notice was ever issued, and the darkhast was dismissed on the 16th November, 1889, because no *batta* had been paid for the process and because the applicants were not present. Article 179, cl. 5, applies only where the notice under s. 248, Civil Procedure Code, has been issued. As no notice was ever issued, time cannot here be

(1) 1891 Weekly Notes, Allahabad, 147.

(2) 6 B. 54.

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counted from the date of the order of the Court, though it may be that where an order has been issued, the date of its issue would be the date on which the Court ordered its issue, as was ruled by the Allahabad High Court in the case quoted from the Weekly Notes by the lower Court.

2. Orders in execution proceedings are, if not appealed from, binding on the parties to the suit in all subsequent proceedings in that suit on principles analogous to those of *res judicata* strictly so called. It is, therefore, necessary, to constitute a bar, that there should have been a hearing and a final decision. In the present case there was no decision passed in the darkhast of 1892. It was allowed to be withdrawn. The matters in dispute **[39]** were thus hung up and remained in issue between the parties pending the presentation of the fresh darkhast in which they could be again made a ground of defence or attack. This fresh darkhast is the one now before us, and in it it is clear that the defendants can raise the contention of limitation, as it has never before been heard or finally decided. The order in execution is confirmed with costs.

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Before Mr. Justice Parsons and Mr. Justice Ranade.

VINAYAKRAO KESHAVRAO AND ANOTHER (*Original Plaintiffs*), *Appellants* *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*), *Respondent.** [20th December, 1897.]

Bombay Land Revenue Code (Bom. Act V of 1879), ss. 37, 38, 61—Scope of s. 37—Survey—Omission to number lands at a survey—Effect of such omission on owner's rights—Summary settlement—Exclusion of land from summary settlement—Effect of such exclusion—Bombay Act VII of 1863—Sanad under the Act—Sanad.

The plaintiffs, who were the inamdars of certain land, sued for a declaration of their ownership in and of their right to cultivate (*a*) two plots of land which (they alleged) formed part of their inam, (*b*) the bed of a stream which flowed through their land. It was contended for the defendant as to these two plots of land that the plaintiffs had no right to cultivate them, as they had been made a part of a village site, and on that understanding they had not been numbered at the survey in 1863 and had been exempted from assessment for twenty years. As to the bed of the stream, it was contended that the stream was a public stream, and that the bed of the stream as it dried up belonged to Government and not to the plaintiffs.

It was held by the lower appellate Court that s. 61 of the Bombay Land Revenue Code (Bombay Act V of 1879) applied; that Government were competent to set apart a portion of the lands comprised in the sanad of the plaintiffs for a village site, and that as these lands had not been numbered at the survey of 1863, and had been exempt from assessment for more than twenty years, the plaintiffs had lost their right to cultivate them. On appeal to the High Court,

Held (reversing the decree of the lower Court) that the plaintiffs were entitled to the declaration prayed for.

Held, also (1) that s. 61 of the Bombay Land Revenue Code did not apply. That section relates back to s. 38 and both refer only to lands the property **[40]** of Government in unalienated villages or unalienated portions of villages. They do not empower the Government to confiscate any land belonging to an inamdar and to confer it on the persons living in his village.

(2) That the mere omission to number the plots of land could not have the effect of turning them into a part of the village site, or take away the right of the

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* Second Appeal No. 648 of 1897.

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plaintiffs. Nor did the omission of Government to assess these lands deprive the plaintiffs of them, or make them the property of Government.

(3) That the bed of the stream was the property of the plaintiffs, who owned the land upon its banks.

SECOND appeal from the decision of G. McCorkell, District Judge of Ahmedabad.

The plaintiffs, who were the inamdars of certain inam lands, which included a village, brought this suit in 1895 for a declaration of their ownership in and of their right to cultivate (*a*) two plots of land forming part of their said village, and (*b*) the bed of a stream which flowed through this village.

The two plots had been admittedly part of the cultivable lands belonging to the plaintiffs, and had formerly been separately numbered under the survey previous to that of 1863.

At the new survey, however, made in that year the two plots were set apart for the village site and were neither numbered nor measured. Nor was the bed of the stream then either numbered or measured.

In 1869 a summary settlement was made with the plaintiffs in respect of the lands of their village and a sanad was issued to them under Bombay Act, VII of 1863; but the two plots of land were exempted from the settlement, and so also was the bed of the stream.

The Collector pleaded, in answer to the present suit, that the Government only claimed the power to require the plaintiffs to use the two plots in question as a village site and he contended that as these two plots had been set apart at the time of the new survey in 1863 for the village site, and as on that understanding they had been exempted from assessment, and as plaintiffs had received the benefit of that exemption for more than twenty years, the plaintiffs had no right now to cultivate them. As to the bed of the stream, he contended that it was a public stream and did not belong to the plaintiffs.

[41] The Assistant Judge dismissed the suit, holding that as the two plots of land had been reserved for the village site and left unnumbered at the time of the survey of 1863, the plaintiffs had no right to them, more especially as they had been exempted from assessment for more than twenty years.

As to the water-course, he held that it was not plaintiffs' private property, but was public property coming under s. 37 of Bombay Act V of 1879.

This decision was upheld, on appeal, by the District Judge. He was of opinion that as regards the two plots of lands the case was governed by s. 61 of the Land Revenue Code (Bombay Act V of 1879). His reasons were as follows:—

"It has been contended that s. 61 of Bombay Act V of 1879 is not applicable to the land in suit, but I hold that it is. One of the objects of that section is to prevent lands which Government have set apart for public purposes, being diverted from such purposes. Were it not for that section, village sites could with impunity be ploughed up and cultivated, and villagers would thereby lose what was intended for their benefit. It has been contended that this land has not been included in the sanad of plaintiffs and that it should have been. But I hold that Government were competent to set apart a portion of the lands in the sanad of the plaintiffs for a village site, and that any original grant is modified by a later grant modifying the former. This is really the important contention in the case. * * *

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"The plaintiffs claim that they have a right to cultivate the village site and derive revenue from it. Government say we have set apart this land to be used only as a village site, and it cannot be cultivated. In my opinion, Government is right."

On these grounds the District Judge agreed with the Assistant Judge in rejecting the plaintiffs' claim.

Plaintiffs thereupon preferred a second appeal to the High Court.

Anderson (with *Ramdatt* V. *Desai*) for appellants.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the respondent.

JUDGMENT.

PARSONS, J.—There are two subject-matters in dispute in this case, and they will have to be separately dealt with.

[42] The first is the two plots of land. As to this the District Judge says "admittedly the two plots of land in suit lie within the boundaries of the Jat inam land of the plaintiffs :" and the Assistant Judge says "there is not the least doubt that the village site was originally part of the cultivable land belonging to the plaintiffs, but at the time of the survey in 1853 the land was freshly numbered and the village site was excluded from the numbering with the exception of the *wada* or compound numbers which were separately numbered." 1853 seems to be a mistake, probably for 1863, but I cannot find any certain information as to the date of the new survey.

The case, therfore, stands thus. These two plots of land were a part of the inam lands of the plaintiffs and used to be separately numbered at the old survey. At the new survey they had no numbers given to them and for this reason the Courts below hold that they have been made a part of the village site over which the plaintiffs have no rights of cultivation. The Assistant Judge does not say how he thinks this could legally have been done. The District Judge says that s. 61 of the Bombay Land Revenue Code, 1879, is applicable, and that Government were competent to set apart a portion of the lands comprised in the sanad of the plaintiffs for a village site. I cannot agree with him. Section 61 relates back to s. 38 and both refer only to lands the property of Government in unalienated villages or unalienated portions of villages. They do not empower the Government to confiscate any land belonging to an inamdar and to confer it upon the persons who live in his village. Moreover, I do not see how the mere omission to number a plot of land could possibly have the effect of turning it into a part of the village site or take away any existing rights of the plaintiffs to cultivate it. Even if the land had been made a part of the village site, it would still belong to the plaintiffs and they would have the same rights over it as before and as indeed they have over the whole of the village site. There is nothing, so far as I know, to prevent an inamdar letting out his land, either for building or for cultivation, as he pleases, and the argument that, because the plots now form part of the village site, they cannot be cultivated, fails, entirely.

[43] The District Judge further seems to think that "as the plaintiffs had themselves procured that the lands in suit should be separated off from the other lands of the inam, and as the lands in suit have now been enjoyed by the plaintiffs rent free for over twenty years, they cannot now claim to prevent Government making use of the provisions of

s. 61 of the Land Revenue Code." This, however, is a clear misapprehension. The two plots were never separated off from the other lands. They were merely left unnumbered. When the plaintiffs accepted the summary settlement and were granted a sanad for their inam holding, they had to pay a certain amount of quit-rent or assessment for that holding. The fact that Government chose to assess only a portion of the holding, and to allow the plaintiffs to enjoy the rest free of assessment, would not have the effect of cutting off the latter from the holding and of placing it at the disposal of Government. It would still be the plaintiffs' inam land. Government under the Act of 1863 had no power thus to take possession of land. They had the power of levying the full assessment only if after enquiry the holder failed to prove title. This power they did not exercise and they have allowed the plaintiffs to hold the two plots free of assessment for more than twenty years. It is clear that this could not possibly create a title in Government or estop the plaintiffs from asserting their own. Even now Government do not claim the land or any assessment upon it; all they wish to enforce is a proviso that the plaintiffs should not cultivate it. I am of opinion that they have no right to place any such restriction on the plaintiffs' rights of ownership, and would, therefore, give them the declaration that the two plots are their inam property and that they have the right to cultivate them.

The second subject-matter is the bed of a stream or rivulet which runs through this village. The fact whether it has its source inside or outside the village is disputed, but is immaterial. Government claim the right to levy rent or assessment from persons who cultivate the bed of this stream as it dries up; they thus claim the bed as their own property. The plaintiffs contend that the bed belongs to them as riparian owners, and as included in their inam holding. Here again because the bed was [44] not numbered or measured so as to be expressly included within the survey numbers formed at the new survey, and was not assessed in the sanad, the Courts below have dismissed the claim. This is, in my opinion, quite wrong. As I have pointed out before, neither the giving nor the omission to give a number to land, works any change in its title, and the inam holding of the plaintiffs would remain the same under the new as it was under the old survey. I have also shown that the omission of Government to assess land separately would not deprive the plaintiffs of the land, or cause it to become the property of Government. The District Judge says that the bed of the stream is public land under s. 37 of the Bombay Land Revenue Code, 1879, apparently because "the rivulet does not, as is falsely alleged, terminate within the plaintiffs' limits, but flows on beyond." The point of termination, however, has no effect at all upon title, and s. 37 deals only with what is not the property of individuals, and can have no application to the bed of a rivulet which flows through the land of any individual, for it would be the property of that individual who owned the land upon its banks. The plaintiffs own the whole village; they, therefore, own the bed of the rivulet that lies within the boundaries of their village. It is clear that the Government has no right whatever to claim the land of that bed and demand rent from the persons who may cultivate it. I, therefore, would give the plaintiffs a declaration that the bed of the rivulet within their village is their inam land.

We grant the plaintiffs the declarations above mentioned with costs throughout.

RANADE, J.—In this case the appellants (original plaintiffs) sought as against Government a declaration of their right of ownership in respect

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of two properties : (1) a village site measuring 15 bighas bounded by plaintiff's lands on all sides and included in the village which was *jat* or personal inam of the plaintiffs, and (2) the bed of a stream which flowed through the lands of this inam village. In the plaint it was stated that these two plots were not numbered at the survey, nor a summary settlement made in respect of them by Government at two annas in the rupee as was done in regard to the other lands, and when plaintiffs [45] applied that the settlement might be extended to them, the Collector, on behalf of Government, claimed that the plots belonged to Government, and refused to extend the settlement to them.

In his written statement, the Collector, among other defences, urged that as regards the village site, Government only claimed the power to require the plaintiffs to use it as village site, and not to cultivate it, because it was on that understanding that the land was exempted from the settlement, and plaintiffs had received for twenty years and more the benefit of that exemption. In regard to the bed of the stream, the defendant's contention was that it was a public stream, and the land belonged to Government, and not to the plaintiffs, as it was not included in plaintiffs' sanad, and was not in their possession. It will be thus seen that the defence in respect of the village site is to some extent distinct from that urged in respect of the bed of the stream.

The Court of first instance in its judgment has found in regard to the village site that it was originally part of the cultivable land belonging to the appellants-plaintiffs, and further the fact of this inclusion of the land in plaintiffs' inam was not denied by Government. Both the Courts below have, however, rejected the appellants' claim to the declaration sought by them about their ownership of these lands, and their right to let them out for cultivation, on the ground that as the lands were not numbered at the survey of 1853, and no quit-rent was fixed in regard to them when the summary settlement was introduced in 1869, the appellants must be held to have acquiesced in the arrangement by which Government allowed these lands to be used only as village site.

I think his view is clearly based on a misapprehension of the legal effects of the operations of the survey and summary settlement of lands. If at a survey certain lands are not numbered or assessed by reason of their being kharab, it does not follow that the ownership of such land is thereby injuriously affected or curtailed. Numbering or surveying do not by themselves create or destory rights. Similarly, the exclusion of these lands from the summary [46] settlement would not of itself have the effect of curtailing the owner's rights. Their exclusion would only not protect these lands from an inquiry into the title of the inamdar to hold them rent free. Sections 38 and 61 of the Revenue Code, on which much stress has been laid in the judgments of both the lower Courts, have plainly no application here, because they relate only to Government lands, and they confer no power on Government to interfere with the private rights of the inamdar to use his property in the way most advantageous to him.

The whole question turns upon the title of the appellants to, and their possession of, these lands as being part of their inam village. As long as that title and possession are admitted by Government, no question of acquiescence or estoppel can arise merely from the fact that the appellants did not see any occasion to go up to Government, and apply for an extention of the summary settlement to these lands. In the argument before us the Government Pleader urged that, in case a declaration was

granted to the appellants in regard to their ownership of these lands, it should be made subject to the right of Government to assess these lands if it deemed proper to do so. Government has admittedly taken no steps till now to claim any assessment for these lands, and such a declaration cannot, therefore, be made in this suit at the present stage. As regards the fixing of the quit-rent of 2 annas in the rupee, no declaration seems necessary, as the appellants-plaintiffs expressly asked Government in 1886 to levy such judi on these lands, and it was the refusal of Government to do so that necessitated this litigation.

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As regards the bed of the stream, it is admitted that the stream flows through the inam lands of the appellants' village. The stream takes its rise in land No. 1352 of the village, and it flows only when rain falls, and is dry at other times. As the stream is included within the boundaries of the inam village, it is immaterial whether it is included or excluded from the measurements of particular survey numbers. The appellants as the owners of the lands on both sides are proprietors of the bed of the stream. As regards the levy of assessment by Government for the use of the bed of the stream, the evidence shows that the **[47]** levy was first made in 1886, and not in 1881 as was contended before us. Both the Courts have found that the claim was not time-barred.

On the whole, the appellants have clearly established their claim to the declaration sought by them, namely, that both the village site and the bed of the stream belong to them as being part of the inam village, and that the defendant has no right to interfere with appellants' use of both the plots for cultivation or otherwise.

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23 B. 47.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BABAJI RAMJI AND OTHERS (*Original Defendants*), *Applicants v.* BABAJI DEVJI AND OTHERS (*Original Plaintiffs*), *Opponents.**

[20th December, 1897.]

Jurisdiction—Mamlatdar—Mamlatdars' Act (Bom. Act III of 1876), s. 4—Disputes between riparian proprietors.

A Mamlatdar's Court has no jurisdiction to determine questions arising between riparian proprietors as to the amount of water each can take from a stream.

A suit will lie in a Mamlatdar's Court where a person has been dispossessed or deprived of the use, or when he has been disturbed or obstructed, or when attempt has been made to disturb or obstruct him in the use of water of which he is in possession or was in possession within six months before suit.

[Overr., 25 B. 395 (402) = 2 Bom. L. R. 1136 **(F. B.).]**

APPLICATION under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiffs sued for an injunction in the Mamlatdar's Court under the following circumstances.

Plaintiffs and defendants were riparian proprietors of lands situate on the banks of a rivulet, defendants' lands being situated higher up the stream than that of the plaintiffs.

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* Application under Extraordinary Jurisdiction No. 185 of 1897.

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There were several dams erected in the bed of the stream for the purpose of regulating the flow of water to the lands of the different riparian proprietors. One of these dams belonged to the plaintiffs and another to the defendants. The distance between the two dams was 62 cubits.

[48] Plaintiffs alleged that in the defendants' dam there had always been a sluice or passage left through which the water flowed down to the plaintiffs' dam and there come to a head; that they had always used the water so collected to irrigate their rice lands in the hot season. They complained that in October, 1896, the defendants, contrary to this established practice, erected a solid dam without any sluice or passage in it and thereby stopped the supply of the water to their (the plaintiffs') lands. They, therefore, prayed for an injunction directing the defendants to open a sluice in their dam, and restraining them from causing any obstruction in future to the passage of the water on to the plaintiffs' dam.

The defendants pleaded that there never had been any sluice or passage in their dam, and that the plaintiffs' user, if any, had not been obstructed by them.

The Mamlatdar found in favour of the plaintiffs, and made an order on the defendants, that "at the time of building their dam in the month of Kartik every year, or about that time, they should, according to the *vahivat* (or established practice), leave a sluice one foot in length and half a foot in height for the purpose of supplying water to the plaintiffs."

Against this order the defendants applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* to set aside the above order.

V. G. Bhandarkar, for the plaintiffs, showed cause.

H. C. Coyaji, for the defendants, *contra*.

JUDGMENT.

PARSONS, J.—This case raises an important question of jurisdiction under the Mamlatdars' Courts Act, 1876. The parties are riparian occupants of lands situated on the banks of a rivulet, the land of the defendants being higher up the stream than that of the plaintiffs. In order to regulate the flow of water, dams are erected in the bed of the stream and thus a head of water is obtained which is led off by channels into the adjacent fields. There are, it seems, no less than six of such dams, of which the plaintiffs own one and the defendants another. Each of the owners is by custom allowed to take a certain quantity of [49] water, leaving the rest to flow over his dam to the dam of the next owner.

The plaintiffs allege that as their dam is very close to the defendants', being only 62 cubits below it, the custom is that the defendants should not have a solid dam but one with a sluice or passage left in it, so that the water should not be dammed up very much, if indeed at all, by the dam, but should flow on to their dam and be there brought to a head, and that in the month of Kartik, 1896, the defendants, in breach of that custom, erected a solid dam, and they sue for an injunction that the defendants should be orderd to open a passage in their dam and should not disturb or obstruct the flow of water.

The Mamlatdar raised the issues mentioned in s. 15 (*c*) of the Act. He did not, however, record any findings thereon, but he decided that "an injunction be issued to the defendants that at the time of building their dam in the month of Kartik every year, or about that time, they should, according to the *vahivat*, leave a sluice one foot in length and half a foot in height for the purpose of supplying water to the plaintiffs."

The question is, whether he had jurisdiction to hear such a suit and grant such an injunction. We are of opinion that he had not. We think that a person can only sue under the Act when he has been dispossessed or deprived of the use, or when he has been disturbed or obstructed, or when an attempt has been made to disturb or obstruct him in the use of water of which he is in possession or was in possession within six months before suit. A owns a well or water-course, which is in his possession. If B prevents A taking water therefrom, or takes water therefrom himself, a suit will properly lie; but if A owns one portion of a water-course and B another, and if B takes from his portion more water than he is entitled to, so that a less amount flows down to A, we conceive no suit would lie in a Mamlatdar's Court, because A never was in possession of the use of the water in B's water-course and no obstruction has been caused to A's use of the water that might be in his water-course. If such a suit lay, then the injunction would have to be not merely that provided by sch. (*c*) of the Act, but an order on the defendant **[50]** to do, or refrain from doing, something with his own property such as has actually been passed by the Mamlatdar in this case, for which no authority can be found in the Act. It is obviously undesirable that the nice questions which may arise between riparian proprietors as to the amount of water each can take from a stream should be determined by a Mamlatdar's Court. This really is the question at issue in the present case. It is not whether the plaintiffs have been obstructed in the use of water in their water-course, but it is whether the defendants have, by exceeding their rights as owners of land abutting on the stream, caused injury to other owners, the plaintiffs. We are of opinion that such a suit does not come within the Mamlatdars' Courts Act. We make the rule absolute with costs.

Rule made absolute.

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23 B. 50.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* GANESH RAMKRISHNA.* [20th December, 1897.]

Criminal Procedure Code (Act X of 1882), *ss.* 195-369—*Sanction to prosecute—Revision—Session Judge's power to review his order in proceedings taken to revoke sanction.*

A Sessions Judge, having once refused to revoke a sanction granted by a Subordinate Court under s. 195 of the Criminal Procedure Code (Act X of 1882), has no jurisdiction afterwards to review his order and set aside the sanction.

An application to a Sessions Judge for revocation of a sanction granted under s. 195 of the Code is a criminal proceeding in revision. Any order passed in such a proceeding is final, and cannot be reviewed or revised by him.

[R., 13 Cr.L.J. 209=14 Ind. Cas. 305=22 M.L.J. 419=11 M.L.T. 367=(1912) M.W.N. 499.]

APPLICATION under s. 435 of the Code of Criminal Procedure (Act X of 1882).

The accused Ganesh Ramkrishna Pathak, having obtained a decree against one Gangaram bin Sankraji in the Court of Small Causes at Poona, applied for execution of this decree without certifying to the Court certain

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* Criminal Revision No. 321 of 1897.

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payments which had been made in part satisfaction of it. Thereupon the Small [51] Cause Court granted a sanction under s. 195 of the Code of Criminal Procedure (Act X of 1882) to prosecute him for an offence under s. 210 of the Indian Penal Code (Act XLV of 1860). He applied to the Sessions Judge to revoke the sanction, but the Sessions Judge on 6th April, 1897, declined to interfere.

The accused subsequently made another application to the Sessions Judge, who thereupon reviewed his previous order, and on 24th August, 1897, revoked the sanction, giving the following reasons:—

"Looking to the fact that the proceedings in a Court of a Subordinate Judge and of a Small Cause Court Judge are in their nature civil, it appears to me that any application to revise an order passed by either of those Courts under s. 195 of the Criminal Procedure Code must be in its nature a civil proceeding, notwithstanding the fact that the application in the case of a Small Cause Court Judge is made to the Court of Session. Whether this view of the law is sound or not, I am further of opinion that it is competent to a Court acting in its capacity as a Court of revision to reconsider its order, and for reasons shown to revise the orders of the Court below. Section 437 of the Criminal Procedure Code confers on District Magistrates certain revisional powers. In Bombay Criminal Rulings for 1890, No. 48, dated 14th September, 1890, it was held that it was competent to a District Magistrate to order a further inquiry under s. 437, although he may have declined to do so on a previous occasion in the same matter. The case of *Queen-Empress* v. *C. P. Fox* (1) was relied upon by the other side to show that the High Court cannot review its judgment pronounced on revision in a criminal case. That case was a peculiar one.....It was held by a Full Bench that it had not power under s. 439 of the Criminal Procedure Code to review its judgment pronounced on revision in a criminal case. Nothing was said as to its powers under s. 195, nor its powers of revision in a civil case.....On these grounds I am of opinion that it is open to this Court in its revisional capacity to review its former order."

Against this order Gangaram, the judgment-debtor, applied to the High Court under its revisional jurisdiction.

G. Inverarity (with him *N. G. Chandavarkar*), for the applicant.—The Sessions Judge had no jurisdiction to review his previous order and revoke the sanction. The proceedings before him were not of a civil, but criminal nature. It has been held that the High Court cannot review its orders passed on revision in criminal cases—*Queen-Empress* v. *C. P. Fox* (1). If the High Court [52] cannot, much less can the Sessions Court review its orders passed in revision.

Shivram V. Bhandarkar, for the accused.—Proceedings for sanction to prosecute, when initiated in a Civil Court in the course of a civil suit, are of a civil and not criminal nature. In *Darubhai* v. *Raiji* (2) such proceedings were treated as civil and not criminal, and this Court dealt with the matter under s. 622 of the Code of Civil Procedure. The Sessions Judge had, therefore, jurisdiction to review his previous order. Assuming that proceedings under s. 195 of the Criminal Procedure Code are of a criminal nature, there is nothing to prevent a Criminal Court from exercising the power of review which is inherent in every Court, unless it is expressly taken away by statute. Section 369 of Act X of 1882 no doubt prevents a Criminal Court from reviewing its judgment after it is signed.

(1) 10 B. 176.

(2) P. J. (1889), p. 123.

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But the order that was reviewed by the Sessions Judge in the present case is not a judgment—ss. 366-368. None of the conditions stated in those sections apply to the order in question. Nor does s. 430 apply, as it relates to judgments and orders of an appellate Court. But the order in question was admittedly passed by the Sessions Judge in his revisional capacity—*Mehdi Hasan* v. *Tota Ram* (1). The ruling in *Queen-Empress* v. *C. P. Fox* (2) does not apply, as that was a case of a conviction on a trial. Here there was no trial and no conviction.

JUDGMENT.

PARSONS, J.—The only point before us is whether the Sessions Judge, having refused on the 6th April to revoke the sanction, had jurisdiction to review his order and revoke it on the 24th August. I entertain no doubt that the proceedings before the Sessions Judge in the matter of the application to revoke the sanction were criminal proceedings, and that his order of the 6th April was an order passed in revision and not by way of appeal. This being so, it is quite clear, from the decision of this Court in *Queen-Empress* v. *C. P. Fox* (2) and of the Allahabad High Court in *Mehdi Hasan* v. *Tota Ram* (1), that the order could not be reviewed. The latter is a decision exactly in point, for in it **[53]** the Court held that its order rejecting an application to revise an order granting sanction was final and could not be reviewed by it. If the High Court has no power to review its order, the Court of Sessions can have none. We set aside the order of 24th August.

RANADE, J.—The only question we have to consider in this case is whether the Sessions Judge, after once passing an order declining to interfere with the sanction granted by the Small Causes Court Judge, could entertain a fresh application, set aside his previous order, and revoke that sanction. The authorities seem to me to be clearly against the exercise of any such power by the Sessions Judge in respect of orders passed under s. 195. There is no provision in the Civil Procedure Code on the subject of granting sanctions to prosecute. These provisions occur only in s. 195 and in chap. 35 of the Criminal Procedure Code, and it has been held that proceedings taken under s. 195 are judicial in their nature, and not ministerial (*Laraiti* v. *Ram Dial* (3)). The procedure of granting sanction to a private party is only an alternative of the more direct procedure of complaint by the Court before whom the offence is committed. In a case which came before us by way of appeal on a point of limitation from an order of dismissal passed by Mr. Justice Candy, we confirmed his order, and held that proceedings under s. 195 held on appeal before a District Court were criminal, and not civil proceedings. The first application to the Sessions Judge, which he disposed of by declining to interfere, was thus a criminal proceeding, and he had no power to admit a review, or to revise his order in the way he has done. Section 369 expressly provides that no Court other than a High Court can alter or review its own judgment, and s. 430 expressly provides that all judgments and orders of appellate Courts are final, except in cases provided for by s. 417 and chap. 32. Section 417 relates to appeals by Government, and chap. 32 relates to references and revision. This latter procedure is obviously intended to be a substitute for review in criminal proceedings. The Allahabad High Court has ruled that an application to a Sessions Judge to set aside a sanction granted under

(1) 15 A. 61. (2) 10 B. 176. (3) 5 A. 224.

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s. 195, is a proceeding in revision—*Mehdi Hasan* v. *Tota Ram* (1). See **[54]** also *In re Anant Ramchandra Lotlikar* (2). The Session Judge's first order was thus passed in revision, and he had no power to review again or revise it except in the manner laid down in chap. 32—*In the matter of the petition of F. W. Gibbons* (3) ; *Queen-Empress* v. *Durga Charan* (4) ; *Queen-Empress* v. *C. P. Fox* (5). Even, as regards the High Courts, it has been expressly ruled that they have no power to review or revise their own judgments or orders. Two of these decisions were Full Bench decisions. This Court has all along held this view both under the old Code, as also under the present Code—*Empress* v. *Mahomed Yashin* (6); *Reg.* v. *Mehtarji Gopalji* (7). It is clear that the same prohibition applies with greater force in the case of the District Courts under the express terms of ss. 369 and 430. If the Sessions Judge was of opinion that his first order was improper, he should have proceeded under chap. 32 and made a reference to this Court. He had no power to revise or review his own decision. We must, therefore, reverse that order.

Order reversed.

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Before Mr. Justice Parsons and Mr. Justice Ranade.

IN RE JAMNADAS HARINARAN.* [26th December, 1897.]

Stamp Act (I of 1879), s. 3 (17)—Receipt—Memorandum of payment—Document containing no acknowledgment of payment not a receipt—No stamp necessary for such document.

A made a payment of Rs. 22 to B. At A's request C made a memorandum in writing to the following effect :—" B has received Rs. 22," but affixed no stamp to it. He was charged and convicted, under s. 61 of the Indian Stamp Act (I of 1879), for not affixing a receipt stamp to the memorandum.

Held (reversing the conviction), that the memorandum was not a receipt. To constitute a receipt within the meaning of s. 3 (17) of the Stamp Act, there must be an acknowledgment, either express or implied, of the receipt, and not a mere statement that money was received.

[55] APPLICATION under s. 435 of the Code of Criminal Procedure (Act X of 1882).

The accused was charged under s. 61 of the Indian Stamp Act (I of 1879) with passing a receipt for Rs. 22 on behalf of his master without affixing a stamp to it.

He admitted having written the document, but contended that it was not a receipt. His case was that one Umed Bhagvan paid Rs. 22 to Kushal Vesta and desired a *dakhla*, or memorandum, to be made of the payment, and that he accordingly made a memorandum in writing to the following effect :—" Kushal Vista has received Rs. (22) twenty-two." This memorandum was not signed by Kushal Vesta.

The Magistrate, however, held that the document was a receipt and that it had been passed by the accused for money paid to him on behalf of his master, one Kushal. He, therefore, convicted the accused under

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* Criminal Revision No. 370 of 1897.

(1) 15 A. 61. (2) 11 B. 438. (3) 14 C. 42. (4) 7 A. 672.
(5) 10 B. 176. (6) 4 B. 101. (7) 7 B.H.C.R. Cr.Ca. 67.

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s. 61 of the Indian Stamp Act, 1879, and sentenced him to pay a fine of Rs. 4.

On appeal the District Magistrate confirmed the conviction and sentence.

Thereupon the accused moved the High Court under its revisional jurisdiction

K. M. Javheri, for the accused.

Rao Bahadur *V. J. Kirtikar*, Government Pleader, for the Crown.

JUDGMENT.

PARSONS, J.—The applicant has been convicted of an offence under s. 61 of the Indian Stamp Act, 1879, in that he passed a document chargeable with stamp duty without affixing a proper stamp thereto.

The document referred to is said to be a receipt for a sum of Rs. 22. The original is not on the record of the case, but the copy filed, which we presume to be correct, runs thus :—" Kushal Vesta has received Rs. 22." The applicant admits that he wrote this document. His account is that Umed Bhagvan paid Rs. 22 to Kushal Vesta, and that he made this as a memorandum of the payment. The Magistrate finds that Kushal Vesta is a mistake for Kushal Moti, that Kushal Moti paid to the applicant Rs. 22 **[56]** which he owed to the master of the applicant and that the applicant gave him the document, and he thinks that it is a receipt, inasmuch as it means that Rs. 22 have been received. It is difficult to see how the Magistrate could come to such an extraordinary conclusion, especially as Kushal Vesta was not examined as a witness in the case.

The question, however, is whether the document is a receipt. For the determination of the question we must take the document to be what it purports to be, *viz.*, a statement that Kushal Vesta has received Rs. 22. To constitute a receipt it is not sufficient that there should be a statement; there must be an acknowledgment, either express or signified or imported. It is clear in the present case that there is none. Kushal Vesta acknowledges nothing. The applicant merely writes out a memorandum of the fact that certain moneys were received by a certain other person. This memorandum cannot be held to be a receipt within the meaning of the Indian Stamp Act, s. 3(17). We reverse the conviction and sentence and acquit the applicant.

Conviction reversed.

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23 B. 56.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

BALVANTA APPAJI WHATKAR (*Original Plaintiff*), *Appellant v.* BIRA AND OTHERS (*Original Defendants*), *Respondents.**

[23rd December, 1897.]

Vendor and purchaser—Deposit—Right of purchaser to return of deposit—Lien of purchaser for the part of the purchase-money paid by him.

A purchaser of land who has paid part of the purchase money by way of deposit, but who afterwards unjustifiably repudiates the contract of purchase, or is guilty of any default by reason of which the sale is not carried out, is not entitled to recover the deposit from the vendor.

* Second Appeal No. 425 of 1897.

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The vendor is not necessarily entitled to retain the deposit merely because under the circumstances the Court refuses to grand specific performance against him.

From the moment part of the purchase-money is paid, the purchaser has a lien upon the property to that extent, which lien can only be lost to him by reason of his failing to carry out his part of the contract.

[R., 33 M. 375 (394)=3 Ind Cas. 941=20 M.L.J. 230=6 M.L.T. 334; 14 C.L.J. 159=11 Ind. Cas. 228; 19 Ind. Cas. 462=24 M.L.J. 488=13 M.L.T. 391=(1913) M.W.N. 341.]

[57] SECOND appeal from the decision of Rao Bahadur G. V. Limaye, First Class Subordinate Judge of Belgaum, with appellate powers.

Suit by purchaser against vendor (defendant No. 2) and others for return of deposit.

The suit as ultimately framed was to recover the sum of Rs. 742 paid by the plaintiff as part of the purchase-money of the land in question and to make it a charge on the land.

Defendant No. 1 was the original owner and vendor. Defendant No. 2 was a purchaser of part of the land under a contract subsequent to the sale to the plaintiff. Defendant No. 3 held a mortgage upon the land.

It was alleged that the land was already sold in execution, that the Court sale was set aside on the application of the first defendant, who was permitted by the Court to re-sell the land by a private sale to the plaintiff for Rs. 2,000. It was alleged that by agreement Rs. 1,258 out of this sum was to be paid by the plaintiff to the third defendant in discharge of his mortgage, when the term of the mortgage should expire. The rest of the amount, *viz.*, Rs. 742, was paid into Court to be divided between defendant No. 1 (the vendor) and others under the agreement. This sum of Rs. 742 was paid into Court in December, 1891, the sale being thus cancelled.

In accordance with this arrangement a deed of sale of the land was executed by defendant No. 1 (vendor) to the plaintiff and was handed over to the latter, but was never registered by him.

The land remained in possession of the mortgagee (defendant No. 3).

In June, 1894, defendant No. 1 sold part of the land to defendant No. 2.

In December, 1894, the plaintiff filed this suit. In the first instance he prayed for a declaration that the land belonged to him and that he was entitled to redeem the mortgage of defendant No. 3 and for other relief, but on settlement of issues the plaintiff was content that the only question should be whether he was entitled to recover the Rs. 742 with interest and to make that sum a charge on the whole of the land.

[58] Defendants Nos. 1 and 2 pleaded that the Rs. 742 had not been paid by plaintiff, but had really been paid into Court by defendant No. 1, and that the sale to plaintiff was a sham, and they relied on the fact that the sale-deed had not been registered.

Defendant No. 3 did not appear.

The Subordinate Judge gave the plaintiff a decree for Rs. 742, holding that plaintiff could recover this sum from defendant No. 1 (the vendor) but he refused to make it a charge on the property, as the sale-deed was unregistered.

The plaintiff appealed, contending (1) that the whole land (*i.e.*, the part sold to defendant No. 2 in June, 1894, and the rest) should be charged with the Rs. 742, and (2) that the money should be recoverable from defendant No. 2. The appellate Court, however, confirmed the lower Court's decree.

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The plaintiff then appealed to the High Court. Only defendant No. 2 appeared to oppose the appeal. Defendant No. 1 did not appear.

Balaji A. Bhagvat, for the appellant (plaintiff).

Narayan V. Gokhale, for respondent No. 2 (defendant No. 2).

JUDGMENT.

CANDY, J.—The facts of this case are these. The land of defendant No. 1 was attached and sold in execution of a money decree obtained by defendant No. 3. In order to induce the Court to set aside the sale, plaintiff was put forward as a purchaser at a far higher price (Rs. 2,000) than had been realized in the Court sale. Accordingly Rs. 742 were paid into Court, to be paid as follows :—Rs. 78-14-0 to defendant No. 3 on account of his money decree, Rs. 200 to the auction-purchaser in consideration of the sale being cancelled, Rs. 59 odd to defendant No. 2, who was another attaching creditor, and the balance to defendant No. 1, the owner of the land. The sum remaining to make up the Rs. 2,000—*viz.*, Rs. 1,258—was to be paid by redemption of the mortgage on the land held by defendant No. 3. The term of the mortgage had not then expired. This cancelment of the Court sale and payment of the Rs. 742 into Court took place in December, 1891.

A deed of sale was executed by defendant No. 1 in the name of the plaintiff and was apparently handed over to the plaintiff. **[59]** This deed has not been registered. The land remained in possession of the mortgagee (defendant No. 3). In June, 1894, defendant No. 1 sold part of the land to defendant No. 2 by a registered deed of sale.

In December, 1894, the present suit was filed by plaintiff for a declaration that the whole land belonged to him, and that he was entitled to redeem the mortgage of defendant No. 3, and in the alternative for such relief as the Court might award. On the case coming up for settlement of issues, and on the Subordinate Judge expressing an opinion that plaintiff was only entitled to recover the Rs. 742, plaintiff applied (Ex. 10) stating that he was not sure that he would get the land, and prayed that his claim should be confined to the recovery of the Rs. 742 with interest, the sum being made a charge on the whole land.

Defendants Nos. 1 and 2 pleaded that the Rs. 742 had in reality been paid by defendant No. 1, and that the alleged sale to plaintiff was a sham, as was shown by the fact that his deed of sale was never registered. The Subordinate Judge found that defendant No. 1 had failed to prove that he (defendant No. 1) had paid the Rs. 742, and the Subordinate Judge, therefore, held that plaintiff could recover this sum from defendant No. 1, but could not have a charge on the property, as the deed of sale was unregistered. The Subordinate Judge also held that defendant No. 2 certainly knew of the sale to plaintiff. He ordered plaintiff to bear his own costs, as he was to blame for not getting the deed of sale registered.

Plaintiff appealed to the District Court, urging that the Rs. 742 should be made a charge on the whole land (both the part sold to defendant No. 2 and also the part not sold), and that the money should be recoverable from defendant No. 2. The Subordinate Judge, A. P., found that the Rs. 742 were not a charge on the land, and that defendant No. 2 was not liable. He, therefore, confirmed the decision of the first Court. Against this decision plaintiff has made a second appeal to this Court, defendant No. 2 alone appearing to resist the appeal.

There are two defects in the judgment of the lower appellate Court, which make it difficult for this Court to effectually **[60]** dispose of this

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appeal. In the first place, whether defendant No. 1 appealed or not against the decree of the first Court awarding to the plaintiff the Rs. 742 to be recovered from him (defendant No. 1), it is clear that defendant No. 2 can take any objection to the decree appealed against which he could have taken by way of appeal ; and it is evident that one of those objections is that plaintiff is not entitled to a charge on the land for the Rs 742, because plaintiff has not proved that he really provided that money. The Subordinate Judge, A. P., has remarked that the decree of the first Court against defendant No 1 " must be allowed to stand, as the defendant No. 2 in resisting the appeal failed to satisfy me that the lower Court's finding on the third issue is wrong." That issue was " Does defendant No. 1 prove that the sum of Rs. 742 was in reality paid by himself ?", and the Subordinate Judge of the first Court found on this issue in the negative. But the *onus* primarily rests on the plaintiff to prove that he furnished the Rs. 742 which he seeks to recover. If he fails to prove this, then there is an end of the case at once as against defendant No. 2, though the decree against defendant No. 1 must be allowed to stand owing to defendant No. 1 not having appealed. The plaintiff naturally points to the recitals in the unregistered deed of sale and in the Court records, which show that he as nominal purchaser paid the money. On the other hand, there is the fact that plaintiff failed to register the deed of sale which was executed by defendant and handed to the plaintiff, and it is possible, therefore, that these recitals are merely formal. It is for the Court to weigh these facts with the other evidence, and to find specifically whether the plaintiff paid the Rs. 742 which he seeks to recover. (See the judgment of the Privy Council in *Chowdry Deby Prasad* v. *Chowdry Dowlut Sing* ((1).) It may be necessary to permit plaintiff to adduce evidence in support of his plea, which owing to the form of the 3rd issue he had no opportunity of giving in the Court of first instance.

In the next place, the question is, whether plaintiff, on proving that he himself furnished the Rs. 742, is entitled to a charge for the same on all or part of the land in suit. The law on this point is clear. Plaintiff cannot be entitled to charge for the **[61]** Rs. 742, even though he paid the same, if he is not entitled to recover that sum at all; and he is not entitled to recover the sum at all if the contract for sale went off by default on his part. This is clearly put in Fry on Specific Performance (3rd Ed.), s. 1487, where numerous authorities are quoted :—

" Where the purchaser after making a payment by way of deposit unjustifiably repudiates the contract, or *it in any other way goes off through his default*, the vendor is, in the absence of stipulation on the point, entitled to retain the money, treating it as having been paid to him as a guarantee for the purchaser's performance of the contract."

It does not follow that if the Court would refuse specific performance, the vendor would be entitled to retain the deposit. This point was brought out in the case of *Howe* v. *Smith* (2). Cotton, L. J., said :—

" It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it, so as to enable the vendor to retain the deposit."

(1) 3 M.I.A. 347 (354).

(2) (1884) 27 Ch. D. 89.

In the present case plaintiff does not claim specific performance of the contract. It may be that he is not entitled to make such a claim. The seller having executed a proper conveyance (as he was bound to do), the plaintiff may not be entitled to call on defendant to execute another conveyance. It also may be that the plaintiff in the absence of a valid conveyance is not entitled to the declaration which he prayed for in his original plaint. But it does not follow that he is not entitled to a return of the Rs. 742. So, too, with regard to his claim to a charge on the property for the Rs. 742, if he proves that they came from his pocket; the authorities are numerous as showing that from the moment part of the purchase-money is paid, the purchaser has a lien upon the property to that extent, which lien can only be lost to him by reason of his failing to carry out his side of the contract. This is clearly brought out in the leading case of *Rose* v. *Watson* (1). It was there laid down that if the contract fails, and the failure is not to be attributed to any misconduct or default on the part of the purchaser, the purchaser cannot be deprived of the interest in the estate, which he has acquired by **[62]** his *bona fide* payment. In that case the failure of performance was attributable entirely to the vendor. The purchaser had not rejected the contract or put an end to it. He would have been willing to perform it, if the vendor had performed those things which in good faith he was bound to do. On the other hand, *Din* v. *Grant* (2) was a case in which the Court held that the plaintiff purchaser had lost his lien for part payments of purchase-money, because his conduct was quite inconsistent with the idea that the agreement had remained in force.

Now in the present case before us it would seem at first sight that the Subordinate Judge, A. P., did hold that the contract failed entirely on account of default on the part of the purchaser. He said: "The defendant No. 1 has done all that was necessary for him to do for completing the contract, and plaintiff has deprived himself of the same by his own unjustifiable omission to get his deed registered." If the Subordinate Judge, A. P., had stopped there, there might be ground for the contention that he found as a fact that the contract had gone off solely through plaintiff's default. But the Subordinate Judge, A. P., went on to say, "the sale to defendant No. 2 is no doubt a fraudulent transaction." This finding is quite inconsistent with the former finding. If the contract went off owing to plaintiff's default, where and whose was the fraud in defendant No. 1 selling part of the land to defendant No. 2? If there was fraud in the sale of part of the land to defendant No. 2, then there was still a contract, which plaintiff had not rejected or put an end to.

Having regard to these inconsistent findings, the only course open is to reverse the decree of the lower appellate Court and to remand the appeal for rehearing in reference to the above remarks. If the Subordinate Judge, A.P., is of opinion, on the evidence before him (which was adduced on the 4th issue—what relief, if any, is plaintiff entitled to obtain?), that the plaintiff by his conduct showed that he repudiated the contract (assuming of course that plaintiff did really provide the Rs. 742 which were paid into Court), then defendant No. 2 is entitled to a decree, and plaintiff can only recover the money from defendant No. 1 because **[63]** defendant No. 1 did not appeal against the decree of the first Court. But if the Subordinate Judge, A. P., on a review of the noted authorities above is of opinion that plaintiff having really provided the Rs. 742 which

(1) (1864) 10 H.L.C. 672.

(2) (1852) 5 DeG. and S. 451.

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were paid into Court, is entitled to recover the same, then as regards defendant No. 2 the question will arise whether plaintiff is entitled to have a charge on the land sold to defendant No. 2. That will depend upon the finding on the issue whether defendant No. 2 had notice of the agreement by defendant No. 1 to sell to plaintiff. No finding was recorded by the Subordinate Judge, A. P., on the question of notice. The remark that "the sale to defendant No. 2 is no doubt a fraudulent transaction" is not a clear finding on the issue. As regards the land not sold to defendant No. 2, the plaintiff is of course entitled to a charge, if he really provided the Rs. 742, and if he has not lost his lien by reason of his failing to carry out his side of the contract.

Decree reversed and appeal remanded. All costs, including costs in this Court, to be dealt with by the Subordinate Judge, A. P., at the rehearing.

Decree reversed and appeal remanded.

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23 B. 63.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

NINGAWA (*Original Defendant No.* 1), *Appellant v.* BHARMAPPA AND OTHERS (*Original Plaintiffs*), *Respondents.** [23rd December, 1897.]

Evidence—Evidence Act (I of 1872), s. 32, cls. (2), and (3)—Deed—Recitals in deed—Description of boundary—Statement against pecuniary or proprietary interest.

The plaintiff sued in 1893 to recover possession of certain land. The defendants denied the plaintiff's title. The plaintiff tendered in evidence a registered mortgage-deed of adjacent land executed in 1877, which set forth the boundaries of the land comprised in the mortgage, and as one of such boundaries referred to the land in question as then belonging to the plaintiff. At the date of the deed there was no litigation existing between the present litigants, and at the date of the present suit the mortgagor was dead.

Held, that the statement in the deed was admissible under cl. 3 of s. 32 of the Evidence Act (I of 1872) as a statement against the pecuniary or proprietary interest of the mortgagor.

[**N.F.**, 8 Ind. Cas. 268=9 M.L.T. 91; **F.**, 4 Bur. L.T. 185=11 Ind. Cas. 854; 15 C.L.J. 7=17 C.W.N. 108=13 Ind. Cas. 120; **Diss.**, (1914) M W.N. 779=26 Ind. Cas. 747; **Appl.**, 13 C.W.N. 71 (73)=1 Ind. Cas. 376; **R.**, 11 A.L.J. 139=18 Ind. Cas 752; 14 C.L.J. 467=16 C.W.N 252=12 Ind. Cas. 149.]

[64] SECOND appeal from the decision of L. Crump, Assistant Judge of Dharwar.

In 1893 the plaintiff brought this suit to recover possession of certain land. The defendants denied the plaintiff's title. The plaintiff tendered, as evidence of his ownership, a registered mortgage-deed relating to adjacent land, executed in 1877 by one Ninga Talwar to one Govind, in which the land now in question was mentioned as one of the boundaries of the land comprised in the mortgage and was described as the property of the plaintiff. Ninga Talwar was dead at the date of this suit. It was admitted that in 1877 there was no litigation between the plaintiff and defendants, and it did not appear that there was any motive on the part

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* Second Appeal No. 858 of 1896.

of the adjacent owner (Ninga) to make this statement in the deed on the plaintiffs' behalf.

The lower Courts admitted the deed (Ex. 70) as evidence for the plaintiff and passed a decree in his favour.

On appeal the question was, whether the statement in the mortgage-deed was rightly admitted in evidence.

Robertson, with *Narayan G. Chandavarkar*, for the appellant (defendant No. 1).

Shivram V. Bhandarkar, for respondent No. 2 (one of the sons of the plaintiff, who died pending second appeal).

JUDGMENT.

CANDY, J.—An important question in this case was whether plaintiff had enjoyed long possession of the land in suit. The Subordinate Judge, after mentioning certain extracts from the village records, remarked that they were "corroborated by the recitals of boundaries in connection with a mortgage of Survey No. 94 (Ex. 70) executed by its owner, one Ninga Talwar, under a registered bond dated 1877. The disputed survey number is therein described as plaintiff's land. There was no litigation between the parties in 1877, and no motive on the part of an adjacent landowner to describe the disputed land as belonging to plaintiff."

On appeal the Assistant Judge remarked that "from Ex. 70 it appears that he (plaintiff) was in possession in 1877. This is a statement by a person who is dead, made in the course of business, and appears perfectly reliable. We now come to the **[65]** oral evidence. Having in view the fact of plaintiff's possession in 1877, the evidence of witnesses Nos. 40, 42 and 69 appears more probable than of those for the defence."

In second appeal it is objected that the document Ex. 70, was inadmissible in evidence. It is admitted that Ninga Talwar is now dead and that he was owner of the Survey No. 94, which was bounded on the west by the field now in dispute. It is not denied that Ninga Talwar executed the original of the copy of ths registered mortgage-deed Ex. 70, and no objection was taken to the admission of the copy as such. A recital in that deed is that the land on the west is the field of Bharma Talwar, *i. e.*, the present plaintiff. The weight to be attached to such a statement cannot now be considered by us. That is solely for the Judge of the lower appellate Court to decide.

But it is contended that the document was inadmissible in evidence, and that thus the Assistant Judge was wrong in relying on it at all, and weighing the statements in it in connection with the oral evidence. If this contention is sound, then the decision of the lower appellate Court must be reversed, and the appeal remanded for the Judge to weigh again the evidence, after excluding from consideration this document, Ex. 70. If the contention is not sound, then the appeal must be dismissed.

The Assistant Judge apparently held that the mortgage bond (Ex. 70) was admissible, and the statement therein, as to plaintiff being owner of the land to the west of the field which was the subject of the mortgage, evidence under s. 32 (2) of the Evidence Act, which provides that a written statement of a relevant fact made by a person who is dead, is itself a relevant fact, when the statement was made by such person *in the ordinary course of business*. The applicability of this clause entirely depends on the exact meaning of the words "course of business." The expression

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occurs in more than one place in the Evidence Act. Thus, in s. 16, when there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact. Illustration (*a*) to that section is evidently the case of *Hetherington* v. *Kemp* (1). The "course of business" [66] there put forward was a certain usage in the plaintiff's counting house. It was not a usage in a private house, which however methodical, cannot carry the same weight as the ordinary routine of an office. So, too, by s. 114 the Court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. What is meant by "the common course of public and private business?" Illustration (*f*), with its explanation refers to the public business of the Post Office. Private business would apparently apply to such a case as that alluded to above (*Hetherington* v. *Kemp*). If the expression was meant to include the dealings of a private individual apart from his avocation or business, different language would have been used. The explanation to illus. (*c*) of the same section (114) speaks of "a man of business," which in its well-known popular sense must mean a man habitually engaged in mercantile transactions or trade. Again, in the explanation to s. 47 it is said that a person is said to be acquainted with the handwriting of another person, when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him. Here, too, the expression must mean in the ordinary course of a professional avocation. The illustration is that of a broker, to whom letters are shown for the purpose of advice.

Again, by s. 34 entries in books of accounts, regularly kept in the course of business, are relevant. In *Munchershaw Bezonji* v. *The New Dhurumsey Spinning and Weaving Company* (2) West, J., referred to a private account book tendered in evidence, which had been entered up casually once a week or fortnight, with none of the claims to confidence that attach to books entered up from day to day or (as in banks) from hour to hour as transactions take place. "These only" (he said) "are I, think, regularly kept in the course of business."

Having regard, then, to the above considerations there can, I think, be no doubt that the expression "in the ordinary course [67] of business" in s. 32 (2) must be read in the same sense. It may in one sense be true that it is, in the ordinary course of business, for a mortgage-deed to contain recitals of the boundaries of the land mortgaged. But that would not make the recitals evidence. The question is, whether the mortgage-deed itself is a statement made in the ordinary course of business. Looking at the particulars set out in cl. (2) of s. 32, which, though not exhaustive, may fairly be taken as indicating the nature of the statements "made in the course of business," and looking at the sense in which the expression is apparently used in other sections of the Evidence Act, it cannot be said that a mortgage-deed executed by an agriculturist falls within that term. It is not the "profession, trade or business" (to borrow the words used in s. 27 of the Contract Act) of an agriculturist to execute mortgage-deeds.

I pass on to consider whether the document is admissible under cl. (3) of s. 32 as a statement against the pecuniary or proprietary interest of the person making it. There is good authority for

(1) (1815) 4 Campbell, 193.

(2) 4 B. 576 (583).

answering this question in the affirmative. This is contained in the judgment of Couch, C. J., in *Rajah Leelanund Singh* v. *Mussamut Lakhputtee Thakoorain* (1). The question before the Court was whether the rent payable to the zemindar by the Ghatwal during a certain period was Rs. 75 or Rs. 175. The zemindar relied upon a statement, prepared by the then zemindar many years previously, of the Ghatwali villages in the mehal, in which there was a recital against the name of the property in question that the original rent was so much and the increased rent so much. Mr. Justice Markby held that this statement was inadmissible. He said: "I cannot bring it under any of the rules of evidence which allow a statement of a deceased person to be put in evidence. It does not appear to me to be a statement in any way detrimental to his interest: on the contrary so far as regards the rate of rent, of course, it would be his interest to state it to be as high as possible." In appeal, Couch, C. J., and Ainslie, J., said: "We cannot concur in the opinion, of the learned Judge that this statement was not admissible in evidence. It is a statement by which the interest in the mehal **[68]** of the person making it is reduced or affected; it is against his interest and against his proprietary right. The effect of it is to cut down the proprietary right, to subject it to the tenure or incumbrance which is mentioned. It is true that in one part of it there is what may be said to be not against his interest but in his favour, namely, the amount of the original rent and increased rent payable to him. But when a document of this kind is tendered in evidence, it is not to be divided into parts, and the part which is in favour of the person making it rejected, and that which is against his interest accepted. The question is, whether, taking the document as a whole, it is against the interest of the proprietary right of the person making it. In estimating the value of any particular part of it, that may be looked at; but the principle upon which the admissibility of it is determined is whether it has been made under such circumstances as makes it reasonable to suppose that it was done *bona fide*, and the statements are true."

Just before this passage there is mention of the provisions of the Evidence Act. The judgment of Mr. Justice Markby was given in April, 1874, and though the evidence had been recorded in or before 1869, it appears that the admissibility of the statement in question was considered with reference to Act I of 1872 ("The Indian Evidence Act"). And even if Act II of 1855 be taken as the Evidence Act then applicable, there is no difference in the principle to be applied. Act I of 1872 made no change in the law in this respect. If, then, a statement of a zamindar, that there was a certain Ghatwali occupant in portion of his mehal, was held to be a statement against the interest of the zamindar, in the same way the statement of a registered occupant of a survey number in the Bombay Presidency that he is indebted in a certain sum of money, which is a charge on his land, must be held to be both against his pecuniary and proprietary interest. If so, then the same case quoted above is also an authority for holding that the whole statement is admissible in evidence, not only to prove so much contained in it as was adverse to the interest of the person making it, but to prove any collateral fact contained in the statement, which fact was not foreign to the part actually against interest, and formed a substantial part of **[69]** it. This was laid down in the leading case of *Higham* v. *Ridgway* (2), and though the framer of the Indian Evidence Act apparently took

(1) 22 W. R. 231.

(2) 2 Smith's Leading Cases (Ed.), 318.

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this case as an illustration of a statement made in the ordinary course of business s. 32 (2), and not of a statement against interest s. 32 (3) on which ground it was decided, still the principle established by that case is in no way weakened.

I have not been able to find any Bombay case which in the least touches upon this important point; I say important, because it is evident that the admissibility of impartial statements made by third parties long before any dispute or litigation had arisen, must often turn the scale in weighing the contradictory depositions of witnesses called by the parties to the suit. Here Ninga Talwar would naturally in 1877 have known who was occupying a field next to his own field, and he would naturally express that by reciting in his own motgage-deed that his own field was bounded on the west by the field of the man who was occupying that next field. It is an accident that this statement is admissible in evidence, because it is part of a statement which is admissible as a whole as being against the interest of Ninga. It is easy to conceive a case in which Ninga might have made the same recital in a statement not directly against his own interest, and so not admissible in evidence, though practically as impartial and trustworthy as if made in a mortage-deed. That must be admitted; but this fact ought not to prevent the application of the law, when the case does happen to come within the four corners of the section. For these reasons I think that Ex. 70 was admissible in evidence and would confirm the decree with costs.

FULTON, J.—The only point argued before us by the learned counsel related to the admissibility in evidence of Ex. 70. The question at issue was in reference to the nature of plaintiff's possession of certain lands, and in the course of the hearing a mortgage-deed of adjoining land was given in evidence to support his contention by showing that his name occurred in the recital of boundaries. No objection appears to have been taken to the document in the Court of first instance; and in the Appellate **[70]** Court the question was but lightly touched on by the Assistant Judge, who remarked that Ex. 70 was a statement by a person who was dead, made in the course of business.

As the mortgagor was not the predecessor-in-title of either of the parties to this suit, it must, I think, be conceded that the admissibility of the document depends on whether it falls within the terms of s. 32 of the Evidence Act. Mr. Shivram V. Bhandarkar, who appeared for the respondent, urged indeed that the case might be covered by s. 9, but we are unable to take this view. The Assistant Judge apparently relied on cl. 2 of s. 32, but Mr. Robertson argued that this clause was inapplicable; and with this contention I am disposed to agree. It can hardly be said that the execution of a mortgage-deed is an act done in the ordinary course of business. Doubtless when a person has determined to mortgage his land, the insertion of the boundaries is made in the ordinary course of the business in course of transaction, but I think that in using the phrase "in the ordinary course of business" the Legislature probably intended to admit in evidence statements similar to those admitted in England as coming under the same description. The subject is dealt with in Ch. XII of Mr. Pitt Taylor's Treatise on the Law of Evidence, and the cases which he has collected show that this exception to the general rule against hearsay extends only to statements made during the course, not of any particular transaction of an exceptional kind such as the execution of a deed of mortgage, but of business or professional employment in which the declarant was ordinarily or habitually engaged. The phrase was

apparently used to indicate the current routine of business which was usually followed by the person whose declaration it is sought to introduce.

While, however, considering that cl. 2 of the section cannot be applied, I think there is no good ground for holding that the case does not fall within the terms of cl. 3. A mortgage-deed taken as a whole is certainly a declaration against interest. In the well-known case of *Higham* v. *Ridgway* an entry in the accoucheur's book that his fee had been paid for his professional services was admitted as a statement against interest, and if the [71] mere acknowledgment of the receipt of a fee comes under this description, much more does an acknowledgment that a person has received money which he is bound to repay. In a mortgage-deed the mortgagor not only acknowledges his liability to repay money, but also charges his land with the debt, and, therefore, it seems that the deed as a whole is a statement against the pecuniary and proprietary interest of the person making it. The declarant would be in a better position if the deed were cancelled than he is whilst it remains in force.

But it may be urged that even assuming this argument to be correct, still it cannot be said that the recital of boundaries, which is the only part of the deed that is relevant, is a statement against interest. It was probably a matter of indifference to the mortgagor whether A or B was his neighbour. On this point no doubt some difficulty arises from the wording of the clause, but the difficulty, I think, is more apparent than real. This recital is a statement of a relevant fact and forms a material part of a statement against the interest of the declarant. If this is a correct description, I think it must be accepted as a statement against interest having regard to the context in which it is used. The real question is, was it material in the mortgage-deed, or in other words, was it used for the purpose of advancing the intention of the deed? If it was so used, then I think it was a statement against interest. The words themselves may be innocent and free from any taint of prejudice to the interests of the declarant; but the context shows that they were only employed for the purpose of more completely describing the property mortgaged and of rendering it impossible for the mortgagor, if dishonestly inclined, to raise any dispute as to its identity. The Registration Act required the mention of other properties abutting on the mortgaged land, and although such properties might perhaps have been sufficiently described without mentioning the names of their occupants it cannot be said that such mention was irrelevant or superfluous. In the case of *Higham* v. *Ridgway* and *Rajah Leelanund Singh* v. *Mussamat Lakhputtee Thakoorain*(1) the principal was admitted that statements and entries against interest might be received as evidence of independent and collateral [72] matters which, though forming part of the declaration, were not in themselves against the interest of the declarant. But as these cases did not come under the Evidence Act, they cannot be treated as authorities for its interpretation though they may serve as guides to indicate, the probable intention. The Courts in India are now bound by the Act and must conform to its provisions, and it is of course necessary to bear this in mind when referring to decisions of the English Courts or of the Indian Courts before 1872. I think, however, that it is strictly correct to say that a statement, though indifferent in itself, becomes against the proprietary interest of the declarant when made as a material part of a deed the

(1) 22 W.R. 231.

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object of which is to limit his proprietary interest. It cannot be said not to affect his interest, because assuming it to be material, the deed, if it were struck out, would be less effective than it would otherwise be. If, on the other hand, the statements were unconnected with the purpose of the deed, and were not in themselves adverse to the declarant's interest, they would doubtless have to be rejected. *Vide Knight* v. *Marquess of Waterford* (1); *Doe* v. *Bevis* (2).

In the circumstances, then I think material recitals or descriptions in a deed of mortgage by a deceased mortgagor may usually be admitted in evidence of the facts stated therein under cl. 3 of s. 32 of the Evidence Act. It would indeed frequently be disastrous if this were not the case. Amid the conflict of the oral statements of interested witnesses a recital in an old deed made *ante litem motam* may often be a most trustworthy guide to indicate on which side lies the truth. The total rejection, then, of such statements might, in some cases, seriously interfere with the administration of justice; but at the same time it must be remembered that the Courts, while accepting them for consideration, will always have carefully to estimate their probative effect according to the circumstances in which they were made and will give them much or little weight as those circumstances may appear to require.

As this was the only point of appeal that was argued, I think the decree must be confirmed with costs.

Decree confirmed.

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23 B. 73.

[73] APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice and Mr. Justice Candy.

VAMAN VISHNU GOKHALE (*Original Defendant*), *No.* 3 *Appellant v.* VASUDEV MORBHAT KALE AND ANOTHER (*Original Plaintiff and Defendant No.* 2), *Respondents.* *

[11th January, 1898.]

Partition Act (IV of 1893), s. 4 †—Application of section—Dwelling-house belonging to undivided family—Re-acquisition by members of such family after it has been sold to a stranger does not give any right under the section as against such stranger.

A dwelling-house belonged to four brothers, Krishnaji, Ramchandra, Vaman and Parashram, joint members of a Hindu family. In 1874 the shares of Krishnaji and Parashram were sold in execution of decrees against them, and in 1877 the remaining shares were sold, and finally the house became the property of the plaintiff and one Karandikar in equal moieties. The plaintiff sued Karandikar for partition and obtained a decree, but pending execution Karandikar conveyed his moiety back again to Ramchandra and Vaman. The brothers had continued

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* Second Appeal No. 795 of 1897.

† Partition Act (IV of 1893), s. 4:—

(1) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family, and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit, and direct the sale of such share to such shareholder and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-s. 1, two or more members of the family being such share-holders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-s. 2 of the last foregoing section.

(1) (1840) 4 Y. and C. Ex. 283. (2) (1849) 18 L. J. (C. P.) 128.

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to occupy the house notwithstanding the changes in ownership. Vaman now applied under s. 4 of the Partition Act (IV of 1893) to be allowed to buy the plaintiff's moiety.

Held, that he was not entitled to the advantage given by the section. It is ownership, not occupation, that gives the right. After the sales in 1877 the house no longer belonged to an undivided family. Vaman and his brothers were then either tenants in the house or trespassers. The question was whether the dwelling-house at the time the shares therein, which had not been sold to Karandikar, were transferred to the plaintiff belonged to an undivided family. When the plaintiff purchased his moiety, he and Karandikar became the owners in common of the house, and as between them s. 4 of the Partition Act had no operation. The subsequent purchase of Karandikar's interest by Ramchandra and Vaman did not confer upon them any rights which Karandikar did not possess. It was in their hands re-acquired [74] ancestral property, but not property belonging to an undivided family within the meaning of s. 4.

[R., 12 C.L.J. 526 (534)=7 Ind. Cas. 436.]

SECOND appeal from the decision of Rao Bahadur M. R. Nadkarni, Additional First Class Subordinate Judge of Ratnagiri with appellate powers.

The house in question originally belonged to Vishnu Bhikaji Gokhale, who died leaving four sons, *viz.*, Krishnaji, Ramchandra, Vaman and Parashram. In January, 1874, the shares of two of them, *viz.*, Krishnaji and Parashram, were sold in execution of a decree against them and were bought by one Karandikar. In 1877 a money decree was obtained against the heirs of Vishnu, and his (Vishnu's) interest in the house was sold in execution, and after passing through several hands was finally conveyed to the present respondent (and plaintiff) Vasudev Morbhat Kale. It was decided in a former suit (see I.L.R., 10 Bom., 451) that by his purchase he became entitled to one moiety of the said house and that Karandikar was entitled to the other.

He accordingly brought this suit for partition and obtained a decree, but pending execution, Karandikar in 1892 conveyed his moiety of the house to Ramchandra and Vaman, the sons of the original owner (Vishnu), and Vaman now applied under s. 4 of the Partition Act (IV of 1893), to be allowed to purchase the plaintiff's share by paying him the value of it. His application was rejected. On appeal the Judge passed the following order:—

"I direct that the house be put to an auction-sale in the presence either of the Subordinate Judge of Rajapur or the Nazir of this Court as between the plaintiff and defendants Nos. 2 and 3 (Ramchandra and Vaman), the appellants only, and given to the highest bidder on his paying half the amount of the highest bid to the other party, the defendants Nos. 2 and 3 being at liberty to bid jointly or severally, and that if the sale be conducted by the Nazir, it should not be completed without the sanction of the Subordinate Judge."

Vaman (original defendant No. 3) preferred a second appeal.

M. B. Chaubal, for the appellant Vaman (original defendant No. 3).—We have been all along in possession of the house, although the interest of our two brothers Krishnaji and Parashram was sold in 1874. Notwithstanding the sale of their shares the family continued to be a joint family, and our subsequent [75] purchase from Karandikar was effected by us as members of a joint family. The object of s. 4 of the Partition Act is to give ancestral property to any of the members of a joint family under certain conditions. Vaman, the appellant, has continued to be a co-sharer in the joint family and he can claim the benefit of the section, which confers a right of pre-emption upon a member of a joint family.

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Narayan V. Gokhale, for the respondent (plaintiff).—Section. 4 of the Partition Act does not apply here; that section applies where the joint family have remained owners of the house, but a share of it has been sold to a stranger.

JUDGMENT.

FARRAN, C. J.—The dwelling-house with regard to which the present appeal has been brought, originally belonged to Krishnaji, Ramchandra, Vaman and Parashram (since deceased), the sons of Vishnu, deceased, but liable to be sold for Vishnu's debts.

In January, 1874, the shares of Krishnaji and Parashram therein were sold in execution of a decree against them, and were purchased by one Karandikar. The house after that sale belonged to the remaining sons of Vishnu on the one side and Karandikar on the other as tenants-in-common.

In 1877 in execution of a money decree obtained against the heirs of Vishnu, his interest in the house was sold to Joglekar, who sold to Hardikar, who in turn conveyed to the present plaintiff Kale. It has now been decided that Karandikar and the plaintiff under the above sales and purchases each became entitled to a moiety of the dwelling-house. In 1892 Karandikar conveyed his moiety of the house to the above-mentioned Ramchandra and Vaman.

In execution of a partition decree made in the present suit the question arises whether under the above circumstances the defendant Vaman, the appellant before us, is entitled to take advantage of the provisions of s. 4 of Act IV of 1893. It should be added that the sons of Vishnu have never actually lost the possession of the house. The latter circumstance, which Mr. Chaubal relied on, does not appear to us really to affect the question. It is the ownership of the dwelling-house and not its actual occupation which brings the provisions of s. 4 [76] of the Partition Act into play. The family of Vishnu after the sale in 1877 were either tenants in the house or trespassers. In neither capacity would they possess any privilege of pre-emption. The question is, whether the dwelling-house at the time, when the shares therein which had not been sold to Karandikar were transferred to the plaintiff, belonged to an undivided family. The answer must, we think, be in the negative. The house then belonged to Karandikar and the heirs of Vishnu whose shares had not been conveyed to Karandikar. When the latter shares were transferred to the plaintiff, he and Karandikar became the owners in common of the house, and it is plain that, as between them, s. 4 of the Partition Act had no operation. The subsequent purchase of the interest of Karandikar by Ramchandra and Vaman did not, in our opinion, confer upon them any rights which Karandikar did not possess. It was in their hands re-acquired ancestral property, but not property belonging to an undivided family within the meaning of s. 4.

We are, therefore, of opinion that the lower appellate Court took a correct view of the case. The order which it passed was really an order under s. 3, cl. (2), and no exception can be taken to it except that the Court ought to have valued the house before putting it up for auction between the parties as directed by s. 3. This can still be done. The provisions of s. 6, cl (3), have, we think, no application to the present case. Decree confirmed with costs.

Decree confirmed.

[77] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BALSHET GOPALSHET SONAR (*Original Defendant-Opponent*), *Appellant v.* MIRANSAHEB VALAD DADESAHEB DARUWALE (*Original Plaintiff-Applicant*), *Respondent.** [5th July, 1898.]

Partition Act (IV of 1893), *s.* 3, *sub-ss.* 2, 4—*Suit by transferee for partition—Suit for partition by sharer against transferee—Procedure.*

Section 4 (1) of the Partition Act (IV of 1893) applies only where the transferee sues for partition.

Where the suit is brought by the sharer against the transferee, s. 2 must be applied.

In cases where s. 4 applies, the Judge should make a valuation of the share of the transferee only and direct its sale.

[R., 12 C.L.J. 525 (530) = 7 Ind. Cas. 436.]

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona.

Appeal from an order in execution proceedings.

The plaintiff brought this suit to recover his share of a house. The first two defendants were his brother and mother, and he complained that during his minority the house which had belonged to his deceased father had been sold in 1879 by them to the third defendant. He claimed to recover a half-share of the house which was in the possession of the fourth defendant, to whom the third defendant had sold it.

The plaintiff obtained a decree declaring that the sale by defendants Nos. 1 and 2 was not binding upon him and that he was entitled to recover a $\frac{7}{16}$ share in the house.

[78] In execution the fourth defendant applied to be permitted to buy the plaintiff's share, and it being admitted that the house could not be divided, the Subordinate Judge ordered a valuation to be made by a Commissioner, who valued the whole house at Rs. 500 and directed that it should become the property of the fourth defendant on his paying the plaintiff the value of his share, *viz.*, Rs. 218-12-0. The Subordinate Judge was of opinion that, as the fourth defendant was already the owner of the larger portion of the house, he ought to be permitted to buy the plaintiff's share.

The plaintiff appealed and the Judge reversed the order of the Subordinate Judge. He applied s. 4 of the Partition Act (IV of 1893) and directed the house to be sold by auction and that the plaintiff should be permitted to buy the share of the fourth defendant if he chose to pay its value so ascertained.

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* Second Appeal No. 158 of 1898.

(1) Section 4 of Act IV of 1893 :—

"4 (1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a share-holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder, and may give all necessary and proper directions in that behalf.

"(2) If in any case described in sub-s. (1) two or more members of the family being such share-holders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-s. (2) of the last foregoing section."

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23 B. 77.

The fourth defendant appealed to the High Court.

M. B. Chaubal, for appellant.—The Judge was wrong in holding s. 4 applicable. The house was not a family dwelling-house. No member of the plaintiff's family had lived there since 1877, in which year it was mortgaged with possession and in 1879 it was sold to the third defendant. Section 4 applies only when a transferee sues for partition, but here it is a sharer who sues the transferee. The Judge was also wrong in directing an auction. He should have valued the house.

Chintamani A. Rele, for the respondent.—We are entitled to the benefit of s. 4. The fourth defendant is the owner of a large share of the house. It is not possession but ownership that brings s. 4 into operation—*Vaman* v. *Vasudev* (1). The fact that it is a sharer and not a transferee who is plaintiff is immaterial. The existence of a suit between them is sufficient. This is a partition suit and all the parties are on an equal footing. Each party can apply for his share whether he be a plaintiff or defendant. An auction-sale was the best mode of ascertaining the value of the house. If s. 4 does not apply, the case will come under s. 3, cl. 2.

JUDGMENT.

PARSONS, J.—The District Judge applied s. 4 of the Partition Act (IV of 1893) to this case apparently without [79] noticing that that section in its terms relates only to cases where the transferee sues for partition. The suit here was by the sharer against the transferee. He has also made a mistake in ordering that the house should be sold by auction. It is true that he has also ordered that the value of the transferee's share should be paid by plaintiff if he is willing to buy it, but in a sale by auction there is the possibility of a purchase by a third party and that is not provided for. As we construe the Act, if s. 4 applied to the case and plaintiff could have and had undertaken to buy the share of the transferee, the Judge should have made a valuation of that share only and directed its sale.

In this case, however, it is not s. 4, but s. 2, which must be applied. Practically this makes no difference in the order that will have to be passed, since s. 4 (2) directs that the procedure prescribed in s. 3 (2) shall be followed in circumstances similar to those that now exist in this suit.

They are as follow:—The parties were agreed that a division of the house could not conveniently be made, and the Court at the request of the largest share-holder, the defendant, who owns $\frac{9}{16}$ of the house, directed a sale of it. When the case was before the District Court, the position was this:—Each of the parties had asked for leave to buy the share of the other at a valuation; and the Subordinate Judge had ordered a valuation of the house and had ascertained its value to be Rs. 500. All then, it appears to us, that the District Court could do under s. 3 (2), if he considered that valuation incorrect and that the market-value of the house should be determined by a sale by auction, was to order a sale of the shares to the share-holder who offered to pay the highest price above that valuation; in other words, the Court had to put the house up to auction between the parties at the reserved price of the valuation, and distribute the purchase-money in the proportion of the share owned by each.

(1) 23 B. 73.

We reverse the order of the District Judge and remand the case for the above procedure to be followed. Costs to be costs in the cause to be dealt with by the Judge when finally disposing of the case.

Order reversed and case remanded.

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23 B. 80.

[80] ORIGINAL CIVIL.

Before Mr. Justice Fulton, and on appeal before Sir C. F. Farran, Kt., Chief Justice and Mr. Justice Strachey.

NAVROJI MANOCKJI WADIA (*Original Defendant*), *Appellant* v. PEROZBAI AND OTHERS (*Original Plaintiffs and Defendants*), *Respondents.** [15th July, 1898.]

Will—Parsis—Construction—Bequest of power of management to widow and daughter for life—Life-estate—Gift to two persons as joint tenants or tenants-in common—Intestacy—Non-claim by persons entitled to shares—Limitation.

Jehangirji Nusserwanji Wadia, a Parsi, died in 1843 leaving a widow (Manekbai) and a daughter (Motlibai) and two grandsons (sons of Motlibai) him surviving. By his will (written in the Gujarati language) he directed that during her life his widow and daughter were "to agree together and to manage the affairs with unanimity" and after Manekbai's death he gave the whole power over his estate to his daughter Motlibai "and so long as Motlibai enjoys her natural life, everything is to remain with her." The will then continued. "After the death of Motlibai—Motlibai has two sons, namely, Bhai Navroji and Bhai Nusserwanji —these two boys are the owners of whatever property and estate there may be belonging to me. They are considered as my children. No one is to offer them any hindrance or impediment. I have presented all to my wife and to my daughter, Motlibai."

Held (confirming Fulton, J.) that Manekbai and Motlibai took only a life-interest in the estate.

(2) (Varying the decree of Fulton, J.) that Motlibai's two sons took the estate as joint tenants subject to the life-interests of Manekbai and Motlibai and not as tenants-in-common.

One Manockji Navroji Wadia died intestate in 1837, leaving a widow (Motlibai) and two sons, *viz.*, Nusserwanji and Navroji. Motlibai obtained letters of administration and until her death in 1897 remained in sole possession and enjoyment of her husband's estate, although by law entitled only to a widow's share, the two sons being entitled to the remainder. In this suit filed in 1897 by the widow of Nusserwanji, one of the sons.

Held, that the right of both sons to recover the shares to which they were originally entitled was barred by limitation (art. 123 of the Limitation Act XV of 1877) and their right to such shares was extinguished under s. 28 of the Limitation Act. Manockji's estate had, therefore, become merged in Motlibai's estate.

[**Rel.**, 1 S.L.R. 211 (216); **Appl.**, 34 M. 80 (81)=6 Ind. Cas. 7=20 M.L.J. 377=7 M.L.T. 379=(1911) 1 M.W.N. 74; **R.**, 26 B. 445 (448); 31 B. 25 (32)=8 Bom.L.R. 770.]

APPEAL from Fulton, J.

Suit for the construction of certain wills.

[81] The plaintiff Perozbai was the widow and sole executrix of Nusserwanji Jehangirji Wadia, who died without issue on the 5th May, 1897. He and the first defendant, Navroji Manockji Wadia, were brothers, the sons of one Motlibai.

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* Suit No. 611 of 1897. Appeal No. 974.

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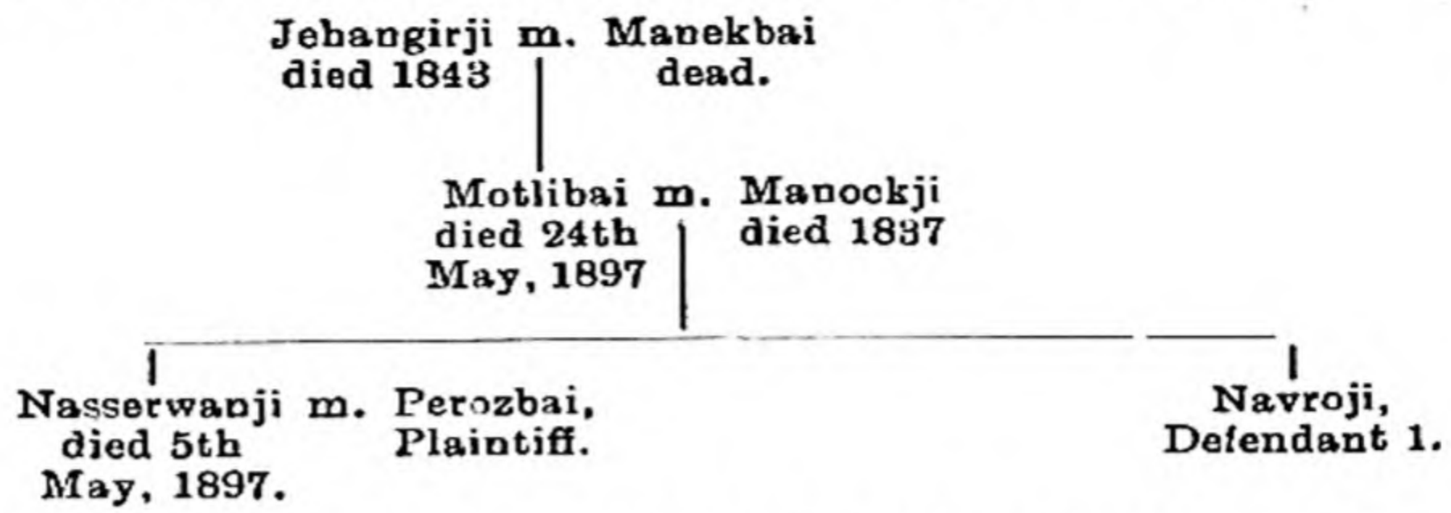
The following table shows the relationship of the parties :—



Motlibai was the daughter of one Jehangirji Nusserwanji Wadia, who died in 1843, leaving a widow (Manekbai) and Motlibai, his only child. Motlibai was then already a widow, her husband (Manockji Navroji Wadia) having died in 1837 intestate, leaving Motlibai and her above-mentioned two sons (Nusserwanji Jehangirji Wadia and the first defendant Navroji Manockji Wadia) him surviving.

By his will and codicil dated 1840 Jehangirji Nusserwanji Wadia left his estate to his widow Manekbai and then to Motlibai (his daughter) and then to Motlibai's two sons. Manekbai died shortly afterwards. The main questions in this suit were :—

(1) Whether under this will Manekbai and Motlibai took an absolute interest or only a life interest in the estate ?

(2) Whether under this will the two sons of Motlibai (the deceased Nusserwanji and the first defendant Navroji) took a joint interest after the death of Motlibai, or a tenancy in common ?

The clause in Jehangirji's will on which both these questions were raised was as follows :—

"So long as my wife Manekbai enjoys her natural life, the aforesaid two persons" (*i. e.*, she and Motlibai, daughter of the testator) "are to agree together and to manage the affairs with unanimity, but after the death of my wife, Manekbai, I do give the whole power over my estate and property and also over the payments and receipts to my daughter, Motlibai, and she is to [82] manage all the affairs : and so long as Motlibai enjoys her natural life everything is to remain under her. After the death of Motlibai—Motlibai has two sons, namely, Bhai Navroji and Bhai Nusserwanji— *these two boys are the owners of whatever property and estate there may be belonging to me.* They are considered as my children. No one is to offer them any hindrance or impediment. I have presented all to my wife and my daughter, Motlibai."

Motlibai as above-mentioned was already a widow at the date of the above will. Her husband, Manockji Navroji Wadia, had died in 1837 intestate. She took out letters of administration to him in 1838. Though only entitled to a widow's share of his estate (her two sons being entitled to the rest) she remained in possession of all until her death in May, 1897. In this case the lower Court accordingly held (see *post* p. 85) that the claim of her two sons to their shares had become barred by limitation under art. 123 of the Limitation Act (XV of 1877), and that the whole of her husband's estate had become her property.

Nusserwanji Jehangirji Wadia (one of Motlibai's sons) died, as above mentioned, on the 5th May, 1897, without issue. He left a will, dated 8th June, 1885, whereby he appointed his widow, the plaintiff Perozbai, to be his executrix. By cls. 4 to 13 of this will he bequeathed legacies of various

amounts to some of his servants, and, in addition, directed his executrix to make certain monthly payments to these legatees. In the case of each of them he directed as follows :—

"I empower my said executrix from time to time and at any time or times to withhold such monthly payment in case of misbehaviour on the part of the said (legatee) of which misbehaviour my said wife shall be the sole judge, and in the event of any such payment being withheld, the said (legatee) shall not be entitled to the same."

And as to lapsed legacies he directed as follows :—

"16. In case all or any of the legacies hereinbefere bequeathed by the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth clauses of this my will shall lapse, or from any cause become void, I direct my said executrix to pay the amount of such lapsed or void legacies or legacy to herself absolutely."

Some of these legatees and annuitants survived the testator and some died in his life-time. In regard to all these annuitants the following questions were raised in the plaint :—

[83] "(*a*) Whether the annuities bequeathed by cls. 4, 6, 7, 9 and 10 are dependent upon good behaviour of the annuitants, and if so who is to be the judge of their behaviour in that behalf?

"(*b*) Whether in regard to the said annuitants, all of whom survived the testator, if the bequest of annuities to them or any of such bequests fail or lapse by reason of death, bad behaviour or otherwise, and whether in regard to the bequests of annuities in cls. 5, 8, 11, 12 and 13, all of which have failed by reason of the annuitants having predeceased the testator, the plaintiff becomes entitled thereto under cl. 16 of the will, or whether such lapsed annuities fall into the residue?"

The 17th clause of the will, which dealt with the residue, was as follows :—

"17. I give, devise and bequeath all the rest and residue of my estate whatsoever and wheresoever situate unto my said executrix upon trust to divide the same equally among all my sons upon their attaining twenty-one years of age, and in case I shall leave only one son, then upon trust as to the whole of the said residue for such son absolutely upon his attaining twenty-one years. And in case I shall leave no sons or son, but shall leave a daughter or daughters, then upon trust as to one equal half part of the said residue for such daughter or daughters (if more than on in equal shares) for their and her respective sole and separate use upon attaining twenty-one years, or marriage whichever may first happen. And as to the other one equal half part of the said residue upon trust to pay the income thereof to my said wife Perozbai during her life and after her death upon trust as to the said last-mentioned one equal half part of the said residue to pay and make over the same to the persons hereinafter designated as my charitable trustees to be held by them upon the charitable trusts hereinafter declared. And I declare that in case I shall die without leaving any issue, my said executrix shall stand possessed of the said residue of my estate upon trust to pay, transfer and make over the same unto my mother Bai Motlibai, Sorabji Shapurji Bengali, of Bombay Parsi inhabitant, and Jehanghir Gustadji, also of Bombay Parsi inhabitant, hereinafter called my 'charitable trustees.' And I declare that my said charitable trustees shall stand possessed of the said residue upon trust to invest the same upon any securities of, or guaranteed by, the Government of India and to apply the annual income arising from such investments in or towards the

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endowment of such hospitals for the sick and in donations, grants and gifts to such dispensaries, infirmaries, educational or charitable institutions situate in the Island of Bombay as in their own absolute discretion my said charitable trustees may select, and also in relieving poor and [84] indigent Parsis in such manner and to such extent as my said charitable trustees may think fit, and I declare that, in case the charitable trusts hereinbefore declared shall from any cause be void or incapable of taking effect then and in the event of my dying leaving a daughter or daughters I give and bequeath one-half of the said residue of my estate unto my said wife absolutely and in case she shall have predeceased me then to the trustees for the time being of the Parsi Panchait, and in the event of my dying witout leaving issue then I give and bequeath the whole of the said residue unto my said wife, Perozbai absolutely, and in case she shall predecease me then to the trustees for the time being of the Parsi Panchait."

As to this clause the plaintiff raised the following question in the plaint :—

"What are the plaintiff's rights, if any, under cl. 17 of the said will in the event, (which has in fact happened), of the said Nusserwanji Jehangirji Wadia dying without issue?"

The plaint also stated that all the trustees of the charitable trusts appointed by Nusserwanji's will were dead, and prayed that, if necessary, new trustees should be appointed and a scheme settled.

Motlibai died on the 24th May, 1897, a few days after her son Nusserwanji. She left a will dated 1896, whereby she appointed both her sons (Nusserwanji and the first defendant) her executors and gave the whole of her property to them in equal shares.

The plaint prayed for a decision on the following points :—

"(1) Were the claims of the deceased Nusserwanji and his brother, the first defendant Navroji, to share in the estate of their father Manockji Navroji Wadia, who died in 1837, barred by limitation ?

"(2) What estate did Motlibai and her two sons respectively take under the will of Motlibai's father, Jehangirji Nusserwanji Wadia ?

"(3) Were the annuities or monthly payments given by the will of Nusserwanji Jehangir Wadia to persons who were still living, dependant on their good behaviour, and, if so, who was the judge of such behaviour, and in case of lapse from death or bad behaviour, and also as to annuities given by the said will to persons who had predeceased the testator Nusserwanji, did the plaintiff become entitled thereto under cl. 16, or did such payments fall into the residue ?

"(4) What are the plaintiff's rights under cl. 17 of the will ?

"(5) Whether new trustees of the charitable bequests should be appointed and a scheme settled ?

[85] "(6) What interest did Nusserwanji take under the will of his mother Motlibai, and in case the bequest to him by the will had lapsed by reason of his dying before her, to whom did the lapsed share belong ?"

The plaint further prayed that the share, if any, of the deceased Nusserwanji in the estate of (*a*) his father Manockji Navroji Wadia, (*b*) his maternal grandfather Jehangirji, and (*c*) his mother Motlibai might be ascertained and handed over to the plaintiff as his executrix.

The case was argued before Fulton, J., who gave the following judgment :—

FULTON, J.—In this suit the Court has been asked to decide certain points as to the persons now entitled to the estate of Manockji Navroji

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Wadia, and certain questions of construction which arise upon the wills of Jehangir Nusserwanji Wadia, Nusserwanji Jehangirji Wadia, and Motlibai, respectively, deceased.

The facts are not disputed. Jehangir Nusserwanji Wadia was married to Manekbai. He made a will, dated 13th April, 1840, and died in April, 1843, leaving one daughter, Motlibai. Motlibai was married to Manockji Navroji Wadia, who died intestate in 1837, leaving his widow Motlibai and two sons, Navroji and Nusserwanji. Motlibai took out letters of administration. Nusserwanji died on 5th May, 1897, leaving a will. Motlibai died on 24th May, 1897, leaving a will. Navroji is still alive. Perozbai, the plaintiff, is the widow and executrix of Nusservanji. Mr. Inverarity, on behalf of the first defendant, Navroji, pointed out that his client was not interested in the points raised in paragraphs 4 and 5 and in paragraphs (*c*) and (*d*) of the prayer of the plaint, but had no objection to their being decided in this suit, provided all costs connected therewith were paid out of Nusserwanji's estate.

The first question to be disposed of is in regard to the estate of Manockji, who died intestate in 1837, leaving a widow (Motlibai) and two sons (Nusservanji and Navroji). The facts as stated in the plaint are not disputed, and are as follows :—" The said Motlibai obtained letters of administration in the year 1838 to the estate of her said husband, and thereafter until her death in May, 1897, **[86]** solely possessed and enjoyed the said estate, although by law she was entitled only to a widow's share thereof, the intestate's two sons being entitled to the remainder." On these facts I must hold that the right of the sons to recover the shares to which they were originally entitled has become barred under art. 123 of the Limitation Act, and their right to such shares is now extinguished under s. 28. The case might have been different if evidence had been given to show that Motlibai was holding with their consent and on their behalf, but the Advocate-General said he was not in a position to give such evidence. The case has, therefore, to be decided on the allegations in the plaint, and there being nothing to show that Motlibai held on her sons' behalf, the rule of limitation must be applied. Manockji's estate, therefore, became merged in Motlibai's estate.

I come next to Jehangirji's estate. The disputed clause in his will as officially translated is as follows :—

"So long as my wife, Manekbai, enjoys her natural life, the aforesaid two persons" (*i. e.*, she and Motlibai, daughter of the testator) "are to agree together and to manage the affairs with unanimity, but after the death of my wife Manekbai, I do give the whole power over my estate and property and also over the payments and receipts to my daughter, Motlibai, and she is to manage all the affairs : and so long as Motlibai enjoys her natural life everything is to remain under her. After the death of Motlibai—Motlibai has two sons, namely Bhai Navroji and Bhai Nusserwanji—these two boys are the owners of whatever property and estate there may be belonging to me. They are considered as my children. No one is to offer them any hindrance or impediment. I have presented all to my wife and my daughter, Motlibai."

On this somewhat obscure clause, Mr. Inverarity, on behalf of Navroji, has contended that Motlibai took an estate for life, and that her two sons took a joint estate vested in them on the death of the testator, while, on the other hand, the Advocate General, though not disputing that Motlibai's interest was a life-estate and that the interests of her sons

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became vested in them on the death of the testator, has urged that they took as tenants-in-common and not as joint tenants. The difference in the result is obvious. If these sons took a joint estate, the whole passed to Navroji on the death of Nusserwanji, whereas if they were tenants in common, Nusserwanji's share passed under his will.

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[87] The question is one of considerable difficulty. It seems to me that on the authorities cited by Mr. Inverarity it is clear that if the will, as translated, had been made in England, these sons would, in the absence of any words of severance, have taken joint estates. The tendency of modern decisions undoubtedly is to give effect to any words indicating an intention to create a tenancy in common rather than a joint tenancy, but still there must be words indicative of such intention, and with the case of *Armstrong* v. *Armstrong* (1) before me it might be difficult to hold that, if this will had been made in the English language, the Court could have construed it otherwise than as creating a joint tenancy. If this question had arisen in the English will of a native testator, various considerations would have applied, and it might have been necessary to refer to the remarks of Arnould, J., in *Lakshmibai* v. *Ganpat* (2).

But I need not consider how the English will of a Parsi made before the passing of the Indian Succession Act would have been construed, for the question now is, whether I ought to apply any particular rule of construction to a vernacular will made by a Parsi in Bombay in the year 1840. The real question is, what was the intention of the testator? Now, since the decision in *Naoroji* v. *Rogers* (3), it cannot be disputed that until the legislation of 1865 "the law uniformly applied to Parsis and their property in the Island of Bombay by the Supreme Court, and, since it was closed, by the High Court at its Original Jurisdiction side has been, as correctly stated in the clear and able report of the Parsi Law Commission, the English law" subject to certain specified exceptions. The Advocate General called attention to the decision in *Mithibai* v. *Limji* (4), where in dealing with the rule in *Shelley's case* and its effect on the disposition, by Parsis, of immoveable property in the Mofussil, Sir C. Sargent said: "Even assuming English law to be the *lex loci* in the Mofussil, or that, at any rate, it must be applied in this Court in the absence of any *lex loci*, the English law so to be applied cannot include the rule in *Shelley's case*, which although said to be a rule of law and not merely of construction, was at any rate a law of property or **[88]** tenure based upon feudal considerations, and is quite unsuited to the circumstances of this country." But I am doubtful about the applicability of this remark to the case of a Parsi's will made in Bombay not affecting immoveable property in the Mofussil; and I feel the force of Mr. Justice Scott's dictum in *Lakshmibai* v. *Hirabai* (5) "that in the expounding of wills the Court should presume that the testator did not intend to depart from the general law beyond what he explicitly declares." Consequently if it appeared that the rule (Williams on Real Property, p. 162) that "if property be given simply to A and B without further words they will at once become joint tenants" were, like the rule in *Shelley's case* as stated by Lord Herschell in the recent decision in *Van Grutten* v. *Foxwell* (6), a rule of law and not a mere rule of construction designed to carry out the intentions of the testator, there would be a serious difficulty in doubting

(1) (1869) 7 Eq. 518.
(2) 4 B.H.C.R. O.C.J. 150 (161).
(3) 4 B.H.C. R. 1.
(4) 6 B. 151 (163).
(5) 11 B. 69 (76).
(6) (1897) Ap. Ca. 662.

that the legal effect of this testator's disposition was to create a joint tenancy. But any uncertainty as to the nature of the rule in question seems removed by the remarks of the Privy Council in *Jogeswar* v. *Ram Chand* (1), in which their Lordships speak of it " as an extremely technical rule of English conveyancing." As such, its application to Hindu wills has been rejected both in the above case and previously in *Hirabai* v. *Lakshmibai* (2), and although the reasoning on which its applicability to Hindu wills was denied may not be equally appropriate to Parsis, it is difficult to understand on what ground a rule of construction of English words and phrases can be used for the interpretation of a will made in a different language and in a country where the people are not familiar with the English doctrine on which it is based. It cannot be disputed that where technical words are used, their legal effect must be given to them, " unless from subsequent inconsistent words it is very clear that the testator meant otherwise " (*Roddy* v. *Fitzgerald* (3) per Lord Redesdale), but it surely would be an undue extension of this rule to say that because in England a particular meaning has been assigned to a particular sequence of words, the same meaning must by analogy **[89]** be given to corresponding words in the Gujarati language used by a testator in Bombay. By themselves, apart from technical rules of construction, the words may indicate a desire to create a joint tenancy or a tenancy in common. It was in the power of the testator to do either. But as the form of his will and the language in which it was written leaves no doubt that the phraseology which he adopted had no reference to English rules of construction it seems to me that it would be unreasonable to apply them in trying to determine his wishes. I think, then, that the only canon of construction to be followed in this case is that laid down by the Privy Council in *Soorjeemoney Dossee* v. *Denobundoo Mullick* (4): " Primarily the words of the will are to be considered. They convey the expression of the testator's wishes ; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded." Well in this case it was, as above pointed out, in the power of the testator either to leave his estate to his grandsons in joint tenancy with survivorship between them, or it was in his power to leave it to them in equal shares, so that their interests should pass after their deaths in the ordinary course to their respective widows and children. The words which he used were of doubtful import, but apart from preconceived notions based on the construction of English wills about which he can have known nothing, I do not think they are more favourable to a joint tenancy than to a tenancy in common.

The question, I think, must be looked at from a layman's point of view and we must try to put ourselves in the position of this grandfather, who probably knew nothing of law and, perhaps fortunately, if my view be correct, was not subject in his use of the Gujarati language to any legal rules of construction. He was making a will in which it is evident he desired to place his grandsons on strictly equal terms. In these circumstances is it more probable that he wished them to be joint tenants, so that the one who happened to survive the other should get the whole to the exclusion of the widow and children, if any, of the deceased brother, or is it more likely that he wished them simply to share **[90]** his property equally, so that on the death of either the share of the one so dying

(1) 23 I. A. 37 (44).
(2) 11 B. 573.
(3) (1857) 6 H. L. C. 823 (878).
(4) 6 M. I. A. 526 (550).

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should pass to those who naturally were nearest and dearest to him? The answer to this question seems clear. As pointed out by Sir C. Sargent in *Hirabai* v. *Lakshmibai* (1), the testator must surely have contemplated the probability of his grandsons leaving families of their own behind them. He cannot have intended that these families should be left unprovided for, or be dependent on the chance of a severance of interest having been effected by his grandsons during their lives. The same feelings must, in all probability, have actuated him as actuate fathers and grandfathers all the world over, who in providing for their sons and grandsons rarely, if ever, make them joint tenants. They naturally prefer a form of tenancy, which, as pointed out in Jarman on Wills in the passage quoted by Mr. Justice Scott in *Lakshmibai* v. *Hirabai* (2), " is better adapted to answer the exigencies of families than joint tenancies." The same anxiety to provide for the families of deceased sons will be found in s. 5 of Act XXI of 1865 (The Parsi Succession Act), which though passed long after the date of this will shows the tendency naturally prevalent amongst Parsis. Attention was called to s. 93 of the Indian Succession Act, but whatever effect this may have on the interpretation of wills made after it became law, it cannot be used as a guide in construing one made in 1840. In these circumstances I must hold that Navroji and Nusserwanji took vested interests as tenants in common, and that on Nusserwanji's death his interests passed under this will.

I now turn to Nusserwanji Jehangirji's will. As the legatees and annuitants are not parties to this suit I cannot give binding decisions between them and the executrix. The wording of the will, however, seems perfectly clear. The executrix is made sole judge of misbehaviour in the case of the legacies or annuities which are made to depend on behaviour, and if any of these legatees or annuitants referred to in paragraph (*c*) of the prayer of the plaint died during the life-time of Nusserwanji the legacies lapsed and fell under the provisions of cl. 16. As to the plaintiff's duties under the 17th clause—Nusserwanji having left no issue—they are that she should make over the residue to the [91] trustees who will now be appointed for the charitable purposes mentioned in the will. It has not been suggested that any of the trusts are void or incapable of taking effect. In the events which have happened, plaintiff takes no beneficial interest at present in the residue of the estate of Nusserwanji. By consent of all parties, Perozbai, Navroji Manockji Wadia, Dr. Temulji Bhicaji Nariman, Cowasji Cursetji, Jamsetji and Dinshaw Sorabji Mody are, if they accept the trust, appointed trustees under the 17th clause of Nusserwanji's will in place of the deceased trustees.

In regard to Motlibai's will, it appears that as Nusserwanji predeceased his mother, the legacy to him lapsed, and as the will made no provision for a residuary legatee, his share passes as intestate property and goes in equal moieties to his widow Perozbai and to his brother Navroji. Perozbai as executrix of Nusserwanji takes no interest in Motlibai's estate.

By consent of Mr. Inverarity and Mr. Vicaji it is ordered that the costs of all parties (excepting the Advocate General) be paid out of Motlibai's estate—those of Motlibai's executors as between attorney and client—but the costs of the construction occasioned by the inclusion of questions arising under Nusserwanji's will of all parties including the Advocate General will be paid out of Nusserwanji's estate; those of

(1) 11 B. 573 (576).

(2) 11 B. 69 (77).

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Nusserwanji's executrix and of the Advocate General as between attorney and client.

Naoroji (defendant No. 1) appealed and contended (1) that under the will of Jehangirji Nusserwanji Wadia, the two sons of Motlibai (*i.e.*, himself and the deceased Nusserwanji) took as joint tenants subject to the life-estate of Motlibai, and that, therefore, (Nusserwanji having died) he (defendant No. 1) was now entitled to the whole of the estate of Jehangirji Nusserwanji Wadia.

(2) In the alternative he contended that Motlibai took an absolute interest in the estate of Jehangirji.

The appeal was heard before Farran, C. J., and Strachey, J.

Macpherson and *Strangman*, for appellant.

Lang (Advocate General) and *Lowndes*, for respondent No. 1.

Scott and *Vicaji*, for respondent No. 2.

[92] The following cases were cited:—*Naoroji* v. *Rogers* (1); *Mancharsha* v. *Kamrunisa* (2); *Soorjeemoney* v. *Denobundoo* (3); *Mithibai* v. *Limji N. Banaji*(4); *Sarkies* v. *Prosonomoyee*(5); Jarman on Wills (7th Ed.), pp. 1115, 1121, 1123; *Armstrong* v. *Armstrong* (6); *Morgan* v. *Brittan* (7); *Surtees* v. *Surtees* (8); *Lalit Mohun* v. *Chakkun Lal* (9); *Jogeswar* v. *Ram Chand* (10); Succession Act (X of 1865), s. 93; Theobald on Wills (Ed. 1895), p. 328.

JUDGMENT.

FARRAN, C. J.—Two questions only have been argued before us upon this appeal. They arise upon the construction of the will of Jehangirji Nusserwanji Wadia.

The testator died so far back as 1843. The will is dated the 13th April, 1840. It was after his death proved in the late Supreme Court by his widow Manekbai and his daughter Motlibai. Motlibai was then married and has two sons, Nusserwanji (who has lately died leaving his widow, Perozbai, the plaintiff) and Navroji the appellant, who was the principal defendant in the Court below. The testator left no other issue.

The first question is as to the interest taken by Manekbai and Motlibai, under the will, whether they took an absolute or a life interest only in the residuary estate of the testator.

Upon this question I agree with the Division Court that Manekbai and Motlibai took only a life interest in such estate. This seems to have been assumed in the Court of first instance, and no argument to the contrary would appear to have been addressed to the learned Judge in that Court. It has, however, been contended before us by counsel on behalf of the executor of Motlibai, that the estate given to her and Manekbai was an absolute estate. I set out the passages in the will upon which this contention is rested. They appear to me to have also an important bearing upon the second and more difficult question with which we have to deal. The amended translation of the introductory paragraph of the will runs thus:—

[93] "I of my own free will and pleasure have made these two persons my heirs and vakils. The particulars thereof are as follows:—I have

(1) 4 B. H. C. R. 1 (11). (2) 5 B.H.C.R. (A.C.J.) 109. (3) 6 M. I. A. 526.
(4) 5 B. 506=6 B. 151. (5) 6 C. 794. (6) (1869) 7 Eq. 518.
(7) (1871) 13 Eq. 28. (8) (1871) 12 Eq. 400. (9) 24 I. A. 76 (85).
(10) 23 I.A. 37.

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given in writing to my wife, Manekbai, and my daughter, Motlibai, these two persons, the entire (*i.e.*,) the whole of the authority belonging to me. The above two persons, (*i.e.*, my) heirs and vakils, these two persons (exercising) that whole (authority) shall duly carry on all the business and affairs agreeably to what I have written (herein), and should these persons have to make inquiries or consult about the said business and affairs, then, having consulted my sister's son, Wadia Dosabhai Kharsedji they are duly to do the same."

Although the expression "heirs" occurs in this passage, I am inclined to think that the testator did not intend thereby to give his wife and daughter any beneficial interest. Having regard to the subsequent context and provisions of the whole will, I think that by the expression "heirs" the testator meant "legal representatives." The introductory paragraph, if I am correct in that view, appoints Manekbai and Motlibai the testator's joint managers and executrices. If, however, it confers a beneficial interest upon them, that fact would not affect my conclusion. The paragraph also shows the testator's mode of conferring a joint estate; for it cannot, I think, be contended that the interest which these ladies took under it was not a joint interest.

The testator then proceeds in seven clauses to provide for the beneficial enjoyment of his estate and for legacies, though the fourth clause again reverts to a question of management. The first clause I need not read *in extenso*. It provides for two contingencies, neither of which occurred, *viz.*, for the testator having a son, and for his having a second daughter. The clause is useful as showing that when the testator desired to give an estate in common as distinguished from a joint estate, he could express his meaning in apt and appropriate language.

The second clause is the important one. It runs in the amended translation thus:—

"As long as my wife, Manekbai is alive, the persons mentioned above shall transact business and affairs peaceably and unanimously. On the decease of my wife, Manekbai, taking place, I have given the said entire (*i. e.*) the whole authority in respect of my wealth and estate, and claims and debts, to my daughter, Motlibai, she shall duly carry on the business and affairs. And as long as Motlibai may be alive, everything shall remain under Motlibai's authority. And on the death of Motlibai there are Motlibai's two sons, **[94]** Bhai Navroji and Bhai Nusserwanji. As to them, whatever wealth and estate and whatever (other) things there may be belonging to me, the owners of all these are (these) sons, two persons. They are my sons. No one shall cause any obstruction or impediment to them. I have given the whole as a gift to my wife and my daughter Motlibai."

It appears to me that whatever may be the interest which is given to Manekbai and Motlibai by that clause, and whatever extensive powers may be conferred on them by it, all that remains on Motlibai's death of the testator's estate is expressly given to the two sons of Motlibai, or, in other words, that the ladies are given the most ample powers of management and it may be of disposition, but only for life. On the death of Motlibai all passes to her sons. At first sight it might appear that the ladies by the opening words of the clause are given only powers of management. This evidently was not intended. If it was, there would be no beneficial disposition during the life-time of the ladies. To prevent this interpretation being placed upon his language the testator added the final sentence "I have given it, not for management only, but as a gift to my wife and

daughter." The whole clause thus reads consistently, and effect is given to each of its provisions. Mr. Vicaji contends that the final gift overrides all the earlier provisions of the clause. It comes last, he says, and effect must be given to it alone. This is the last can on of construction to which recourse should be had. If it is reasonably possible to give effect to all provisions of the clause, that course should, I think, be followed in preference to eliminating all the provisions except the last.

I am, therefore, of opinion that Motlibai had an interest for life only in the testator's residuary estate (as had also Manekbai jointly with her) and that the sons of Motlibai had during her life-time a vested interest in the residuary estate to come into possession on her death. Motlibai survived Manekbai for very many years, and has only recently died. Her death took place on the 24th May, 1897. Nusserwanji predeceased her by a few days, having died on the 5th May, 1897.

The second question is, whether Nusserwanji and Navroji took a joint interest under the will or an interest in common—whether they were joint owners or tenants in common of the residue, **[95]** subject to the life-interests of Manekbai and Motlibai. The English law upon this subject is summed up in Jarman on Wills in the following passages: "A devise to two or more persons simply, it has long been settled, makes the devisees joint tenants." * * * "A bequest of chattels, whether real or personal, to a plurality of persons, unaccompanied by any explanatory words, confers a joint, not a several interest, and that whether the gift be by way of trust or not; and, notwithstanding the disposition of the Courts of late years to favour tenancies in common, the same rule is now established as to money legacies and residuary bequests in opposition to some early authorities and the doubts thrown out by Lord Thurlow in *Perkins* v. *Baynton* (1)." The passages are quoted from chap. XXXII, s. I, of Mr. Jarman's work. In *Crooke* v. *De Vandes*(2) Lord Elden says that "a simple bequest of a legacy or a residue of personal property to A and B without more is a joint tenancy." The same rule of construction is recognised by the Indian Legislature in s. 93 of the Succession Act (X of 1865).

The question which we have to determine is whether it is applicable here. The will provides that upon the death of Motlibai, the owners of all these (the residue) are the sons, two persons. It is not denied that these words involve a bequest to the two sons. That is common ground. Mr. Advocate General contends that it has not been decided that a bequest to two persons in this exact language makes them joint tenants and that the Court is at liberty to treat these words as conferring a tenancy in common upon the sons. The words, however, imply a gift to the persons indicated, and in such a case the inquiry has always been "are there explanatory words which indicate that the testator intended a separate and not a joint gift." I can myself see no difference between a direct bequest to A and B and an implied bequest to the same persons arising from the use of such an elliptical phrase as the testator has employed. It would be splitting hairs to rule that a different legal result follows from the testator writing "after the death of M, I 'leave,' bequeath' or 'give' my house or the residue of my estate to N and N," to that which **[96]** follows from his writing "after the death of M the owners of my house or of the residue of my estate are N and N." In each case there is a bequest to N and N,

(1) (1781) 1 Bro. C. C. 118.

(2) (1803) 9 Ves. 197, (204).

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without the use of words of severance. Mr. Advocate General also contends that words of severance do occur in the case of this bequest. "They are my children" are the words of severance relied upon. They are to take, it is argued, as children would take, or as in the first clause it is directed that his children shall take. I think that it is quite impossible to adopt this view. "They are my children"—"they are to me as children" is the reason assigned by the testator for making such a bequest in their favour and is not intended to indicate the nature of the interest which they are to take. The learned Judge in the Division Court appears to concede that, if this had been a will written in English, the usual rule would apply, and that the sons of Motlibai would in that case have taken as joint tenants, but that as the testator has used the Gujarati language, different considerations apply. It is not, however, suggested that idiomatically there is any peculiarity in the Gujarati language in this respect. I have already pointed out that when dealing with the management of the estate which is conferred upon Manekbai and Motlibai, the direction of the testator is couched in somewhat similar phraseology ("those two persons are my heirs and vakils") to that used to confer a beneficial interest upon the grandsons, and that such phraseology cannot there import a division of interest. We have, therefore, only the simple fact to deal with, that the testator has, to express his meaning, used the Gujarati and not the English language. Does this really affect the question? I cannot think that it does. A bequest to A and B has, in my opinion, the same meaning and the same legal effect, whether it is expressed in English or in one of the vernacular languages of this Presidency. The construction cannot vary according to the particular language used by the testator. I know of no authority to support the view of the Division Court in this respect. I entirely assent to the proposition that the Court has to ascertain the intention of the testator, but this expression is sometimes apt to mislead. "The use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation that [97] it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he has written means. The will must be expressed in writing and that writing only is to be considered"—per Lord Wensleydale in *Abbott* v. *Middleton* (1). This rule does not preclude the surrounding circumstances, such as the state of the testator's family and the law under which he lived, being called in aid to explain ambiguous language. "Primarily the words of the will are to be considered. They convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by the surrounding circumstances, and where this is the case, there circumstances no doubt must be regarded"—*Soorjeemoney* v. *Denobundoo* (2). The judgment in *Gurusami* v. *Sivakami* (3) affords a useful guide upon the same subject.

Here, however, there is nothing in the surrounding circumstances which can, in my opinion, afford a guide to the interpretation of the language of the testator. He was a rich Parsi and had a wife, daughter and two grandsons. There is nothing in these circumstances to show that, in making a bequest in favour of the latter, he intended it to be a bequest in common and not a joint bequest. There is this to be said in

(1) (1859) 7 H. L. Ca. 68, (114).
(2) 6 M. I. A. 526 (551).
(3) 22 I.A. 119 (127).

favour of the opposite view. The grandsons were infants. The testator dwells upon that circumstance in cl. 4 of the will. If it were allowable to conjecture what his wishes in that case would have been if one of the infants had died a child, one might naturally suppose that he would have wished the whole estate to pass to the survivor. For my part I think that it is probable that he would have done. Then there is to be considered the impossibility of one of the boys dying in the lifetime of the testator and the different result flowing in that case from a tenancy-in-common and a joint tenancy. Section 93 of the Succession Act (X of 1865) does not introduce a new rule—Williams on Executors (Ed. 1893), p. 1080. The remarks of Lord Hobhouse in *Gurusami* v. *Sivakami* (1) are appropriate here. What the testator may [98] have wished in one state of circumstances, might be quite different from what he would have wished in another contingency. The conjecture fails. We must return to the language of the will and ascertain what it means.

Speaking as a grammarian I apprehend that a simple gift to A and B is a joint gift,—that is to say, for the purpose of the gift the two are treated as one *persona*. The idea is made more clear when a gift to a class—as, for example, to the inhabitants of a parish—is assumed. If a gift is made in that form no one would, I imagine, suggest that it was a gift to each of the inhabitants of a proportionate share in the bequest. They are all considered as a unit for the purpose of accepting the gift. The Roman Jurists adopted the same view. "*Conjunctim autem legatur, veluti si quis dicat, Titio et Seio hominem Stichum do lego ; disjunctim ita. Titio hominem Stichum do lego, Seio Stichum do lego.*" (Institutes of Justinian, Lib. II, Tit. XX, para. 8) (2).

The technicality in this matter, if technicality there is, consists, I think, not in construing a gift to A and B as a joint gift, for it cannot, I think, be construed otherwise, but in the rule that the heirs of a joint tenant do not inherit his interest in the subject of the joint tenancy, and that he cannot deal with such interest by will, his interest upon his death passing to his co-tenant. That, however, is a rule of law and not a canon of construction.

It has not been contended before us that Parsis in the island of Bombay are not subject to English law generally. There are certain legislative and other well-defined exceptions to the rule, but such exceptions do not include the law relating to wills, nor, so far as I am aware, the ordinary rules for their construction. The judgment in *Naoroji* v. *Rogers* (3) has set at rest any doubts which ever existed as to the law by which the Parsis are governed. I have, therefore, considered the question before us in the light of the English law being applicable to it. That law is now embodied in the Succession Act, but is virtually left unaltered by its codification.

The remarks of the Privy Council in the case of *Jogeswar* v. *Ram Chand* (4) do not appear to me to affect the question before [99] us. In that case the High Court of Calcutta held that the clause of the will they had to construe—which was in these words : " The remaining four annas' share I give to you Srimati Rani Donger Kumari and the son born of your womb Jogeshwar Narain Deo for your maintenance. Upon my death you and your sons and grandsons in due order of succession shall

(1) 22 I. A. 119 (128).
(2) See Sandar's Justinian (4th Ed.), p. 312.
(3) 4 B.H.C.R. 1.
(4) 23 I. A. 37.

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held possession of the zemindari, &c. * * *. I give you the power of making alienations, sales or gifts "—created a joint tenancy in favour of the mother and son, and that each of them could at pleasure dispose of his or her interest. Their Lordships did not dissent from that view. What in my opinion they held in addition to construing the will before them was (1) that the rule of English law (which their Lordships term an extremely technical rule of English conveyancing), that a joint tenant's interest does not descend upon his heirs, is not properly applied to a bequest in joint tenancy under a Hindu will, and (2) that even under English law a conveyance or an agreement to convey his or her personal interest by one of the joint tenants operates as a severance. The case itself rather supports the view that in a will written in an Indian vernacular language, a bequest to a mother and son *simpliciter* is a joint bequest. If in a Parsi will written in Gujarati the words used are such as to create a joint interest, it appears to me that it is impossible to escape the consequence that the beneficiaries take as joint tenants with the benefit of survivorship.

For these reasons I would vary the decree of Fulton, J., by declaring that Nusserwanji Jehangir Wadia and the defendant Navroji Manockji Wadia took a vested interest as joint tenants under the will of the said Jehangirji Nusserwanji Wadia in his estate, subject to the life-estate of the said Motlibai therein.

Costs of all parties out of the estate of the testator.

STRACHEY, J.— I agree with the judgment of the Chief Justice.

Attorneys for the plaintiff :—Messrs. *Nanu and Hormasji.*

Attorneys for the defendants :—Messrs. *Nanu and Hormusji* and *Little & Co.*

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[100] ORIGINAL CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice and Mr. Justice Strachey.

BAI POREBAI (*Plaintiff*) *v.* DEVJI MEGHJI (*Defendant*).*
[25th August, 1898.]

Practice—Security for costs—Infant female plaintiff—Civil Procedure Code (Act XIV of 1882), s. 380.

Unless in exceptional cases, neither an infant female plaintiff nor her next friend ought to be required to give security for costs.

[**F.**, 18 M.L.J. 155 (156) ; **Appl.**, 35 B. 339 = 13 Bom.L.R. 480 (491) ; **R.**, 32 B. 602 (605) = 10 Bom.L.R. 337 ; **D.**, 27 B. 100 (103).]

SUMMONS adjourned into Court for argument. The plaintiff was a minor, and she sued by her next friend, Passu Devraj, to recover certain ornaments and clothes of the value of Rs. 8,775, which she alleged had been presented to her at the time of her marriage. Her husband died on the 23rd May, 1897. This suit was filed in April, 1898.

On the 25th July, 1898, the defendant took out a summons under s. 380 of the Civil Procedure Code (Act XIV of 1882), calling upon the plaintiff to show cause why she or her next friend should not give security for the defendants' costs of this suit.

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* Suit 138 of 1898.

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The summons came on before Strachey, J., in chambers, and be adjourned it into Court under Rule 22 of the High Court Rules, to be heard before two Judges. It now came on for hearing before Farran, C. J. and Strachey, J.

Macpherson, for plaintiff, showed cause.

Lang (Advocate-General), for defendant, *contra*.

JUDGMENT.

FARRAN, C. J.—The summons in this matter has been referred to this Bench under rule 22 of the rules and orders of the High Court.

The question for consideration is whether a minor female plaintiff suing by her next friend can, and ought to be ordered to give security for costs before being allowed to proceed with the suit. It is not denied that the suit is, in substance, a suit for money. The ruling upon this point in *Degumbari* v. *Aushootosh* (1) has usually been followed in this Court.

[101] The Civil Procedure Code (Act XIV of 1882) was amended by Act VI of 1888. Section 245-A, by that Act added to the Code, enacts that "the Court shall not order the arrest or imprisonment of a woman in execution of a decree for money." It has always been a principle of the law relating to security for costs that persons privileged from legal process can be called upon to give such security—*Aldborough* v. *Burton*(2); *Goodwin* v. *Archer* (3); Morgan and Wurtzburg on Costs (2nd Ed.), p. 10. In accordance with that principle, when legislation exempted women from arrest and imprisonment in execution of money decrees, it provided by s. 5 of the same Act that "on the application of any defendant in a suit for money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order" (*i.e.*, an order for security for costs) "if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India independent of the property in suit." This provision is now added to s. 380 of the Civil Procedure Code (Act XIV of 1882).

Now, in terms, no exception is made, in that section, of the case of a woman who is a minor, suing by her next friend, and we cannot, we think, introduce such an exception into the section. The Code is applicable generally to all descriptions of parties, whether plaintiff or defendant, and its provisions apply as well to minors as to others. Thus a minor can be directed to file a written statement under s. 112 and his suit is liable to be dismissed under s. 113 if he fails to do so; and an affidavit of documents may be required of a minor defendant—*Nathmull* v. *Malharrao* (4). Doubtless it is not intended that an infant party to a suit should personally obey such orders. It is evident from the provisions of Chap. XXXI of the Code that it is intended that his next friend or guardian should obey the orders of the Court on his behalf. Hence in construing the Code we cannot read an exception as to infants into its provisions generally, but rather a proviso that orders given to an infant may be obeyed for such infant by his next friend or guardian, nor do we think [102] that we can do so when construing s. 380 either as originally framed or in its amended form.

The order as to giving security for costs is, however, a discretionary one, and the question still remains whether such an order ought to be made in the case of a female infant suing by her next friend. The practice

(1) 17 C. 610.
(2) (1834) 2 Myl. and K. 401.
(3) (1727) 2 P.W. 452.
(4) 19 B. 350.

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has always, so far as we are aware, been not to demand security for costs either from an infant directly or from his or her next friend—*Fellows* v. *Barret* (1); *Hind* v. *Whitmore* (2); *Pennington* v. *Alvin* (3), and no order as to costs is made against an infant plaintiff—Simpson on Infants (2nd Ed.), p. 468. The next friend of an infant is liable for the costs of the suit if unsuccessful—*Frank* v. *Mainwaring* (4); Morgan and Wurtzburg, p. 352, s. VII; Simpson on Infants, p. 482; Civil Procedure Code (Act XIV of 1882), s. 440. How complete this liability is, and how far it extends, is shown by s. 447 of the Code, which provides that a next friend cannot, *ipso motu*, retire from his position without giving security for the costs already incurred, unless the Court relieves him from that obligation.

If, then, the next friend of an infant plaintiff and not the infant plaintiff himself or herself is and has always been liable for the costs of the suit, a provision that a woman shall not be imprisoned for debt gives rise to no inference that the Legislature intended in any way to change the practice as to a female infant plaintiff giving security for costs. We think, therefore, that, except in exceptional cases, the old practice ought still to be observed.

The Advocate-General urges that this ruling will permit of improper suits being filed by indigent persons as next friends of female infant plaintiffs. The same argument, if of weight, applies with equal cogency to the next friends of male infant plaintiffs. The answer to this appears to us to be that the Courts can be moved to stay a suit improperly brought on behalf of an infant and to remove an improper next friend of an infant and to substitute a proper person in his place. This is pointed out **[103]** in *Hind* v. *Whitmore* (*supra*). All the cases upon the subject are cited in Seton on Decrees, Part III, Chap. XXI, s. I. The Court can thus prevent the law from being put in motion by the next friend of an infant from malicious or improper motives. The summons will be disposed of by the Judge in chambers having regard to this judgment.

Attorneys for the plaintiff :—Messrs. *Ardesir, Hormasji and Dinsha.*
Attorneys for the defendant :—Messrs. *Little & Co.*

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23 B. 103.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

CHARLESWORTH (*Original Plaintiff*), *Appellant v.* MACDONALD (*Original Defendant*), *Respondent.** [12th January, 1898.]

Injunction—Contract in Zanzibar—Contract for personal service—Contract not to practise as physician—Construction—Restraint of trade—Contract Act (IX of 1872), s. 27.

A agreed on certain terms to become assistant for three years to B, who was a physician and surgeon practising at Zanzibar. The letter (Ex. B), which stated the terms which B offered and which (as the Court found) A accepted, contained the words "the ordinary clause against practising must be drawn up." At the end of a year a disagreement took place and A ceased to act as B's assistant and began to practise in Zanzibar on his own account. B sued for an injunction to restrain him.

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* Appeal No. 77 of 1897.

(1) (1836) 1 Keen 119.
(2) (1856) 2 Kay and J. 458.
(3) (1823) S. & S. 264.
(4) (1839) 4 Beav. 37.

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Held, that B was entitled to an injunction restraining A from practising in Zanzibar on his own account during the period of three years.

[App., 36 C. 354 (365)=9 C.L.J. 190=13 C.W.N. 255=1 Ind. Cas. 829; R., 5 Bom. L. R. 878 (881); D., 26 M. 168 (172).]

APPEAL from the decision of H. W. DeSausmarez, Acting Judge of the Consular Court at Zanzibar.

Suit for injunction restraining the defendant from practising as a physician and surgeon in Zanzibar.

The plaintiff was a physician and surgeon practising in Zanzibar. Being desirous of engaging an assistant, he wrote in October, 1895, to his brother, J. B. Charlesworth, in London to look for a suitable man, and subsequently to Dr. Scott to assist J. B. Charlesworth in doing so. He embodied in a document **[104]** (Ex. B), which was not signed, the nature of the services which he required and the terms which he was prepared to offer. This document (Ex. B) stated the qualification which he would require in his assistant and certain terms with regard to board and lodging. It also contained the following terms:—

"I am prepared to offer (1) a three-years' agreement; (2) first class passage out and home; (3) £ 200 a year pay in addition to board and lodging. Half pay during travelling.

"In the event of my going away on long leave, *i.e.*, for more than a month or so, and my assistant being in charge, I propose to pay him additional during my absence as follows:—

"1. In the event of his living in my house, being required to furnish his own board he would receive an allowance at the rate of £ 300 a year for that; putting him, of course, by that means into the position he would be in if resident outside my house, and the £ 300 a year would be for the same purposes, namely, domestic servants, food, &c., &c.

"In addition he would receive for acting 5 per cent. of the nett income during the time of acting Nett income means after the expenses of the practice, including his own pay and board, had been deducted. This would be at the rate of at least £ 75 a year and would be guaranteed not less than £ 50 per annum. The duties as assistant are all the ordinary duties of an assistant—keeping of the books of general and of special sorts; and any assistance required in scientific work. The ordinary clause against practising must be drawn up."

On receiving this communication from the plaintiff, his brother (J. B. Charlesworth) and Dr. Scott resolved to ask Dr. Stockman, of Edinburgh, to find a man suitable for the post. Accordingly on the 13th November, 1895, J. B. Charlesworth wrote a letter to Dr. Stockman (Ex. A), of which the following are the material portions:—

"On the other side I state the probable terms to be offered and you will notice that provision is made in the event of Frank selling his practice. The practice is now worth £ 2,500 per annum; and he has made it equal to that by his own exertions. If I may offer unprofessional suggestions, I would say the candidate should be about 30 to 33, of good experience, &c. . . . . Terms Scott has confirmed are:—

"(1) As assistant, £ 200 per annum, clear in Zanzibar, but no allowance for liquors or laundry. Passage money out and home. (2) As locum tenens £ 400 ditto. (3) To purchase practice worth £ 2,500 per annum. Terms to be arranged."

[105] A copy of the terms as given above (Ex. B) was also sent to Dr. Stockman.

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The defendant hearing of the offered appointment had an interview in Edinburgh with Dr. Stockman, who showed him the two documents, Exs. A and B. The defendant subsequently went to London and saw J. B. Charlesworth on the subject and at the final interview the latter asked him to write to the plaintiff. The defendant accordingly on the 10th December, 1895, wrote the following letter to the plaintiff (Ex. C) :—

"I am sending a line or two to let you know that I have to-day accepted the post of assistant to your practice in Zanzibar. I have seen your father and brothers as also Dr. Scott, and they have all been good enough to say that they think I will suit your requirements. As regards the bacteriological work, I may mention that I am accepting your offer with reference to taking out a class on the subject in Edinburgh so as to be able to help you in that work later on as occasion occurs. At the same time I shall pay a little attention to work—gen æological work and veneeal diseases—as I fancy this would be of much need in Zanzibar. Having lived for the last eight years in Edinburgh, and having held hospital appointments there, I have easy access to any work, &c., there, and could do more study there than in London, knowing more of the men here. You may expect me by the mail leaving here on the 10th February. I could hardly be ready before, having only a few days ago had the offer of your assistancy. I may mention that my present intention is to arrange with you later on about purchasing your practice (as I believe that is your wish), should of course this be suitable to us both when the time comes.

"Believe me, &c., &c.

(Signed) G. A. MACDONALD."

The defendant subsequently went to Zanzibar and took up the appointment. No formal agreement was drawn up between him and the plaintiff, but the terms of Ex. B and Ex. A were strictly observed. At the end of a year, however, a disagreement took place and the defendant gave up his connection with the plaintiff and began to practise on his own account at Zanzibar.

The plaintiff then filed this suit for an injunction. The defendant pleaded that he had never accepted the terms contained in Ex. B ; that that document contained terms which were merely part of a proposal which was modified by the letter (Ex. A) and in conversation with the plaintiff's agent in England ; that finally it had been arranged that he should go to Zanzibar [106] without any agreement, but that one was to be drawn up after his arrival.

He further pleaded that, if there had been any agreement made by him, it had been obtained by misrepresentation.

The Judge of the Consular Court at Zanzibar found that the Exs. B and C constituted an agreement which the defendant had broken, but he refused an injunction for the reasons stated in his judgment, as follows :—

"It is well, at the outset, to lay down the law by which this Court must be guided in determining this action, which is one purely for an injunction to prevent the defendant from practising as physician and surgeon in Zanzibar. The contract between the parties, if there be one, is of course governed by the Indian Contract Act, which contains no provisions as to orders for specific performance or injunctions. In India 'The Specific Relief Act' supplies the machinery for this, but that Act does not apply in Zanzibar, and we are thrown back on the provisions of the Order in Council, 1884, under which it has always been the practice of this Court to grant

injunctions in such cases as it thought just: in doing so it has followed the practice of the English Courts. This having been the practice of this Court heretofore, I shall follow it strictly now, though I cannot help feeling that, in the rare cases in which specific relief is sought, the Indian Specific Relief Act would be a boon.

"To come now to the facts of this case." (The Judge after a review of the evidence continued:—) "I find that, in fact, the defendant came out to Zanzibar to assist the plaintiff for three years on the terms as to remuneration and payment of expenses which were offered to him in the proposal Ex. B and accepted by him in his letter Ex. C and by his conduct throughout.....I do not profess to have analyzed the evidence thoroughly, but I have tried to give the lines on which I have arrived at my conclusion, which is that the letters B and C constitute an agreement between the parties; that the agreement still exists and that Mr. Mac Donald has broken it....." (With regard to the grant of an injunction the judgment continued:—) "Would the practice of the English Courts allow this? I think not.....Let us look at the agreement. There is a sentence in the proposal which runs as follows:—'The ordinary clause of not practising must be drawn up.' I will at once say that I do not propose to interpert this clause; what it does is only to pledge the parties to come to reasonable terms about it, which has never been done; and it seems that, if such a clause had been drawn up, the contract would *pro tanto* have been void by the 27th section of the Contract Act. Save, therefore, that this clause seems to show that the defendant was not intended in all circumstances to be free to practise, I hold it inoperative. But says the plaintiff: The Court is entitled to infer, from the positive undertaking in this contract and the evidence before it, a negative undertaking on the part of the defendant, *viz.*, that he will not practise in Zanzibar **[107]** during the time of his agreement. He urges that such an undertaking would be implied by the Indian Courts, and relies, to show this, on s. 57, illustration (D), of the Specific Relief Act. Now, were this the law here I should be inclined to agree with him. I think, however, that the English law is different. Certain Indian Acts, such as this and the Contract Act, are codifications of the law of England with certain differences, and it seems to be the practice of the Indian Courts to look at the settled law of England to explain any doubtful passages in those Acts. Now at the time of the passing of the Specific Relief Act, *viz.*, 1877, the case of *Montague* v. *Flockton* stood uncontradicted, and it certainly implied a negative agreement where none was expressed. So far as I can ascertain, this case goes further than any other, and it seems to me to justify the illustration in the Specific Relief Act; but, in view of the case decided by the Court of Appeal in 1891, *The Whitwood Chemical Company* v. *Hardman*, *Montague* v. *Flockton* is expressly disapproved, and the later case seems to be in direct conflict with that illustration. The decisions in the English cases point to a negative clause being essential to the right to claim an injunction, though Lindley, L.J., says that the principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this or the other, some specific thing on which you can put your finger. In this case I cannot put my finger on that specific thing; it might be practising in the town of Zanzibar, in the protectorate of Zanzibar, in East Africa, during the defendant's assistancy or after it. I feel that taken with the Contract Act this will make it difficult, in cases such as this, to obtain injunctions here, but that has nothing to do with me, for it is the law in

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Zanzibar, unless and until the Specific Relief Act is introduced. The plaintiff has further urged that this is a case in which the damages cannot be assessed, but the class of cases to which he refers is one where the damages suffered are sentimental, as in the case of the non-delivery of an heirloom or some famous picture or work of art for which pecuniary damages do not adequately compensate. This case is one in which damages, if claimed, could be assessed, though possibly with some difficulty. The injunction sought must, for the reasons I have given, be refused with costs."

The plaintiff appealed.

Inverarity (with *Edgelow* and *Gulabchand*), for the appellant (plaintiff).

Lowndes (with *Payne, Gilbert and Sayani*), for the respondent (defendant).

JUDGMENT.

FARRAN, C. J.—This is an appeal from the decree of the Consular Court of Zanzibar refusing with costs the plaintiff's prayer for an injunction to restrain the defendant from practising as physician and surgeon in Zanzibar in breach of an alleged agreement between him and the plaintiff prohibiting him from [108] doing so. The plaintiff is himself a physician and surgeon practising there.

The issues raised in the Consular Court were :—(1) Is there any agreement between the plaintiff and the defendant ?(2) If so, what are the terms of such agreement ?(3) If an agreement for three years was entered into by the defendant with the plaintiff, was it obtained by the misrepresentations of the plaintiff's agent ? (4) Is the plaintiff in any event entitled to an injunction ?

The third of the above issues has been found in the negative, and for the plaintiff, in the Consular Court. The correctness of that finding was not seriously impugned in argument before us, and at the outset I may say that I entertain no doubt as to the soundness of the view taken upon this branch of the case by the Judge of the lower Court. I adopt his judgment upon this question and need not any further refer to it. This enables me to state the evidence in a more succinct manner than I could have done had I to consider it in detail in reference to the charge of misrepresentation.

The appellant is not satisfied with the finding of the Consular Court as to the terms of the agreement which that Court considers was entered into, while the respondent contends that there was no completed agreement between the parties. I deal with these questions of fact raised by the first and second issues before considering the question of law which the fourth issue gives rise to.

The plaintiff for some years before 1895 had been practising with success as a physician and surgeon in Zanzibar. In October of that year he was desirous of engaging an assistant. He wrote to his brother, J. B. Charlesworth, to be prepared to look out for a suitable man ; and subsequently to Dr. Scott to assist J. B. Charlesworth in doing so. The nature of the services which the plaintiff required, and the terms which he was prepared to offer, he embodied in a document (Ex. B) which is headed "Zanzibar, E. Africa," but is not signed. This he sent to J. B. Charlesworth or to Dr. Scott—it does not appear to which. These gentlemen consulted together in London and resolved to ask Dr. Stockman of Edinburgh to look round for a suitable doctor. In pursuance of this resolve the plaintiff's brother on the 13th [109] November, 1895, wrote a letter (Ex. A) to Dr. Stockman to which he appended "terms Scott has confirmed." The memo. (Ex. B) was then or subsequently also sent to

Dr. Stockman. The defendant, who was at this time in an assistancy in Edinburgh, heard of the offered appointment from a Dr. Orr. He saw Dr. Stockman upon the subject. This is the account which the defendant gives of the interview. "He" (Dr. Stockman) "told me that he had been asked to get a man to go to Zanzibar and he said I could see the particulars in the letters he showed me. They were Ex. B and Ex. A."

This was, he says, on the 6th December, 1895. The defendant on the next day told Dr. Stockman that he would like further details. He then went to London, where he saw J. B. Charlesworth and Dr. Scott, and had lengthy conversations with them about the practice and the desirability of his going to Zanzibar, but I cannot find a suggestion that at any of these interviews any alteration or variation was made or suggested in the proposals contained in Exs. B and A originally submitted for his consideration. At the final interview which he had with J.B. Charlesworth, the latter asked him to write to the plaintiff. The defendant then wrote a letter (Ex. C), dated 10th December, 1895, which J. B. Charlesworth approved and which was then posted to the plaintiff.

It appears to me that this letter contains an unconditional acceptance by the defendant of the offer made to him in Ex. B and Ex. A, and that Exs. B and A and C contain a binding agreement come to between the defendant and the plaintiff from which neither party was thenceforth at liberty to recede. This is the conclusion which the Consulate Court has arrived at, and I entirely agree with it. The only consideration which militates against that conclusion is a remark which the defendant states that he made to J. B. Charlesworth at their final interview when a reference was (he says) made as to having an agreement drawn up. J.B. Charlesworth said that it had better be drawn up at Zanzibar, to which the defendant (he says) replied that "this will suit me much better, as I can go out and see this place and people and every thing."

[110] It was subsequently to this that the defendant wrote and signed Ex. (*supra* p. 105) C at the request of J. B. Charlesworth. Assuming, as it is uncontradicted, that the defendant made the above remark, it appears to me to be quite inconsistent with the letter which he wrote to the plaintiff with reference to the plaintiff's proposal, which letter, as I have said, amounts, in my opinion, to an unconditional acceptance of it. There is no proposal in either Ex. B or Ex. A that the defendant should go to Zanzibar and see the place and people at the defendant's expense and have half his salary paid on the way. The proposal is that he shall go out upon these terms as an assistant to the plaintiff for three years. I, therefore, think that the defendant's alleged remark may be disregarded.

It is stated by the defendant that it was proposed to have a written agreement drawn up when he got to Zanzibar. This may have been so, but that circumstance does not appear to me to prevent the defendant's written acceptance of a written proposal constituting a completed agreement. The subsequent written agreement would only be a reduction into formal language of the terms which had been previously agreed upon between the parties. Lastly, Mr. Lowndes contends that Ex. C is not an acceptance of the plaintiff's offer, but an acceptance of the post which the plaintiff had offered to him. The words are: "I am sending a line or two to let you know that I have to-day accepted the post of assistant to your practice in Zanzibar." That acceptance of the post to my mind is as complete an acceptance of the terms upon which the post was offered as would have been an acceptance in words of the terms themselves. The acceptance of the one necessarily involves the acceptance of the other.

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This is the construction which the plaintiff would naturally put upon the letter of the defendant, and in my opinion it is not really susceptible of any other.

There is not, I think, any contract contained in Exs. B, A and C, that the plaintiff shall sell his practice to the defendant. The hope or expectation of being able to purchase the business was no doubt held out to the defendant, but upon that subject there was no contract. The terms of Ex. C, in which the defendant accepts the post of assistant, place that matter beyond doubt. **[111]** After accepting the plaintiff's offer of his assistancy the defendant adds: "I may mention that my present intention is to arrange with you later on about purchasing your practice (as I believe that is your wish) should, of course, this be suitable to us both when the time comes." To prevent the defendant from expecting anything definite with reference to the purchase, the plaintiff wrote the letter Ex. D to the defendant. The defendant received this at Marseilles and did not on his arrival or for nearly a year afterwards, when the rupture occurred, refer to the question of purchase.

No formal agreement was drawn up on the arrival of the defendant in Zanzibar. It is difficult to see how the terms of the defendant's engagement could be more precisely defined than they are in Exs. A and B, except in regard to the defendant not practising on his own account. These terms were observed to the letter on both sides until the rupture occurred. The term contained in Ex. B with reference to the defendant's practising on his own account is this: "The ordinary clause against practising must be drawn up." I do not see why this term of the contract is not, like its other terms, a term to which the defendant agreed. I am of opinion that when he signed Ex. C, he agreed to it. The effect of that is, in my opinion, to give the plaintiff the right to call upon the defendant to execute the ordinary covenant against practising as a physician and surgeon in Zanzibar. The parties were contracting with reference to Zanzibar and their intention as gathered from the context of the contract must, I conceive, necessarily have been to confine the operation of the agreement to that place. As to the limit of the covenant in point of time, the law as contained in the Contract Act, s. 27, renders such a covenant void in so far as it extends beyond the period of the agreement. This is clear from the decided cases. Most of them will be found collected in *Haribhai* v. *Sharafalli* (1). The parties must, I think, be taken to have contracted with reference to the law prevailing upon this subject in Zanzibar. If that be so, the result is that the defendant has, in effect, agreed not to practise as a physician and surgeon on his own account in Zanzibar during the term of his agreement and during the same **[112]** term to practise there as the assistant of the plaintiff. If this is the meaning and effect of the agreement, as I think it is, there is nothing vague or indefinite about it and there can be no objection to it on that ground. It does not in the least resemble the agreement in *Davies* v. *Davies* (2), which on the ground of vagueness and uncertainty was held to be unenforceable.

Being then of opinion that the parties here came to a binding contract, and that it included the above agreement against the defendant's practising on his own account in Zanzibar, I pass to consider whether that agreement is void under the Contract Act or is an enforceable agreement. In other words, is it an agreement which restrains the defendant from

(1) 22 B. 861. (2) (1887) 36 Ch. Div. 359.

exercising his lawful profession? Is it an agreement in restraint of trade? I think not. I do not think that an agreement of this class falls within the section. If it did, all agreements for personal service for a fixed period would be void. An agreement to serve exclusively for a week, a day, or even for an hour, necessarily prevents the person so agreeing to serve from exercising his calling during that period for any one else than the person with whom he so agrees. It can hardly be contended that such an agreement is void. In truth, a man who agrees to exercise his calling for a particular wage and for a certain period agrees to exercise his calling, and such an agreement does not restrain him from doing so. To hold otherwise would, I think, be a contradiction in terms. The authorities appear to me to support this view. The case of *Mackenzie* v. *Striramiah* (1) is directly in point as a decision, and in *Carlisles Nephews and Co.* v. *Ricknauth* (2) the same view is taken. There is also the dictum of Candy, J., in *Callianji* v. *Narsi Tricum* (3), and illustration (*d*) to s. 57 of the Specific Relief Act is what I may call a legislative decision to the same effect.

The next question which arises is whether the Consular Court of Zanzibar ought not to have granted an injunction in the case. Upon that question I think that we must accept with deference the law laid down in *Whitwood Chemical Co.* v. *Hardman* (4) as the law applicable in Zanzibar, but the facts of the present case are [113] different. Here there is, as there there was not, a negative clause in the agreement, and the learned Judges all recognized the law in England to be that if the parties express by negative words their intention that the employe is not at liberty to carry on business on his own account during the term of his engagement the Court will enforce that agreement by injunction. They recognized *Lumley* v. *Wagner* (5) as binding law. I will only say with reference to the remarks made by the Lord Justices as to the propriety of extending the law of injunction to contracts of personal service which contain a negative covenant that the Indian Legislature has adopted that extension, and though the Specific Relief Act is not law in Zanzibar, this shows that the law laid down in *Lumley* v. *Wagner* is not considered by the Legislature to be inappropriate in the East. In my opinion it would be most unfair to gentlemen in the position of the plaintiff not to protect them in such cases. It would virtually debar them from engaging an assistant at all. An action for damages would afford them no protection, certainly no adequate protection. Lastly it was urged by Mr. Lowndes that the circumstances which led the defendant to throw up his assistantship and to start as the plaintiff's competitor for the medical business of Zanzibar were such as to justify the Court exercising its discretion not to grant an injunction, though they may not protect the defendant from an action for damages. The defendant admittedly wilfully refused to continue to perform the duties of an assistant and purported to throw up his appointment. As to this contention no defence on this ground was suggested in the pleadings and no issue was raised in the lower Court, and the evidence was not directed to the point. I am of opinion that it cannot now be raised here. I refrain from offering any opinion upon the moral justification upon which the defendant relies, and will only say that, so far as I can judge from the proceedings before me, the plaintiff is morally as well as legally entitled to the protection which he asks the Court to grant him.

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(1) 13 M. 472.
(2) 8 C. 809.
(3) 18 B. 702.
(4) (1891) 2 Ch. 416.
(5) (1852) 1 D.M.G. 604.

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I would, therefore, allow the appeal and grant an injunction restraining the defendant from practising as a physician and [114] surgeon in Zanzibar during the period of his engagement, and direct that he pay the plaintiff's costs of suit and appeal.

CANDY, J.—I have had the advantage of reading the judgment written by the Chief Justice, and as I agree with the conclusions arrived at by him, I need not enter into details, but will merely indicate generally some of the reasons which led me to those conclusions.

The learned counsel for defendant supported the decree of the lower Court, dismissing the plaintiff's claim, on the ground that there was no concluded agreement between the parties. There is more than one answer to that contention. Not the least forcible is the consideration that it would be contrary to the common course of human conduct and private business to suppose that plaintiff would pay £20 for defendant going through a course of bacteriology in Edinburgh, and would pay the costs of defendant's passage to Zanzibar, the consideration thereof being merely that defendant should come out to Zanzibar, and look round and see how he liked the place, and then if it suited him enter into an agreement to become plaintiff's assistant. Defendant's contention, in short, is that it was open to him, having reaped all these advantages, to say to plaintiff after an indefinite time "I have received all this from you, and I have drawn my salary (£ 200 per annum) as your assistant, and lived at your expense: now that I have looked round and liked the place, I am entitled to leave you and to set up a rival practice." It seems to me sufficient to state this contention thus plainly to show that it cannot have any weight with the Court.

It was contended that at any rate there were certain terms in the contract which were purposely left open in England, and were to be settled when the agreement was concluded in Zanzibar, *i.e.*, (*a*) the period of the agreement; (*b*) the terms for purchase; (*c*) the clause about not practising. The answer to that is the memorandum B, which admittedly contains the proposal emanating from plaintiff, the very first item of which is "a three-years' agreement." There is not a suggestion in the evidence or in the arguments before the lower Court that there was any discussion in England as to the period [115] of engagement being anything else than three years. In the letter from Dr. Scott to Dr Stockman (A), it is true that the expression "probable terms to be offered" is used; but it is admitted that this letter must be read with the memorandum (B). The letter proceeds "Terms Scott has confirmed are" and the first deals with the pay which the assistant should have: there is no mention of the period. That is explicitly stated in the memorandum (B). When then defendant wrote (C) saying "I have to-day accepted the post of assistant to your practice in Zanzibar," he must be taken to have accepted the terms of a three-years' engagement.

As to the terms of purchase it is abundantly clear from defendant's own admissions in his deposition that no definite agreement to purchase formed a term of the contract. No doubt the probability of purchase, "should of course this be suitable to us both when the time comes," (as defendant himself wrote in C), was an inducement to defendant to accept the post; but this is the utmost that can be said. Not only did defendant remain silent for many months after his arrival at Zanzibar, but he never wrote to Messrs. J. B. Charlesworth, Scott, or Stockman, pointing out that the principal ground of his engagement, or at least of his proceeding to Zanzibar, was found by him to be non-existent. His counsel before us pointed to the fact that no attempt had been made by plaintiff

to obtain the evidence of the above named gentlemen on commission, or to put in their letters, and he referred to Exs. M and N. But these are notices from defendant's solicitor calling for the letter and telegram from J. B. Charlesworth to plaintiff of 11th December, 1895. It was for defendant to put these in, if they were admissible, and it was certainly for defendant, and not plaintiff, to obtain the evidence of the above-mentioned gentlemen, since it was he who contended that his interviews with them would show that there was no concluded contract. Plaintiff took his stand on the written proposal and acceptance; and in the absence of any corroborative evidence to the contrary, defendant's contention that these do not constitute a contract is worthless.

As to the clause about not practising, defendant's counsel drew our attention to the fact that there is no suggestion in the [116] cross-examination of defendant that anything was said in England about this clause. The obvious answer to that is that the clause was evidently taken as a matter of course. Defendant himself admitted in his deposition that if he was engaging an assistant, he would have such a clause in his agreement. The learned counsel for defendant invited us to draw no inferences from defendant's conduct after his arrival in Zanzibar, and he pointed to the correspondence F. G. H. as showing that defendant's allegations must be true as to the terms on which he came out from England. But this correspondence took place in January, 1897. By that time the parties were at arms length; and defendant was then forced to put forward some excuse for his conduct—the excuse which he shortly afterwards attempted to substantiate in Court.

As to what "the ordinary clause against practising" is, it is true that there is no evidence. But in my opinion it must be taken at least to be a contract not to practise at Zanzibar in competition with the employer during the period of the engagement. That certainly is not void for vagueness or indefiniteness. In *Davies* v. *Davies* (1), to which the learned counsel referred, the covenant which the Court of appeal held was too vague to enforce, was "to retire from the partnership, and *so far as the law allows* from the business, and not to trade, act, or deal in any way so as directly or indirectly to affect the continuing partners." As to whether this particular term in the contract in the present case is void under s. 27 of the Contract Act, I see no reason to recede from the position which I took in *Callianji Harjivan* v. *Narsi Trikam* (2). I still agree with the remarks of the Calcutta High Court in *The Brahmaputra Tea Co.* v. *Scarth* (3): "an agreement to serve a person exclusively for a definite term is a lawful agreement, and it is difficult to see how that can be unlawful which is essential to its fulfilment, and to the due protection of the interest of the employer, while the agreement is in force." The Specific Relief Act may not be in force in Zanzibar; but the intention of the Indian Legislature may well be inferred from its terms. As I put it to the learned counsel [117] for the defendant in the argument at the bar, s. 57 of the Indian Specific Relief Act, passed in 1877, evidently contemplates a valid agreement, express or implied, on the part of a servant not to serve any one else during the period of engagement of service. The service may be in a lawful profession, trade or business of any kind. Are we then to assume that to that extent the provisions of s. 27 of the Contract Act are impliedly repealed? I feel quite unable to answer that question in the affirmative. On the contrary I hold

(1) (1887) 36 Ch. D. 359. (2) 18 B. 702 (708). (3) 11 C. 545 (550).

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that, when B contracts with A to serve him for three years as assistant in his profession as physician and surgeon at a certain place, and at the same time there is the ordinary clause against practising (presumably at that place during the period of engagement), there is a valid agreement in furtherance, and not in restraint, of the exercise of a profession.

There remains the question whether, according to the principles followed by the Courts in England (apart from the provisions of the Specific Relief Act which is not in force in Zanzibar), plaintiff is entitled to an injunction restraining defendant from practising as a physician and surgeon in Zanzibar during the period (three years) of defendant's engagement. The Judge of the lower Court thought that plaintiff was not so entitled, on the authority of *Whitwood Chemical Co.* v. *Hardman* (1), holding that the term in the agreement—"the ordinary clause of not practising must be drawn up"—was not a specific negative covenant on which he could put his finger. He said: "I do not propose to interpret this clause: what it does is only to pledge the parties to come to reasonable terms about it, which has never been done. * * * * It might be practising in the town of Zanzibar, in the protectorate of Zanzibar, in East Africa, during the defendant's assistancy or after it." I am unable to agree with the above remarks. It seems to me that the words constitute an express negative covenant not to set up a rival practice during the period of the engagement in the place where defendant was to practise as plaintiff's assistant. I do not interpret the words as meaning that the parties were to subsequently come to terms as to the exact extent or limit of such a clause. There is not a **[118]** word in the evidence pointing to that conclusion. Defendant admittedly made no enquiries on the point in England. It was probably the intention of defendant, if not of both the parties, that all the terms of the proposal and acceptance including the ordinary clause of not practising, which constituted the contract, should on defendant's arrival at Zanzibar be drawn up in a formal agreement. But the omission to do this did not make the contract less binding.

If, then, we hold that there was in this case an actual negative clause, if we can say that the parties were contracting in the sense that one should not do this or the other—some specific thing on which we can put our finger—then the authority of *Whitwood Chemical Co.* v. *Hardman* fails, and there is no reason why we should not follow the principle laid down in *Lumly* v. *Wagner* (2).

This is not a case in which we are asked to indirectly decree specific performance of the contract of personal service. Considering the relations between the parties it is evident that plaintiff does not wish to compel defendant to serve as his assistant for the remaining portion of the three years. Except Zanzibar the whole world is free to defendant to practise his profession. I see no reason, therefore, on that ground why the injunction should not issue. The principle is well settled that in granting or withholding an injunction, the Courts exercise a judicial discretion, and weigh the amount of substantial mischief done or threatened to the plaintiff and compare it with that which the injunction, if granted, would inflict upon the defendant. The doctrine is very clearly explained in *Doherty* v. *Allman* (3). See the remarks of Wilson, J., in *The Shamnugger Jute Factory Co.* v. *Ram Narain* (4).

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(1) (1891) 2 Ch 416.
(2) (1852) 1 DeG M. and G. 604.
(3) (1878) 3 A. C. 709.
(4) 14 C. 189 (199, 200).

In the present case the learned counsel for defendant urged us in the exercise of our discretion not to grant an injunction because the plaintiff's conduct had been such as to disentitle him to that form of relief. But there is no evidence that the plaintiff has behaved badly towards the defendant. On the contrary his conduct appears to have been perfectly honourable. There was mention in the evidence of a Court of enquiry demanded by [119] the plaintiff in regard to imputations on his conduct towards other persons, but nothing tangible was established or even put forward against the plaintiff. Under these circumstances I see no reason why the plaintiff should not obtain the only relief which would really be of any use to him.

Injunction granted.

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23 B. 119.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice and Mr. Justice Candy.

HUSEIN AND OTHERS (*Original Defendants Nos.* 4, 5 *and* 6) *Appellants v.* SHANKARGIRI GURU SHAMBHUGIRI AND OTHERS (*Original Plaintiffs Nos.* 1—3 *and Defendants Nos.* 1—3, 7 *and* 8), *Respondents.** [10th February, 1898].

Mortgage—Money-decree obtained by mortgagee—Execution—Sale of mortgaged property in execution—Purchaser at such sale—Title of such purchaser—Transfer of Property Act (IV of 1882), *s.* 99.

Previous to the passing of the Transfer of Property Act (IV of 1882) a mortgagee obtained a money-decree against his mortgagor and in execution sold the mortgaged property. The son of the mortgagee bought it at the sale.

Held, that by his purchase at the execution sale the son took an absolute title and was not liable subsequently to be redeemed at the suit of the heirs of the mortgagor.

Martand v. *Dhondo* (1) distinguished.

Semble.—A third person purchasing mortgaged property *bona fide* at a sale in execution of a money-decree obtained by the mortgagee against the mortgagor obtains a good title free from the mortgage lien, unless the sale is made subject to it.

[Appr., 2 N.L.R. 106 (107); Appl 35 C. 61=6 C.L.J. 320=11 C.W.N. 1011 (1018) (F.B.); R., 40 C. 173=16 C.L.J. 202=17 C.W.N. 137=16 Ind Cas. 365; 14 Bom. L R. 254=14 Ind. Cas. 780; 1 Ind. Cas. 952=3 S.L.R. 17 (29); Cons., 9 Ind. Cas. 549=15 P.R. 1911=30 P.L.R. 1911=109 P.W.R. 1911.]

APPEAL from a remand order passed by E. M. Pratt, District Judge of Sholapur-Bijapur.

Suit for redemption. The plaintiffs' father (Shankargiri) on the 23rd July, 1873, mortgaged the property in question to Nurudin, the father of defendants Nos. 1,2,3, 7 and 8 and grandfather of defendants Nos. 4, 5 and 6, who were the children of Pirshah, a deceased son of Nurudin.

Defendants Nos. 1, 4, 5 and 6 denied the plaintiffs' right to redeem. They pleaded that the mortgaged property had been sold [120] in 1878 in execution of a money decree obtained by Nurudin (the mortgagee)

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* Appeal No. 38 of 1897 from order.

(1) 22 B. 624.

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against Shankargiri (the mortgagor), and that Pirshah, the son of Nurudin (the mortgagee), had purchased it ; that the sale had been duly confirmed and Pirshah had got possession, and on his death his children (defendants Nos. 4, 5 and 6) had succeeded as his heirs. They contended that by the sale the mortgage was extinguished and the right of redemption gone.

The Subordinate Judge of Barsi dismissed the suit, holding that the mortgage had been extinguished by the sale under the money-decree obtained by the mortgagee.

On appeal by the plaintiffs the Judge reversed the decree. He held that under the provisions of the Transfer of Property Act (IV of 1882), s. 99, the sale in 1878 was void and he remanded the case for a finding as to what balance was due by them on taking account under the mortgage.

The Transfer of Property Act (IV of 1882) came into force on the 1st July, 1882, and was extended to Bombay in January, 1893. Section 99 of that Act is as follows :—

"99. Where a mortgagee in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not attaches the mortgaged property he shall not be entitled to bring such property to sale otherwise than by instituting a suit under s. 67, &c., &c."

Defendants Nos. 4, 5 and 6 preferred a second appeal.

Dattatraya A. Idgunji, for the appellants (defendants Nos. 4, 5 and 6.)—The sale was valid and the right of redemption was extinguished. The Transfer of Property Act does not apply. The sale in question was in 1878 and the Act was not passed until 1882 and was not applied to this Presidency until 1893. It is not retrospective : see s. 2 ; *Ambabai* v. *Bhau bin Rajaram* (1). The Judge has relied on *Durgayya* v. *Anantha* (2), but that decision is not applicable. It has been found as a fact that Pirshah did not purchase *benami*, nor was there any fraud or collusion in the transaction. Pirshah obtained an absolute title by his purchase and has been in possession ever since—*Bhuggobutty Dossee* v. *Shamachurn Bose* (3).

There was no appearance for the respondents.

JUDGMENT.

[121] FARRAN, C. J.—The District Judge was, we think, in error in applying the provisions s. 99 of the Transfer of Property Act to the solution of the appeal before him. The sale in execution at which Pirshah purchased, took place in 1878 long before the Transfer of Property Act came into operation in this Presidency—before it was even passed. The Act is not retrospective. Section 2 provides that "nothing herein contained shall be deemed to affect" * * * "(*c*) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability." In *Durgayya* v. *Anantha* (2), relied upon by the District Judge, the sale was after the Transfer of Property Act came into force in Madras.

In this case the original mortgagee Nurudin having obtained a money decree against his mortgagor put up the mortgaged premises for sale. They were purchased by Pirshah and it is expressly found that the latter did not purchase *benami* for Nurudin. This distinguishes the present case from *Martand* v. *Dhondo* (4), where the mortgagee himself purchased in the names of his servants and dependants at an undervalue and without

(1) P.J. (1895), p. 291. (2) 14 M. 74. (3) 1 C. 337. (4) 22 B. 624.

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the leave of the Court. That was the *ratio decidendi* there. It went as far as it was possible to go, and the principle deducible from it cannot be extended to the case of a third person purchasing *bona fide* at an execution sale held by the mortgagee. Such a sale confers a good title upon the purchaser, and that too we are inclined to think free from the mortgage lien, unless the sale is made subject to it—*Bhuggobutty Dossee* v. *Shamachurn Bose*(1)—but that question does not arise here.

Pirshah, therefore, obtained an absolute title to the property and is not liable to be redeemed at the suit of the plaintiffs, who represent the original mortgagor. The Subordinate Judge was, therefore, right in dismissing the suit when he found that Pirshah did not purchase *benami* for Nurudin, and the District Judge having agreed in that view ought not to have remanded the case.

Remand order reversed and decree of the Subordinate Judge restored with costs throughout on the plaintiffs.

Remand order reversed.

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23 B. 122.

[122] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

APPAYA AND ANOTHER (*Original Defendants*), *Appellants v.* PADAPPA (*Original Plaintiff*), *Respondent**. [21st February, 1898.]

Jurisdiction—Jurisdiction of Civil Courts—Caste question—Excommunication—Court's power to inquire into the validity of the order of ex-communication—Burden of proof.

The plaintiff, who was *a pujari* of a jain temple, sued for an injunction to restrain the defendants from entering the temple and worshipping the idol, on the ground of their ex-communication by the Swami for misconduct. Defendants pleaded that they had been guilty of no offence for which a sentence of ex communication could properly be passed, and that the inquiry into their conduct was held by the Swami *ex parte* and without any notice being given to them.

Held, that the Civil Court had jurisdiction to inquire into the validity of the sentence of ex-communication, and that it lay on the plaintiff, who sought to enforce the sentence and by virtue of it to deprive the defendants of their civil rights, to prove that it was passed on justifiable grounds and after a fair and proper inquiry.

[R., 24 B. 13 (22)=1 Bom. L. R. 478; 26 B. 174=3 Bom. L.R. 718 (725); 11 Bom. L. R. 1267 (1274)=4 Ind. Cas. 569; 1 L. B.R. 4 (6).]

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum.

The plaintiff and defendants were *bhaubands* belonging to two different branches of a family of *pujaris*, or officiating priests, of a Jain temple at Gavan in the Belgaum District.

There were certain lands set apart for the remuneration of the *pujaris*, which were in the possession and enjoyment of the defendants.

The plaintiff alleged that the Jain Swami, who managed the affairs of the temple, had excommunicated the defendants for misconduct, and had appointed the plaintiff as the *pujari* of the temple. The plaintiff, therefore, brought this suit, praying for an injunction restraining the

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* Second Appeal No. 895 of 1897.

(1) 1 C. 337.

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defendants from entering the temple and from touching and worshipping the idol, on the ground of their excommunication.

Defendants pleaded (*inter alia*) that they had been excommunicated without sufficient reason, and that the inquiry into their [123] conduct was held by the Swami *ex-parte* and without any notice being given to them. They also pleaded that the suit was not cognizable by the Civil Court, as it involved a caste question.

The Subordinate Judge held that the Court had jurisdiction to entertain the suit, that the sentence of excommunication was justifiable, and that the defendants had in consequence forfeited their right to the office of *pujari*. He, therefore, granted the injunction sought, and ordered the injunction to remain in force until the defendants were re-admitted to their caste.

This decision was confirmed, on appeal, by the District Judge, who was of opinion that the Civil Court had no power to inquire into the validity of the order of excommunication, though the evidence in the present case did not disclose any very definite ground for the ex-communication.

The defendants preferred a second appeal to the High Court.

Setlur (with *M. V. Bhat*), for appellants (defendants).—We contend that the Court had no jurisdiction to take cognizance of this suit. The suit is brought to enforce the excommunication passed by the Swami. The object of the suit is to give a legal sanction to the excommunication, and prevent the defendants from exercising their religious functions. The suit thus involves a caste question, and, as such, will not lie in a Civil Court. Section 21 of Reg. II of 1827 ousts the jurisdiction of the Civil Court over such a suit—*Shankara* v. *Hanma* (1). But, if the Court has jurisdiction to take cognizance of such a suit, then we contend that the Court is bound to inquire into the validity of the excommunication. The Court will not give effect to that order unless it is satisfied that it is passed on justifiable grounds. The lower Court was wrong in holding that the legality of the order cannot be inquired into by the Civil Court. The sentence of excommunication in this case was passed *ex parte* and without giving us any opportunity of proving our innocence of the offence charged. We were condemned unheard. Under these circumstances the excommunication is absolutely invalid and will not be enforced in a Court of justice—*Vallabha* v. *Madusudanan* (2); [124] *Venkatachalapati* v. *Subbarayadu* (3); *Krishnasami* v. *Virasami* (4); *Jagannath Churn* v. *Akali Dassia* (5); *Advocate-General of Bombay* v. *David Haim* (6); *Pragji* v. *Govind* (7); *Ganapati* v. *Bharati* (8): *Queen* v. *Sankara* (9).

H. C. Coyaji, for respondent (plaintiff).—The jurisdiction of the Civil Court is not ousted merely because the suit involves a caste question. The object of the present suit is not to interfere with the autonomy of a caste, but to give effect to the decision of the caste as promulgated by the Swami, who is the spiritual head of the caste. Regulation II of 1827 does not debar the Court from taking cognizance of such a suit—*Pragji* v. *Govind* (7). It is alleged that the sentence of excommunication was passed on insufficient grounds and without proper inquiry; but this is a mere allegation without any proof. The excommunication will be presumed to be just and proper unless and until the contrary is proved.

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(1) 2 B. 470. (2) 12 M. 495. (3) 13 M. 293. (4) 10 M. 133.
(5) 21 C. 463. (6) 11 B. 185. (7) 11 B. 534. (8) 17 M. 222.
(9) 6 M. 381.

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JUDGMENT.

PARSONS, J.—In this case the plaintiff, who is the *pujari* of a temple at Gavan, sued for an injunction to restrain the defendants from entering the temple and from touching and worshipping the idol, on the ground that they had been excommunicated by the Swami for misconduct. The defendants, admitting the power of the Swami to excommunicate for proper cause, disputed the fact and the legality of the excommunication.

The Judge of the lower appellate Court held that the Civil Court had jurisdiction to grant the injunction, but that it could not inquire into the validity of the order of excommunication. I do not agree with the latter proposition in this case where civil rights are at stake. The parties are Jains and the Swami is their religious chief; as such he may have the power to excommunicate offenders against the tenets of their religion, but when it is sought to extend a civil sanction to an ecclesiastical offence, by enforcing the order of excommunication and thereby depriving persons of civil rights which otherwise they would be entitled to exercise, it must always be open to the Civil Court, whose aid is invoked to **[125]** enforce it, to inquire if the order was made by the Swami in the proper exercise of his power.

On this point there seems to be no conflict of authority. In *Krishnasami* v. *Virasami* (1) an expulsion from caste was held invalid on the ground of the *ex parte* nature of the enquiry. In *Venkatachalapati* v. *Subbarayadu* (2) an enquiry was ordered as to whether an exclusion from caste and, therefore, from the temple shrine was justified. In *Ganapati Bhatta* v. *Bharati Swami* (3) it was held that it was only in a matter relating to caste customs over which the ecclesiastical chief has jurisdiction and exercises his jurisdiction with due care and in conformity to the usage of caste that the Civil Courts cannot interfere. In *Advocate General of Bombay* v. *David Haim Devaker* (4) the same principle was enunciated, namely, that, if the domestic tribunal has acted in a manner consonant with the ordinary principles of justice, a Civil Court has no jurisdiction to interfere, but the proceedings must have been conducted with fairness. So also in *Jagannath Churn* v. *Akali Dassia* (5) it is laid down that it is open to Courts of justice to interfere with the decision of a private association if it is shown, in the first place, that the rules of the association according to which the decision is arrived at, are contrary to natural justice, or secondly that the decision is against the rules of the association, or thirdly that the decision has not been come to *bona fide*. In *Pragji* v. *Govind* (6), West, J., says: "It is plain that the Civil Courts may discuss and deal even with a caste question where the membership and the character of a member have been unjustly injured. To take evidence of the customary law of a caste, to recognize the law and the vote of a majority as given effect to by the law, is not to interfere in caste questions; it is simply to recognize the existence of caste as corporations with civil rights and an autonomy suitable to the purposes of their existence." The District Judge cites *Dayaram* v. *Jethabhat* (7) as laying down a contrary proposition, but he has not correctly interpreted that decision, which was passed as was expressly stated "in the **[126]** circumstances of the present case" and depended upon pleading and submission and not upon general jurisdiction.

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(1) 10 M. 133. (2) 13 M. 293. (3) 17 M. 222. (4) 11 B. 185.
(5) 21 C. 463. (6) 11 B. 534. (7) 20 B. 784.

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In the case we are now dealing with, the sentence of excommunication was passed, not by a caste, but by an individual, the Swami or religious chief of the sect to which the parties belong. Its legality is disputed by the defendants, who say that they were guilty of no offence for which a sentence of excommunication could properly be passed, and that the inquiry into their conduct was held by the Swami *ex parte* and without any notice being given to them. I think that a Civil Court has jurisdiction to inquire into that plea and that it lies on the plaintiffs, who seek to enforce the sentence and by virtue of it to deprive the defendants of their civil rights, to prove that it was passed on justifiable grounds and after a fair and proper enquiry.

We, therefore, frame an issue on that point, namely:—Was the sentence passed on justifiable grounds and after fair and proper inquiry? and ask the Judge of the lower appellate Court to find on it, taking evidence if necessary, and certify his finding to this Court within two months.

RANADE, J.—In this case, the parties are Jains, and belong to different branches of the family of the *pujaris* of a temple. The original claim was for an injunction to prevent the appellants from entering the temple, and worshipping the idol, and the ground on which the injunction was sought was the alleged excommunication of the appellants by the Swami of the caste, who it appears had also some hand in the management of the temple, and had appointed the respondent plaintiff to officiate as *pujari*. The appellants denied the Swami's right over the temple, as also plaintiff's claim to be *pujari*, and they further denied the alleged excommunication and misconduct. Finally they urged that the claim was in the nature of a caste question, and, as such, excluded from the jurisdiction of Civil Courts.

The Court of first instance held that the Court had jurisdiction, that the plaintiff was of the *pujari* family, that the appellant-defendants had been excommunicated, and for a justifiable cause, and that the injunction sought for should be granted until such time as the appellants were re-admitted to caste. The appellants in their grounds of appeal to the District Court raised the question [127] of jurisdiction, as also of respondent's right to sue, and of the fact and validity of the excommunication. The District Judge, however, laid down only two issues, as to (1) whether the Civil Court had jurisdiction, and (2) whether the excommunication was justifiable. He found both these issues in the affirmative, and confirmed the decree. Though this finding on the second issue apparently suggests that the District Judge was satisfied that the excommunication was proper and justifiable, yet it is clear, from the express words used towards the the conclusion of the judgment, that what the District Judge really found on this point was that the Civil Court had no power to inquire into the validity or justification of the Swami's excommunication. If the question was one which could be considered open for inquiry, the District Judge clearly stated his view that there were no definite grounds for the excommunication, and none which the Courts would regard as adequate. In other words, while, in so far as the respondent-plaintiff's claim for injunction was concerned, the District Judge was inclined to hold that it was a matter within the cognizance of Civil Courts, yet when the factum and justification of the alleged excommunication on which the claim for injunction was based were denied, the District Judge was of opinion that the Courts could not inquire into such a defence. These two positions

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seem to be obviously inconsistent, and I feel satisfied that a careful consideration of the authorities does not lead to any such conflict.

If the position of the parties had been reversed, and the present appellants had brought the suit to establish their right to the office of *pujaris*, or to enter the temple and worship the idol, it is plain that they would have a perfectly clear right to require the Courts to entertain such a suit, and if the defence raised was of excommunication, to ask the Courts to inquire into the factum and binding character of that action. It has been decided in a large number of cases that a suit for restoration to caste and for obtaining a declaration that the expulsion was not justified, would lie in the Civil Courts—*Gursangaya* v. *Tamana* (1) ; *Pragji* v. *Govind* (2) ; *Anandrav* v. *Shankar* (3) ; *Vengamuthu* v. *Pandaveswara* (4), **[128]** *Archakam* v. *Udayagiry* (5) ; *Srinivasa* v. *Tiruvengada* (6) ; *Krishnasami* v. *Krishnamacharyar* (7). In *Gopal* v. *Gurain* (8), the suit was brought by plaintiff to secure his restoration to caste from which he had been expelled by reason of a charge brought by defendant against him of adultery. In such a case it was held that the defendant may plead justification, and plaintiff may show that the charge was false. In *Venkatachalapati* v. *Subbarayadu* (9), it was ruled that the right to worship in a public temple is a civil right, and when it is questioned on the ground of excommunication, it is competent to the Courts to inquire into the defence and they are bound, when necessary, even to examine the religious foundations on which the excommunication is based. In such an inquiry it must be shown that the Swami had jurisdiction, and that there was an express declaration and that the excommunication was passed in accordance with usage, and after hearing the explanation of the person charged. This same view was expressed still more strongly in *Jagannath Churn* v. *Akali Dassia* (10). There also the plaintiff's right to enter a prayer house was resisted on the ground of an alleged expulsion by the majority of the Samaj. The Court followed the ruling in *Gopal* v. *Gurain* (8) and dissented from the Bombay ruling in *Pragji* v. *Govind* (2). It was observed that even if this last ruling were accepted, it would be still necessary to see if the rule or order of the majority was properly arrived at in a *bona fide* manner, and that it was in conformity with natural justice. In *Ganapati Bhatta* v. *Bharati Swami* (11), which was also a case of expulsion from caste, it was held that a guru has, no doubt, a right to exercise his jurisdiction according to caste usage, and when he exercises his jurisdiction with due care and in accordance with custom, Civil Courts will not interfere with his action—*Murari* v. *Suba* (12). If these limits are exceeded, there is no protection—*Queen* v. *Sankara* (13). Similarly it was held in *Krishnasami* v. *Virasami* (14), that even when the expulsion had been ordered under a *bona fide*, but **[129]** mistaken, belief on a point of fact, and it was shown that plaintiff had not been guilty of the misconduct imputed to him, he has a right to have the order of expulsion set aside. Kernan, J., who decided the case, observed that 'a caste custom permitting expulsion without notice would be invalid. The caste institution is not above or outside the law. Usage and custom exist only under, and not against, the law.'

When a man had been expelled from his caste for alleged adultery, and the caste had allowed him no opportunity to defend himself, the order

(1) 16 B. 281. (2) 11 B. 534. (3) 7 B. 323. (4) 6 M. 151.
(5) 4 M.H.C.R. 349. (6) 11 M. 450. (7) 5 M. 313. (8) 7 W.R. 299.
(9) 13 M. 293. (10) 21 C. 463. (11) 17 M. 222. (12) 6 B. 725.
(13) 6 M. 381. (14) 10 M. 133.

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of expulsion was set aside—*Vallabha* v. *Madusudanan* (1). The fact is that in such matters the Courts treat caste corporations like any other voluntary societies or clubs. If their proceedings are *bona fide* and fairly conducted, their action is upheld and not otherwise. The principle of the rulings in *Advocate General* v. *David Haim Devakar* (2), which was a dispute between Beni Israelite parties, and the case in *Gompertz* v. *Goldingham* (3), which related to a club, apply equally to expulsions from caste. If there is jurisdiction, and the procedure is fairly conducted and *bona fide*, the action of the caste, corporation, or club is upheld. If possible, for the reasons stated by the Judges who decided the case of *Jagannath Churn* v. *Akali Dassia*, the Civil Courts have to be more careful in the matter of caste expulsions than is necessary in the case of voluntary associations. It might be indeed contended that s. 21 of Regulation II of 1827 imposes a special limitation on the power of the Courts of this Presidency. This contention is, however, not correct. As laid down by West, J., in *Anandrav* v. *Shankar*, and affirmed by the same Judge in *Pragji* v. *Govind*, and by Sargent, J., in *Murari* v. *Suba*, s. 21 of Regulation II of 1827 only prevents such interference as is likely to affect the autonomy of caste tribunals. The section itself provides a remedy in the matter of alleged injury to caste or character in the shape of damages. This means that Courts have jurisdiction when the injury is due to the illegal or unjustifiable conduct of the other party. Such suits must be clearly distinguished from caste disputes proper. Claims between rival factions of the same caste to common caste **[130]** property, claims to leadership of caste, claims to require voluntary offerings and honours and presents to be paid to particular members, claims to officiate as priests against the consent of the caste, claims for compulsory invitations to dinners, &c.—*Girdhar* v. *Kolya* (4) ; *Dullabh* v. *Narayan* (5) ; *Murar* v. *Nagria* (6) ; *Murari* v. *Suba* ; *Archakam* v. *Udayagiry* ; *Gossain Doss* v. *Gooroo Doss* (7) ; *Krishnasami* v. *Krishnama* ; *Dayaram* v. *Jethabhat* ; *Mayashankar* v. *Harishankar* (8) ; *Karuppa* v. *Kolanthayan* (9) ; *Joy Chunder* v. *Ramchurn* (10) ; *Sudharam* v. *Sudharam*(11) ; *Shankara* v. *Hanma*(12) ; *Striman* v. *Kristna*(13).—These are matters which affect the internal autonomy of the caste and its social relations, and suits in regard to them have been properly held to be barred by s. 21 of Regulation II of 1827 and similar enactments in other parts of India.

But where, as in this case, a man's character and status as a member of a caste is called in question, and on the strength of an alleged excommunication it is sought to deprive him of the use of a priestly office connected with a temple, with lands and perquisites attached to it, it is clear that the Courts must inquire into the factum of excommunication, and to see that the expulsion was in accordance with caste usage and in conformity with natural justice. It may not be possible for a Court to determine the adequacy of the religious grounds on which the excommunication is based, but it can and ought to satisfy itself that there are fair and *bona fide* grounds for such action. There is nothing in the record to show that the excommunication in the present case fulfilled this character. It appears that the misconduct attributed to the appellants

(1) 12 M. 495. (2) 11 B. 185. (3) 9 M. 319.
(4) 5 B. 83. (5) 4 B.H.C.R. A.C.J. 110. (6) 6 B.H.C.R. A.C.J. 17.
(7) 16 W. R. 198. (8) 10 B. 661. (9) 7 M. 91.
(10) 6 W.R. 325. (11) 3 B. L. R. 91. (12) 2 B. 470.
(13) 1 M. H. C. R. 301.

is that they did not attend upon the swami, and that they refused to allow a share in the temple lands in their possession to the other sharers. The District Judge himself states that there are no adequate grounds for the alleged expulsion. It is aiso not clear whether the Swami has a right of dismissing or employing the *pujari* in the temple, or whether the [131] excommunication has been resorted to in order to compel obedience to the wishes of the *bhaubands* for a share in the temple lands.

If the appellants as plaintiffs had a right to require the Courts to make an inquiry into the factum and regularity and *bona fides* of the excommunication proceedings, it is clear they have a stronger right as defendants to insist upon such inquiry before an injunction is given against them.

We must, therefore, remand the case for a finding upon the issue about the regularity and *bona fides* of the excommunication.

Case remanded.

N. B.—Upon remand the District Judge found that the sentence of excommunication was not passed on justifiable grounds after a fair and proper inquiry.

On this finding the High Court reversed the decree of the lower Court and dismissed the suit.

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Before Mr. Justice Parsons and Mr. Justice Ranade.

RAJARAM AND ANOTHER (*Original Defendants, Nos.* 1 *and* 2), *Appellants v.* GANESH (*Original Plaintiff and Defendant No.* 4), *Respondents.** [28th February, 1898.]

Gift—Revocation of gift—Vritti—*Gift of* Vritti—*Validity of such gift—Compulsory alienation of* vritti *invalid—Private alienation not absolutely prohibited.*

When a gift is made, the donor taking all the steps in his power to give effect to it, it is complete, and he cannot revoke it by a subsequent will.

A *vritti* cannot be sold in execution of a decree. Such a compulsory alienation is not only opposed to the Hindu law and public policy, but is also against the provisions of s 266 of the Code of Civil Procedure (Act XIV of 1882). But private alienations are not absolutely prohibited. No general rule can be pleaded in such matters. The rules of succession depend upon each particular foundation or office, and in respect of it, custom and practice must govern and prevail over the text law which prohibits both partition and alienation.

[**F.**, 13 Ind. Cas. 225 = 5 S.L.R. 107 ; 16 Bom. L.R. 593; **Appl.**, 26 M. 31 (33); **R.**, 27 B. 31 (39); 36 C. 975 (977) = 13 C W.N. 1084 = 3 Ind Cas. 76 ; 26 M L J 315 = (1914) M.W.N 286 = 23 Ind. Cas. 72 ; 20 C.L.J. 183 = 19 C.W.N. 208 ; **Cons.**, 34 C. 828 (833) = 11 C.W.N. 782 ; 45 P.R. 1901 = 64 P.L.R. 1901.]

SECOND appeal from the decision of Rao Bahadur D. G. Gharpure, Additional First Class Subordinate Judge at Nasik.

[132] One Bhikambhat was the original owner of the property in dispute, which consisted of (1) a house at Trimbak, (2) one-fourth share in an inam village, (3) a right of service in the temple of Shri Trimbakeshvar, and (4) one-half share in the *upadhikpana vritti* (1) on the *Kushavarth Tirth*, which is a sacred place at the source of the Godavari.

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* Second Appeal No. 948 of 1897.

(1) The *vritti* is a priestly office in virtue of which certain religious services are performed on behalf of pilgrims to the *tirth* who pay fees to the holders of the *vritti* for the performance of those services. See 10 B. 395.

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Bhikambhat made a gift of the whole of the property in dispute to the plaintiff by a *bakshis-patra* (deed of gift) dated 16th November, 1888.

At the date of the gift the house and the inam village were in the possession of a mortgagee to whom Bhikambhat had mortgaged them. Bhikambhat, however, handed over to the plaintiff such documents of title as he had with him relating to the property, and he also applied to the Revenue authorities to transfer his share in the inam village to the plaintiff's name.

As to the *vritti*, plaintiff entered upon the duties of his office immediately after the execution of the deed of gift.

On the 5th January, 1891, Bhikambhat adopted defendant No. 1 and made a will by which he revoked the deed of gift to the plaintiff and bequeathed the whole of his property to his adopted son (defendant No. 1). Bhikambhat died shortly afterwards.

In 1894 plaintiff filed the present suit to establish his title to the property under the deed of gift executed by the deceased in his favour.

The defendants pleaded (*inter alia*) that the deed of gift was invalid on the ground that it was not accompanied with possession, and as to the *vritti* and the right of service in the temple contending that Bhikambhat was not competent to alienate them to a complete outsider and stranger to the family.

Both the lower Courts held the gift valid and awarded the plaintiff's claim.

Defendants thereupon preferred a second appeal to the High Court.

[133] *Daji Abaji Khare*, for appellants :—The deed of gift is invalid because it was not accompanied by delivery of possession. Part of the property in dispute was not in the possession of the donor at the time of the gift. It was then, and is still, in the possession of the mortgagee. As regards the *vritti* and the right of service in the temple, the donor continued in possession after the execution of the deed, since we find that the donee signed the receipts for the payments made to him in the donor's name. The gift was, therefore, incomplete and it was afterwards revoked by the donor by his will. But assuming that the gift was complete, still it is open to the objection that the *vritti* as well as the right of service in a temple are inalienable under the Hindu law. A religious office cannot be made the object of sale, mortgage or gift, and the emoluments of the office are absolutely *extra commercium*—*Rajah Vurmah Valia* v. *Ravi Vurmam* (1) ; *Narasimma* v. *Anantha* (2). *A vritti* is a right of personal service and as such cannot be attached or sold in execution of a decree *Ganesh* v. *Shankar* (3). In the present case the *vritti* was transferred to a perfect stranger. Such an alienation outside the family is bad—*Kuppa* v. *Dorasami* (4) ; *Durga Bibi* v. *Chanchal Ram* (5).

N. G. Chandavarkar, for respondents :—It is found as a fact by both the lower Courts that the gift was carried out by the donors taking all the steps necessary to give effect to it. This finding is conclusive on this Court in second appeal. As to the alienability of a *vritti*, it is too broad a proposition to assert that a *vritti* is absolutely inalienable. No such rule is deducible from the decided cases. On the contrary the Courts have upheld the alienation of a priestly office to a member of the founder's family standing in the line of succession—*Sitarambhat* v. *Sitaram* (6);

(1) 1 M. 235.
(2) 4 M. 391.
(3) 10 B. 395.
(4) 6 M. 76.
(5) 4 A. 81.
(6) 6 B.H.C.R. (A.C.J.) 250.

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Srinivasa v. *Rengasami* (1) ; *Mancharam* v. *Pranshankar* (2). Even an alienation to a stranger has been allowed where such alienation is in the interest of the endowment—*Khetter Ohunder Ghose* v. *Hari Das* (3). No doubt it has been held that a *vritti* **[134]** cannot be sold in execution of a decree. But the grounds on which such an alienation is forbidden, do not apply in the case of a private alienation. If a *vritti* were subject to attachment and sale, the auction-purchaser might be a Mahomedan or a Christian, and he would be both unwilling and incompetent to perform the services to an idol. But these objections do not apply to the alienation in the present case. In *Sadashiv* v. *Jayantibai* (4), this Court has allowed the sale of a *vritti* even in execution of a decree. It is not, therefore, correct to say that a *vritti* cannot be alienated under any circumstances. It is for the Court to determine in each case whether the alienation is one that can be upheld.

RANADE, J.—The appellants' pleader in this case raised only two contentions in his argument before us,———first, that the gift in this case was invalid, because it was not carried out by transfer of possession, and was subsequently revoked by the donor, and secondly, that the alienation of the *vritti* was invalid as being the alienation of an hereditary priestly office outside the family to a stranger.

As regards the first contention, both the Courts below have found in respondent's favour, that the possession was transferred to the respondent by the donor taking all the steps necessary and in his power to effect it. This is a question of fact, and we must accept the concurrent finding of both the lower Courts as binding on us in second appeal. The donor transferred the documents relating to the *vritti* to the respondent, and he also applied to the Revenue authorities to transfer his interest in the inam village to respondent. The donor was not in possession of the inam village and the house, which he had mortgaged to his creditors, and transfer of actual possession was in the nature of things impossible till the debt was paid off. The duty of service in the temple was performed by the respondent, who signed the receipts in the donor's name. We must, therefore, overrule this objection. If the gift was carried out by the donor's taking all the steps in his power to give effect to it, it was complete, and the donor had no power to revoke it by a subsequent will, as was sought to be done in the present case.

[135] The other ground of invalidity presents more difficulty. It appears that the objection that a *vritti* was inalienable was raised in the Court of first instance, and decided against the appellants before us. In the District Court, the point was again raised, but the judgment of the lower appellate Court shows that it was not pressed there. This of course does not deprive the appellants of their right to raise the question in second appeal—*Kuppa* v. *Dorasami* (5).

It appears from the authorities cited, and from others which will be noticed further on, that a distinction has been made by the Courts between *vrittis* such as those in dispute in this case, and defined in *Ganesh* v. *Shankar* (6), and the right of hereditary service in temples, private and public, and between alienation to strangers and to members of the family, and, lastly, between compulsory and private alienation. Compulsory alienation by way of sale in execution of decrees has been disallowed in all cases as being not only opposed to Hindu law and public policy but against the provisions of s. 266 as being rights of personal service—

(1) 2 M. 304. (2) 6 B. 298. (3) 17 C. 557.
(4) 8 B. 185. (5) 6 M. 76. (6) 10 B. 395.

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Ganesh v. *Shankar* ; *Govind* v. *Ramkrishna* (1) ; *Kalee Churn* v. *Bungshee Mohun Dass* (2); *Durga Bibi* v. *Chanchal Ram* (3) *Dubo Misser* v. *Srinibas Misser* (4). Such compulsory sales might transfer such properties to persons disqualified to perform the duties of the office. In the case of private alienations, this objection does not hold equally good, and private alienations are not absolutely prohibited. Alienations to strangers are indeed not favoured, as will be seen from the rulings in *Rajah Vurmah Valia* v. *Ravi Vurmah* (5), *Narasimma* v. *Anantha* (6), *Raja Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (7), *Keyake Ilata Kotel Kanni* v. *Yadattil Vellayangot* (8), *Rajah of Cherakal Kovilagom* v. *Mootha Rajah* (9), *Venkatrayar* v. *Srinivasa Ayyangar* (10).

Most of these decisions relate to temple offices in Madras Presidency where the sentiment against alienation is very **[136]** strong. In other parts of India, the restrictions are less strictly enforced, especially when the alienee is a nearly related member of the family. In this Presidency it was ruled in *Sitarambhat* v. *Sitaram Ganesh* (11) where the dispute related to a temple office, that alienation to grand-children by way of relinquishment on the part of the grandfather was not illegal The principle was re-affirmed in *Mancharam* v. *Pranshankar*(12), where the dispute related to a *joshi vritti*, and it was held that alienation to a member in the line of succession or to a possible heir, bandhu or sapinda, would not be illegal unless there was any express direction of the founder, or rule or usage to the contrary. In *Khetter Chunder Ghose* v. *Hari Das Bundopadhya* (13) the alienation by the entire family of the sebaits of private idol with its endowed land to a stranger was upheld as being in the interest of the idol, and calculated to carry out the objects of the original founder. A similar transfer in respect of a public temple was held to be legal—*Konwar Doorganath Roy* v. *Ram Chunder Sen* (14). Where the alienation is made by one out of several joint owners for his own benefit, the transfer was held to be illegal—*Kupa* v. *Dorasami* ; *Narasimma* v. *Anantha*. In *Ukoor Doss* v. *Chunder Sekhur Doss* (15) such a transfer was held to be invalid beyond the life-time of the alienor. In *Kuppa* v. *Dorasami*, transfer to a person not in the line of heirs was disallowed. In *Durga Bibi* v. *Chanchal Ram*, alienation outside the family was held to be illegal. In *Sadashiv* v. *Jayantibai*(16), on the other hand, the execution of a decree directing the sale of a *vritti* was upheld.

It will be thus seen that in the case of private alienations the prohibition is not of general application. As observed by their Lordships of the Privy Council, no general custom can be pleaded in such matters. The rules of succession depend upon the nature of each particular foundation or office, and in respect of it custom and practice must govern and prevail over the text law which admittedly prohibits both partition and alienation—*Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*(17); **[137]** *Greedharee Doss* v *Nundo Kissore Doss Mohunt*(18). *Rajah Vurma Valia* v. *Ravi Vurma Mutha* ; *Genda Puri* v. *Chhatar Puri* (19) : *Durga Bibi* v. *Chanchal Ram* ; *Ramlingam Pillai* v. *Vythilingam Pillai* (20) ; *Manchharam* v. *Pranshankar*. By force of custom, however, a limited right of partition and

(1) 12 B. 366. (2) 15 W. R. 339. (3) 4 A. 81. (4) 5 B.L.R. 617.
(5) 4 I. A. 76. (6) 4 M. 391. (7) 1 M. 235. (8) 3 M. H.C.R. 380.
(9) 7 M. H. C.R. 210 (10) 7 M.H.C.R. 32. (11) 6 B.H.C.R. 250.
(12) 6 B. 298. (13) 17 C. 557. (14) 2 C. 341. (15) 3 W.R.152.
(16) 8 B. 185. (17) 1 I.A. 209. (18) 11 M.I.A. 405. (19) 13 I.A. 100.
(20) 16 M. 490.

alienation might be established, and the custom must be ascertained by evidence in each class of cases.

As this point has not been formally inquired into, it becomes necessary to send down the following issues and obtain a finding on the same :—

(1) Whether a custom and practice of the alienation or gift of the *vritti* in dispute and of the service in the temple was established either generally or as limited to particular classes of heirs or relations ?

(2) Whether the appellant's gift falls within or is governed by such custom and limitations ?

The finding and evidence taken, if any, should be certified to this Court within two months.

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23 B. 137 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir C. F. Farran, Kt., Chief Justice, Mr. Justice Candy and Mr. Justice Fulton.

BHAVRAO AND OTHERS (*Original Defendants Nos.* 17, 19 and 20), *Appellants v.* RAKHMIN AND OTHERS (*Original Plaintiffs*), *Respondents.**
[1st March, 1898.]

Partition—Alienation by co parceners—Possession by alienee—Adverse possession—Limitation—Limitation Act (XV of 1877), sch. II, Arts. 127 *and* 144.

Where co-parceners have alienated their shares in the joint property by sale and mortgage, and the alienees have been in possession for more than twelve years, a claim for partition is, as against such alienees, barred by limitation under art. 144 of the Limitation Act (XV of 1877).

Pandurang v. *Bhaskar* (1) distinguished.

[138] Article 127 of sch. II of the Limitation Act (XV of 1877) does not apply except in cases between members of a joint family. It does not apply to the case of a stranger to the family holding property which originally belonged to the family. As to him the ordinary rule of limitation (art. 144) applies.

[F., 1 P. L. R. 1902 ; **R.**, 27 B. 43 (51) ; 9 Ind. Cas. 540 = 23 P.L.R. 1911 = 48 P.W.R. 1911 ; 15 Ind. Cas. 394 = 15 O.C. 111 ; U P R. (1897—1901), 469 (471) ; 12 A. L. J. 1233 = 27 Ind. Cas. 35.**]**

SECOND appeals from the decision of M. P. Khareghat, District Judge of Ratnagiri.

Suit for partition and possession. The plaintiffs claimed a one-fifth share of a portion of the village of Bhelsai, which itself had been previously partitioned. Most of the land in question was, however, in the possession, not of the co-sharers, but of their alienees, to whom they had from time to time sold or mortgaged their shares. These alienees were made defendants to this suit and some of them pleaded adverse possession for more than twelve years. The defendants were eighty-five in number.

The lower Courts granted partition. The District Judge was of opinion that, as regarded the right of partition, there was no adverse possession and that art. 144 of the Limitation Act (XV of 1877) did not apply. The following is an extract from his judgment :—

"It has been argued that all the alienations prior to 12 years before suit are free from resumption, as the suit with respect to them is barred

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* Joint Second Appeals Nos. 989 and 990 of 1896.

(1) 11 B. H.C.R. 72.

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by art. 144 of sch. II of the Limitation Act. But I think otherwise. If the original sub-sharers had continued in possession, it is clear that this suit for partition of what was admittedly joint property could not have been barred even against an outsider (see 11 Bom. H. C. Rep., 72). I do not see, therefore, why it should be barred if the sub-sharers put their mortgagees or vendees in possession. Those vendees and mortgagees admittedly took possession knowing it was joint property liable ultimately to partition; they did nothing to show the other sub-sharers that they denied their right of partition. There was, therefore, no adverse possession as respects the right of partition, and art. 144 is inapplicable. Of course, these alienees have got the equitable right of having the alienated property assigned, as far as possible, to the shares of their respective alienors; but if they have anything in excess, it can be resumed just as it could have been from the original sub-sharers to equalize the shares.

Two separate groups of defendants appealed to the High Court (appeals Nos. 989 and 990 of 1896). The appeals came before a Division Court (Farran, C.J., and Candy, J.), which referred the following question to a Full Bench:—

"Whether on the facts stated by the District Judge the claim for partition of the lands which have been in the possession of vendees and mortgagees and [139] holders under alleged purchases, for more than twelve years, is barred by limitation."

The Full Bench consisted of Farran, C. J., Candy and Fulton, JJ. Both appeals were heard together.

Maneksha J. Taleyarkhan and *Mahadev R. Bodas*, for appellants (defendants).—We have been in possession as mortgagees and vendees for more than twelve years under mortgages and sales made by co-sharers of the plaintiff. It is contended that our long possession is no defence against a claim for partition, and that the plaintiffs can recover the land from us. We contend that our possession has been adverse to their claim, and that their claim is barred by art. 144 of the Limitation Act—*Datto* v. *Babaji* (1); *Ganesh* v. *Ramchandra* (2). Our mortgage-deeds purport to mortgage specific lands to us, and the mortgagors (the co-sharers) are described as the owners. We had nothing to do with any of the co-sharers, except the mortgagors, and, therefore, so far as regards others our possession has been adverse. No doubt it is true that co-sharers in possession do not exclude each other, and that possession of co-sharers is not adverse to the other co-sharers. But an alienee of a co-sharer is not a co-sharer. He is a stranger and he does exclude the others, and his possession is adverse—*Bejoy Chunder* v. *Kally Prosonno* (3); *Lukshman* v. *Moru* (4). Article 144 of the Limitation Act (XV of 1877) applies—*Ram Lakhi* v. *Durga Charan* (5); *Horendra* v. *Aunoardi* (6); *Muttusami* v. *Ramkrishna* (7); *Rane* v. *Rane* (8). The case of *Pandurang* v. *Bhaskar* (9), relied on by the Courts below does not apply.

Vasudev Gopal Bhandarkar, for respondents (plaintiffs).—The plaintiffs have a right to partition and possession as against the defendants. Those of the defendants who have purchased from co-parceners have no better title than their vendors as against the other co-parceners—*Pandurang* v. *Bhaskar* (9). The defendants took the lands knowing they were joint property. [140] Art. 127 of the Limitation Act does not bar the plaintiffs'

(1) P. J. (1894), 149. (2) 20 B. 557. (3) 4 C. 327.
(4) 16 B. 722. (5) 11 C. 680. (6) 14 C. 544.
(7) 12 M. 232. (8) 3 B. H.C.R. (A.C.J.) 173. (9) 11 B.H.C.R. 72.

claim—*Horendra* v. *Aunoardi* (1). This suit would lie against the co-sharers and, therefore, it lies against their assignees. *Hanmant* v. *Mahadev* (2); *Vinayak* v. *Mainai* (3); *Chinto* v. *Janki* (4).

JUDGMENT.

FARRAN, C. J.—We think that the question referred for our decision should be answered in the affirmative.

The first point to consider is what article of the schedule to the Limitation Act is applicable to the case. We think that art. 144 is the article which applies. The only alternative article which can be suggested is art. 127, but we do not think that it is applicable. That article deals with the limitation applicable to joint family property. It provides a special rule of limitation applicable to that class. In the case of such property mere lapse of time is of no avail. There must be exclusion to the knowledge of the person excluded before limitation begins to run. It is applicable only to property belonging to members of what may in common speech be called a joint family—*Bavasha* v. *Masumsha* (5). The Allahabad and Madras High Courts would confine its operation to property of a joint family in the technical or Hindu sense of the term—*Amme Raham* v. *Zia Ahmad* (6); *Patcha* v. *Mohidin* (7). It does not, in our opinion, apply to the case of a stranger to the family holding property which originally belonged to the joint family. As to him, we think that the ordinary rule of limitation is applicable. The principal decisions upon this point are collected in Starling on Limitation, p. 251 (Ed. 1895). We need only refer to *Kartick Chunder* v. *Saroda Sunduri Debi* (8); *Muttusami* v. *Ramkrishna* (9).

The article applicable to the case must, therefore, be art. 144 and the inquiry is limited to this:—Has the possession of the alienees been adverse to their respective alienors and their co-parceners or not? It can hardly, we think, be contended that their possession was not adverse to their alienors. The latter [141] sold or mortgaged to their respective alienees certain defined and distinct portions of the estate, which had been in their exclusive possession and put the purchasers in possession of the same. The deeds are clear and unequivocal in their terms. The alienors convey to the alienees separate portions "out of their share," using these words or words to that effect. The boundaries are given of the plots conveyed and the alienors covenant for title. It cannot, we think, be said that a purchaser entering under such a deed, whether it be a deed of sale or a mortgage, does not enter as owner, absolute or qualified as the case may be, of the particular plot of land so conveyed to him, and not as purchaser of a right to ask the Court upon a partition to have that particular plot, which he has purchased, assigned to his alienating co-parcener in order to give effect to his purchase according to the principle laid down in *Pandurang* v. *Bhaskar* (10).

What, then, is the purchaser's position with reference to the co-parceners of his vendor or mortgagor? The answer, we think, must be that, as he enters as owner and in right of his conveyance, his possession is adverse to them also. In the eye of the law, all the co-parceners, though for the sake of convenience they may be in separate possession of

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(1) 14 C. 544. (2) 18 B. 513. (3) 19 B. 138. (4) 18 B. 51.
(5) 14 B. 70. (6) 13 A. 282. (7) 15 M. 57. (8) 18 C. 642.
(9) 12 M. 292. (10) 11 B. H. C. R. 72.

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portions of the joint estate, are the owners of the whole estate including the alienated portion. It may be and indeed is the case that such a purchaser by his purchase does not get a good title to the land conveyed to him by a single co-parcener, but only the qualified right laid down in *Pandurang* v. *Bhaskar* (*supra*), and he is liable under some circumstances even to be evicted if the co-parceners take the requisite steps within the statutory period. Nevertheless his exclusive possession does not on that account cease to be adverse. He, entering as owner, his possession must, we think, necessarily be adverse to the true owners. Adverse possession depends upon the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested—whether in a single person or in many jointly. "Adverse possession is possession by a person holding the land, on his own behalf, or of some person other than the true owner" **[142]**—Per Markby, J., in *Bejoy Chunder* v. *Kally Prosonno* (1). In favour of such a holder limitation begins to run from the date of his possession, provided the true owner is not under disability and is capable of suing.

The District Judge lays stress in this case upon the fact that the alienees must have known that the alienors were separate holders of property held in co-parcenary; indeed he speaks of such knowledge as being admitted. The statements of the defendants, the alienees, in their pleadings scarcely admit, we think, of being construed so unfavourably to them, but admitting that the defendants did know that the land which they were purchasing formed part of an undivided estate, we do not think that it affects the question. A person coming in under a title, which he knows to be defective, or even a trespasser is not by reason of his knowledge deprived of the benefit of the law of limitation. The principle expressed in art. 126, which affords a clear analogy to the present case, applies, we think, alike to a purchaser with and to a purchaser without notice.

The view which we have above expressed is in accordance with the decision in *Datto* v. *Babaji* (2), but in that case it does not appear that the defendant knew that he was purchasing the interest of one branch of the family only. The decision in that case was cited with approval in *Ganesh* v. *Ramchandra* (3).

The judgment in *Pandurang* v. *Bhaskar* (*supra*) on this branch of the case, upon which the District Judge relies, does not, we think, at all militate against the view which we have arrived at. It was there held that Bhaskar, the purchaser of Nilo's share in a joint estate, had to show that Nilo's claim against Pandurang, Nilo's co-parcener, was not barred at the date of his purchase. To that extent he was identified with Nilo. If Nilo was barred, Bhaskar was barred too. That is clear. Bhaskar's purchase appears to have been shortly before suit. The sale was in 1871 and the suit in 1874. If Bhaskar's purchase had been more than twelve years before suit, different considerations would have arisen. The case, moreover, is rather the converse of the present and is not a ruling against the defendants, the alienees, **[143]** who are defending their possession and not seeking the aid of the Court as plaintiffs.

The inconvenience of a contrary ruling to that which we have expressed is shown by the practice which prevails in the Ratnagiri District from which these appeals come. There the ordinary condition of a *khoti* estate held in co-parcenary appears to be that the parceners should be in occupation

(1) 4 C. 327. (2) P. J. (1894), 149. (3) 20 B. 557.

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of separate portions of the estate—*Babashet* v. *Jirshet* (1). This condition originally adopted temporarily for the convenience of the co-parceners often continues for very long periods without an actual partition taking place. In the above case it appears to have continued for more than 150 years. Another instance of the practice will be found in *Sakho* v. *Narayan* (2). A purchaser thus might be in possession of land which he had purchased for valuable consideration for 50 years or more, considering himself to be the owner, and after that period the co-parceners of his vendor, by filing a suit for partition amongst themselves and adding him as a party, might deprive him of it. No limitation would ever run in his favour. If knowledge is important, an inquiry into the knowledge with which he purchased would have to be made. It is to avoid such inquiries as these, and to quiet titles depending upon possession, that statutes of limitation exist. The same reasoning applies to the lands in respect of which the defendants in possession have not been in a position to prove the deeds of sale.

As to the contention that the plaintiffs' share was under mortgage at the date of the alienation, it was a question which was not raised in the lower Court, or referred to the Full Bench. It is of little more than academical interest, as it only extends to the plaintiffs' one-fifth share in those lands. We shall leave the Division Bench to deal with it.

Appeal referred to Division Bench for disposal.

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23 B. 144.

[144] APPELLATE CIVIL.

Before Sir C.F. Farran Kt., Chief Justice and Mr. Justice Candy.

GANPAT (*Original Plaintiff*), *Appellant* v. ANNAJI (*Original Defendant*), *Respondent.** [28th March, 1898.]

Hindu law—Joint family—Family Property—Family firm—Partnership—Partnership suit between members of joint famaly—Suit by a co-parcener for an account of the profits of a joint family firm—Injunction—Exclusion of partner.

A member of a joint Hindu family cannot maintain a suit for an account of the profits of a partnership which is alleged to be joint family property and an award of his share in such profits when ascertained.

This rule of Hindu law does not prevent an injunction being granted in cases in which one member of the family is prevented from taking part in the business of the firm.

[R., 10 Ind. Cas. 210=5 S.L.R. 47.]

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona.

The plaint stated that the parties to the suit were full brothers possessed of joint ancestral property, consisting (*inter alia*) of a shop at Poona; that the defendant did not allow the plaintiff to enter the shop, inspect the account books, and take part in the management of the shop; and that the defendant had been acting in a manner detrimental to the joint business.

The plaintiff, therefore, sued (1) for an account of the cash, stock in trade, and of the debts and liabilities of the Poona shop, and for an award

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* Second Appeal No. 1106 of 1897.

(1) 5 B.H.C.R., A.C.J. 71. (2) 6 BH.C.R. (A.C.J.) 238.

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23 B. 144.

of such sum as might be found due to him on taking accounts; (2) that the defendant might be held liable for such sums as might have been lost by negligence or laches on his part; and (3) for an injunction restraining the defendant from excluding the plaintiff from the joint possession and management of the shop.

The defendant pleaded (*inter alia*) that he and the plaintiff were not joint and did not carry on joint dealings; that a partition had been effected between the parties in accordance with an award dated 16th August, 1894; and that the suit as framed would not lie.

The Subordinate Judge held that the suit in its present form would not lie; and that as there was admittedly other joint [145] family property, moveable as well as immoveable, over and above the joint business, the suit ought to have been for partition of the entire family estate. The suit was, therefore, dismissed.

This decision was affirmed, on appeal, by the District Judge.

The plaintiff thereupon preferred a second appeal to the High Court.

Branson (with him *P. P. Khare*), for appellant.

Ganpat S. Rao, for respondent.

JUDGMENT.

FARRAN, C.J.—We agree with the lower Courts in thinking that the plaintiff claiming to be a member of a joint Hindu family cannot maintain a suit for an account of the profits of the Poona partnership which he alleges to be joint family property and an award of his share in such profits when ascertained. This is in accordance with the general rule of Hindu law which governs such cases.

Counsel for the appellant did not controvert that view. What he contended was that his client was entitled to maintain a suit for the injunction which he sought, restraining the defendant from excluding him from the joint possession or management of the Poona shop, and we are of opinion (assuming his allegations to be proved) that the plaintiff is entitled to that portion of the relief prayed for. The plaintiff ought not, we think, to be refused relief to which he is entitled, because he seeks in addition relief to which he is not entitled. There is no rule of law which prevents the Court from interfering to protect a partner in the enjoyment of his rights. The cases will be found collected in Lindley on Partnership, p. 538, and Ker on Injunctions, p. 510. We need only refer to the case of *Z* v. *X* (1), where an injunction was granted restraining the other partners from preventing one member of the firm from transacting the business of the partnership. The rule of Hindu law does not prevent an injunction being granted in cases of the ouster of one member of the family from an item of family property—*Anant Ramrav* v. *Gopal Balvant* (2) and *Ramchandra* v. *Damodhar* (3).

[146] We reverse the decrees of the lower Courts and remand the case to the Court of first instance to be dealt with on the merits having regard to this judgment. Costs, costs in the cause.

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(1) (1855) 2 K. and J. 441. (2) 19 B. 269. (3) 20 B. 467.

23 B. 146.

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23 B. 146.

Before Sir C. F. Farran, Kt., Chief Justice, Mr. Justice Ranade and Mr. Justice Fulton.

SADASHIV VAMAN DHAMANKAR (*Original Defendant*), *Appellant v.* TRIMBAK DIVAKAR KARANDIKAR (*Original Plaintiff*), *Respondent.** [10th March, 1898.]

Minor—Capacity to contract—Contract Act (IX 1872), ss. 2, 10, 11, 247, 248—Ratification—Release by minor father of his interest in joint property to his son—Family arrangement—Voluntary conveyance by father to son—Transaction impeached by subsequent creditors.

Per FARRAN, C.J., and RANADE, J., (FULTON, J., *dissenting*):—In India the contract of a minor is not void, but voidable only, and is capable of ratification after he attains majority.

A release by a minor father of all his right and interest in the ancestral property to his son *held* to be valid if ratified by the donor after he attained majority.

Per RANADE, J.—The property sought to be protected by the release was admittedly ancestral property, and Vaman's minor son had a half-share in it, of which the minor could at any time claim partition. The release was only intended to protect Vaman's one half-share against the consequences of his own improvidence. When all existing debts were paid off and settled, Vaman's right to make a voluntary conveyance of the same in his minor son's interest cannot be questioned. Such conveyances are well known in English law, and there have been cases in India also where Courts have given effect to such voluntary conveyances or gifts by a father to his son—*Ganga Sahai* v. *Hira Singh* (1). Such transactions do not become colourable merely because in their ultimate consequences they have the effect of protecting the family property against the prospective extravagance of the settlor, or because no adequate consideration is shown to have been paid by the party benefited.

Per FULTON, J.—Apart from s. 7 of the Transfer of Property Act, 1882 (which was not in force in the Presidency of Bombay when the release of 1887 was executed) a conveyance depends on a preceding contract and cannot be valid unless the party making it is competent to contract. Without an antecedent agreement to give and receive there can be no transfer at all. The [147] power to convey must depend on the power to contract. Unless it can be held that the provisions of s. 10 of the Contract Act were not meant to be exhaustive, and it was intended to leave out of consideration agreements by minors, we must hold that a minor is incompetent to contract.

Vaman Sadashiv, a minor member of an undivided Hindu family, in 1887 executed a release of his right and interest in certain ancestral property to his minor son. In 1892 the plaintiff obtained a decree against him in respect of a debt incurred subsequently to the date of the release, and he sought to attach the released property in execution of his decree. He impeached the validity of the release.

Held by FARRAN, C.J., and FULTON, J. (RANADE, J., *dissenting*) that the release was inoperative, and that the plaintiff was entitled to attach the property in execution of his decree.

By FARRAN, C.J., on the ground that it had not been ratified by Vaman after he attained his majority.

By FULTON, J., on the ground that the release was absolutely void and incapable of ratification.

Per FARRAN, C.J., and RANADE, J., (FULTON, J., *dissenting*).—The release was voidable only at the option of the minor (Vaman), and was not void, and if it was ratified or not repudiated by him on attaining majority, it was, in the absence of fraud, a valid transaction, at least as against judgment-creditors whose debts were of a subsequent date.

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* Second Appeal No. 669 of 1896.

(1) 2 A. 809.

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[Appl., 12 A.L.J. 1098=25 Ind. Cas. 193; R., 23 B. 406 (412); 26 B. 577 (585): 33 M. 205 (207)=4 Ind. Cas. 301=19 M.L.J. 747=7 M.L.T. 28; 25 Ind. Cas. 183; Expl., 7 O.C. 181 (183).]

SECOND appeal from the decision of L. G. Fernandez, First Class Subordinate Judge of Thana, with appellate powers.

Suit for a declaration that certain property was liable to attachment in execution of plaintiff's decree against one Vaman Sadashiv, the father of the defendant.

The decree was obtained in 1892 by the plaintiff against Vaman Sadashiv, and in 1893 the property was attached in execution. Thereupon the guardians of the defendant, who was a minor, applied to have the attachment removed. They claimed that by a release dated 12th October, 1887, long before Vaman's debt to the plaintiff had been incurred, Vaman had released all his interest in the property to his son the defendant, and that consequently it was not liable to attachment for his debts.

The attachment was accordingly removed on the 27th August, 1893, and the plaintiff then filed this suit.

The property released was ancestral property, having been inherited by Vaman from his adoptive father. At the date of the [148] release, Vaman and his son the defendant were jointly interested in it as members of a united family, and by the release Vaman purported to make over all his right and interest therein to the defendant. The document recited his inability to manage the estate and an arrangement made by his sister Subhadrabai that she would allow him Rs. 15 a month for his maintenance in case he should execute it, and proceeded as follows:—

"Knowing that the object of my father was that the estate should not be wasted, that the same should always remain with the family, and knowing also that your object also is that the estate should remain for the benefit of the boy, I agree to your above proposal, and having waived all my right to and interest in the whole of the undermentioned immoveable and moveable 'estate,' I have given (the same) to Sadashiv Vaman, in respect of which I have given this release in writing.

"The whole of the abovementioned immoveable and moveable property has been this day given into your possession and charge, and all the papers relating to the *vahivat* and ownership of the immoveable property have been delivered into your possession for enjoyment (thereof). To the said property I have (now) left in me no right, title and interest of any kind whatever. I will get the immoveable property transferred to your name in the Government records at any time you may require me to do so. I have duly given this release in writing of my own accord. The handwriting of Vinayak Narayan Gogte, an inhabitant of Banvel."

It appeared that in 1891 an application was made to the District Court for a certificate of administration to the estate of the defendant, who, as already stated, was a minor. Vaman opposed the application and in the course of the proceedings denied and repudiated the above release. He subsequently, however, withdrew his opposition to the application.

The Court of first instance dismissed this suit, holding that the release was valid and genuine, and that the property was, therefore, not liable to Vaman's debts.

On appeal the lower appeal Court reversed the decree and passed a decree for the plaintiff, holding the release invalid and inoperative on the grounds (1) that Vaman was a minor when he executed it in 1887, (2) that he did not ratify it on attaining majority, and (3) that it was a

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colourable transaction and did not operate to transfer Vaman's interest to his son (the defendant).

[149] On second appeal the main points argued were (1) whether the lower appellate Court was wrong in holding that the release was a colourable transaction not really intended to transfer the property and as such void as against Vaman's creditors; (2) whether, having regard to the provisions of the Indian Contract Act (IX of 1872), a minor was capable of contracting at all, and whether, therefore, the release in question, being made by Vaman while he was a minor, was absolutely void or merely voidable; and (3) if voidable whether the lower Court was wrong, in law, in holding that Vaman had not ratified the release after attaining majority.

The Judges of the appeal Court differed in their judgments. Ranade, J., was of opinion that the decree of the lower Court should be reversed and the suit dismissed, holding (1) that the transaction was *bona fide*; (2) that the release executed by Vaman as a minor was only voidable, and not void; and (3) that it had been ratified by him after he came of age.

Fulton, J., was of opinion that the decree of the lower Court should be confirmed and a decree passed for the plaintiff on the ground that under the Contract Act a minor is incapable of binding himself by contract or execution of a deed of transfer, and that such contract or transfer is void and incapable of ratification on attaining majority. He, therefore, held the release to be invalid. He was further of opinion that in second appeal the High Court was bound by the finding of the lower Court that the release was merely colourable and not intended to transfer the property.

The following judgments were delivered:—

RANADE, J.—In this case, as also in the two other appeals heard along with it, the contest lies between certain judgment-creditors, who obtained decrees against one Vaman Sadashiv Dhamankar in 1892, and in execution of the same attached in 1893 certain properties as belonging to Vaman, and the appellants, who are certificated administrators, appointed by the District Court, of the estate of Vaman's minor son, who obtained possession of the said properties on the strength of a release in favour of his minor son executed by Vaman on 12th October, **[150]** 1887, and who succeeded in removing the attachment of the said creditors on 27th August, 1893. These three suits were accordingly filed in 1894 to obtain a declaration that the properties in dispute were liable to be attached and sold in execution of the decrees against Vaman, and that the release of 12th October, 1887, conferred no rights on Vaman's minor son to the same. The validity of the release-transaction was thus the principal point in issue between the parties, and there was also a further complication created by the circumstance that Vaman was alleged to have been a minor himself when he executed the release in 1887. The Court of first instance held that Vaman was not a minor at the time of the execution of the release, and that the release was a genuine and valid transaction, which transferred Vaman's interests to his minor son so that the property in dispute being included in the release, was not liable to attachment and sale at the instance of Vaman's creditors. In appeal these decrees were reversed, as the lower Court of appeal held that Vaman was a minor when he executed the release in 1887, and that he did not ratify the release on attaining majority, and, lastly, that the release was a colourable transaction and effected no transfer of Vaman's interest to his minor son; so that the properties in dispute were liable to attachment and sale.

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In second appeal, the three points to which the arguments of learned counsel on both sides were confined were: (1) whether Vaman was a minor at the time of the execution of the release; (2) whether he could on attaining majority ratify the release so as to validate it, and whether he did so ratify it; and (3) whether the release was a genuine and valid transaction, or only a colourable one which effected no transfer of interest. These are points of mixed law and fact. So far as they relate to matters of fact, this Court is bound to accept the findings of the lower Court of appeal.

In regard to Vaman's age in October, 1887, I must, therefore, accept as final the decision of the lower Court of appeal, namely, that he was under 21 years at the time. As his adoptive mother had taken out a certificate of guardianship and administration, her subsequent death shortly after would not enable Vaman to [151] attain his legal majority when he was 18 years old. The appellants' contention to the contrary is opposed to a series of rulings both of this Court—*Yeknath* v. *Warubai*(1), and of the Calcutta High Court—*Girish Chunder* v. *Abdul Selam*(2), *Rudra Prokash* v. *Bhola Nath*(3), *Chunee Mul Johary* v. *Brojo Nath Roy*(4)—and I must, therefore, overrule this objection.

The next point for consideration is whether Vaman could ratify, after attaining majority, the release executed by him when he was legally a minor; and if so, whether there was a legal ratification of the same; in other words, whether the release was a void or voidable transaction, and if the latter, whether it was repudiated by Vaman. It is necessary to discuss this point in some detail, for my learned colleague, Mr. Justice Fulton, has come to a different conclusion from mine. His view is that a minor is incapable of binding himself by contract or execution of a deed of transfer, and that such contract or transfer is void and incapable of ratification on attaining majority. This view is chiefly made to rest on the wording of the definition of "contract" given in s. 10, which presupposes parties competent in respect of age (s. 11), and on the corresponding provisions of the Transfer of Property and Trusts Acts. I regret to be unable to accept this view, and I hold that the point is concluded by a long course of decisions.

The law as it stood prior to the Contract Act has been clearly expressed by Mr. Justice Markby in *Hari Ram* v. *Jitan Ram* (5) decided in 1869. In this case the mortgage-bond was executed by the agent of a minor owner and registered, and the mortgagee was in possession. This possession was sought to be disturbed by the auction-purchaser of the minor's right, title and interest on the ground that the bond was void and of no effect. It was held in that case that the transaction was voidable only, and that until it was so avoided by some distinct act of the minor on his attaining majority it must be considered to be a valid transaction.

[152] Then came the Contract Act of 1872, and the construction to be placed on s. 10 of that Act was considered by the Calcutta High Court in *Sashi Bhusan* v. *Jadu Nath* (6). Garth, C.J., and McDonell, J., held that the lower Court's view that a bond passed to a minor was void by reason of its being entered into by a party not competent to contract, was not correct. Their Lordships observed further that "the language of the Indian Contract Act may well have led to this mistake. A contract entered into with a minor is only voidable at the option of the minor." The same point

(1) 13 B. 285.
(2) 14 C. 55.
(3) 12 C. 612.
(4) 8 C. 967.
(5) 3 B.L.R. 426.
(6) 11 C. 552.

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was similarly decided by Sargent, C.J., and Nanabhai Haridas, J., in *Hanmant* v. *Jayarao* (1). It will be noted that while in *Hari Ram* v. *Jitan Ram*, the mortgage-bond was passed by an agent of the minor owner, in the two other cases noted above the bonds were passed in favour of the minor, but this circumstance was held not to make any difference, notwithstanding the terms of the Contract Act. The question whether any and what change was effected by the Contract Act in regard to the validity of contracts and transfers by minors, was again considered by the Calcutta High Court in *Mahamed Arif* v. *Saraswati Debya* (2), in which case Tottenham and Trevelyan, JJ., held "that a transfer by a minor was only voidable under Hindu law. Apart from the Contract Act, ... this transaction must be held valid, as it was not avoided by the minor." In the Contract Act "there is no express provision declaring the contract of an infant to be void, but it is said that s. 2, sub-ss. (*g*) and (*h*), and ss. 10 and 11 have this effect. ... In the case of *Sashi Bhusan* v. *Jadu Nath* (3), a Division Bench held that a contract entered into with a minor was only voidable at the option of the minor. We have carefully considered this decision. The question is one of some difficulty, but on the whole we prefer to follow the decision to which we have referred." The case of *Sham Charan* v. *Chowdry Debya* (4) was also on a bond passed by a minor for raising money to defend himself in a certain prosecution instituted against him, and the Judges held that the minor was liable on the contract. In *Watkins* v. **[153]** *Dhunnoo Baboo* (5), a minor was similarly held liable for the costs of a suit in which he was defendant, and in which his property was in jeopardy. The only case which appears to militate against this current of authorities is that of *Fatima Bibi* v. *Debnauth Shah* (6), where Norris, J., expressed his view that "a minor in this country cannot contract at all, and that no other construction can be put on s. 11 of the Act. But whether I am right or wrong, does not seem to signify as far as this case is concerned, because this is a case of specific performance of contract" and it has been decided that a minor cannot claim specific performance. Such a hesitating expression of opinion by a single Judge on a point not directly arising in the case cannot, in my opinion, be set against the numerous decisions of Division Benches of this and the Calcutta High Courts, where the operation of the Contract Act was expressly considered. I am accordingly inclined to hold that this point is concluded by the authorities noticed above, and that a minor's contracts and transfers are not absolutely void acts, but only voidable at his option on attaining majority.

Even if the question were not so concluded by authority, I should be inclined to come to the same conclusion on general grounds. The Contract Act expressly enumerates eight classes of void agreements, and a minor's contracts are not included in this list. Sections 20 and 24-30 have a common feature that they relate to the nature of the subject-matter, and have no relation to the parties contracting. Contracts founded on a mistake of facts common to both parties, wager contracts, contracts in restraint of trade, marriage, and legal proceedings, contracts without consideration, or for unlawful consideration, or uncertain agreements—all these have this common feature, and what is true of agreements is true of contracts, for contracts are defined to be agreements enforceable by law. Where a contract is enforceable on one side, but not on the other, such

(1) 13 B. 50. (2) 18 C. 259. (3) 11 C. 552.
(4) 21 C. 872. (5) 7 C. 140. (6) 20 C. 508.

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contracts are expressly defined to be *voidable*, and not *void*. A minor's liability for contracts for necessaries must be affirmed under every system of law; only s. 68 makes his property, but not the [154] person of a minor, liable in this case. The Contract Act itself expressly recognizes a minor partner's liability (s. 247), and the Transfer of Property Act which follows the Contract Act, s. 7, in this respect, similarly recognizes a minor donee's obligation, when he accepts a gift burdened with conditions, and does not repudiate the gift. These circumstances show that the Legislature could never have intended to affirm a general and total incapacity of minors, as such, to enter into contracts. The minor who executed the release in this case actually put himself forward as a man who had attained majority, and he took bonds and *kabulayats* in his own name one or two years before the release. Though technically a minor, he was a married man, and had a minor son born to him a year or two before the release, and the evidence of minority was so conflicting as to lead two competent Judges to two different conclusions. He was old enough to run into extravagance, and repent of the same. I should hesitate, therefore, to lay down that such a minor's contracts were absolutely void.

As shown above, the authorities are all the other way, and I, therefore, hold that the release in this case was voidable only at the option of the minor, and was not void, and that if it was ratified, or not repudiated by the minor on attaining at age of majority, it was in the absence of fraud a valid transaction, at least as against those judgment-creditors whose debts were of a subsequent date to the release.

The question of ratification has been considered by the lower Court of appeal from a legally wrong point of view. It has relied chiefly upon the circumstance of Vaman's opposition to the appellant's application for a certificate of administration to the minor's estate in 1891, and certain stray acts of Vaman committed by way of self-assertion. As regards the opposition to the certificate proceedings, it is to be noted that he withdrew the same on further consideration. The statements of Vaman in these certificate proceedings, made by him before he withdrew his opposition, are entitled to no weight, seeing that they were made to serve his immediate purpose of the hour. It is not this opposition made five years after the release, but his conduct soon after [155] attaining majority, that ought to have been considered by the lower Court of appeal—*Hari Ram* v. *Jitan Ram* (1). Vaman admittedly attained his majority in 1888-89, and the evidence of his conduct in that year, and in the following two years, shows clearly that he fully accepted the situation created by the release. The debtors and tenants of Vaman passed bonds, *khatas*, *kabulayats*, receipts and agreements in favour of his minor son represented by his guardian or next friend Sundrabai (*alias* Subhadrabai), and a hundred such exhibits have been filed in the case, of Shake 1810, 1811, 1812. Suits were brought in the son's name, and darkhasts given to execute decrees. On some of the bonds and agreements passed in favour of the minor son, Vaman made endorsements, Ex. 257, acknowledging receipt of payments, and one of these bonds is attested by one of the judgment-creditors in these suits, Ex. 108. Taking all the transactions of these five years, it is quite plain that without Vaman's active concurrence, such a renovation of contracts could not have taken place. During all that time, Vaman only executed two sale-deeds, Exs. 269, 270, in his own name, and appears to have appropriated two sums

(1) 3 B.L.R. 426.

for which he passed receipts, Exs. 58, 59. The two subsequent receipts, Exs. 254, 255 are of a doubtful character, because the present appellants gave notice and made protests. Such conduct and acquiescence on Vaman's part leave no room for doubt that he not only did not repudiate the release, but actually co-operated in giving effect to it after attaining majority. I accordingly hold that the release was duly ratified by Vaman.

Such conduct might also operate by way of estoppel against Vaman and Vaman's subsequent creditors—*Ganesh* v. *Bapu* (1); *Sarat Chunder* v. *Gopal Chunder* (2). Estoppel under s. 115 of the Evidence Act operates even against minors who put themselves forward as majors, and prevents them and those who claim under them from raising the question of their incompetency to the detriment of those who, acting on the faith of such representations, have been led to enter into certain transactions.

The third and most important question to be considered is whether the release was a merely colourable transaction, and as **[156]** such void against Vaman's judgment-creditors. On this point also, so far as the decision of the lower Court relates to a matter of fact, I am bound to accept its finding that Vaman's sister Subhadrabai did not, as she stated, pay any money of her own to satisfy Vaman's creditors. The point is not very material, as all existing debts were admittedly paid off by Vaman, or for him by his sister Subhadrabai. The evidence is clear that all Vaman's creditors at the time of the release were paid off, and that the debts of the judgment-creditors in these three cases are all of a subsequent date, contracted apparently in 1891, when the application was made for a certificate. There was thus admittedly no fraud practised or intended against old creditors of Vaman by those who advised him to execute the release, and who were well-wishers of his family, being in fact the pleaders who conducted the judgment-creditors' suits in these three cases.

It appears to me that the lower Court of appeal did not correctly apprehend the true nature of the release transaction. The property sought to be protected by the release was admittedly ancestral property, and Vaman's minor son had a half-share in it, of which the minor could at any time claim partition. The release was only intended to protect Vaman's one-half share against the consequences of his own improvidence. When all existing debts were paid off and settled, Vaman's right to make a voluntary conveyance of the same in his minor son's interest cannot be questioned. Such conveyances are well known in English law, and there have been cases in India also where Courts have given effect to such voluntary conveyances or gifts by a father to his son—*Ganga Sahai* v. *Hira Singh* (3). Such transactions do not become colourable merely because, in their ultimate consequences, they may have the effect of protecting the family property against the prospective extravagance of the settlors, or because, no adequate consideration is shown to have been paid by the party benefited.

The consideration in such cases need not be valuable. It is enough if it is what the law regards as good, *i.e.*, natural affection for wife and children. There is nothing illegal in such a conveyance if it is made *bona fide*, and is not intended to defraud **[157]** creditors. When the father is involved in debts and makes a settlement, *mala fides* is presumed. But when there is no such indebtedness, no *mala fides* can be presumed merely from the possibility that the settlement might prejudice the claims of subsequent creditors. The lower Court appears to have lost

(1) 21 B. 198. (2) 20 C. 296. (3) 2 A. 809 (811).

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sight of this distinction, which the law makes between the claims of existing and subsequent creditors when it presumed against the *bona fides* of the release chiefly on the ground of its being prejudicial to the interests of Vaman's subsequent creditors. In the present case, the advisers of Vaman were aware of this distinction, and insisted on the prompt payment of all existing debts, and these were admittedly paid off, and every effort made to give the widest publicity to the transaction, and avoid all secrecy or underhand dealing. Under these circumstances, there was no room for presuming any fraudulent intention on the part of Vaman or his advisers. In the words of Chancellor Kent, (1) " fraud in a voluntary conveyance was an inference of law in so far as it concerns existing debts. There is no such legal presumption as regards subsequent debts. There must be proof of positive fraud in fact" to vitiate a voluntary conveyance. No such evidence of positive fraud is forthcoming in the present case. If the release were a *bona fide* voluntary conveyance in its inception, it could not become colourable because the settlor, long after its execution, contracted more debts, and under the pressure of his creditors sought for a time to encroach upon his minor son's rights in breach of the settlement, after he had ratified the same by his active co-operation. Both the grounds on which the lower Court of appeal has relied, namely, absence of consideration, and prejudice to prospective creditors, in support of its view that the release was a colourable transaction, appear to me to be erroneous as reasons for upsetting a *bona fide* settlement in the nature of a voluntary conveyance duly made and acted upon.

I would, therefore, reverse the decree of the lower Court and restore that of the Subordinate Judge in this and in the other two appeals and dismiss the claims. Under the circumstances I would direct each party to bear his own costs.

[158] As there is a difference of opinion between myself and Mr. Justice Fulton, and the difference relates to important points of law, we now order, under s. 575 of the Code, that the case may be referred to a third Judge, or either the Chief Justice or such other Judge or Judges as he may appoint.

FULTON, J.—It appears that in 1887 Vaman Sadashiv while still under the age of 21 executed a document purporting to convey to his infant son Sadashiv the whole of his estate subject to a reservation in his own favour of an allowance of Rs. 15 per mensem to be paid out of the income. It is not suggested that the deed was executed in fraud of existing creditors, as arrangements were made to pay them off by Subhadrabai at whose instance the transaction took place. The object, assuming that the conveyance was intended to represent a real transaction and to give the son exclusive rights of ownership against the father, was, I think, legitimate. By thus settling the property it was meant to protect it against the effects of Vaman's extravagance. The deed was registered and was thus open to the inspection of persons having dealings with him if they chose to take the trouble to search for alienations. Assuming, then, that the deed represented a real and not a mere *benami* transaction, no case of fraud seems to arise—*Rajan Harji* v. *Ardeshir* (2).

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(1) Story's Equity Jurisprudence, paras. 350—359. *Twyne's Case*, 1 Smith's Leading Cases. 52.

(2) 4 B. 70.

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After the date of the deed, Vaman incurred debts. The plaintiff is one of his creditors who obtained a decree against him and in execution attached the property. Subsequently the attachment was removed at the instance of Sadashiv's guardians; and the plaintiff now sues to have it declared that the property is liable to attachment and sale in execution of his decree.

The question, then, arises whether under the deed above referred to, or at any subsequent period, Vaman is proved to have conveyed the property to Sadashiv, not as a mere *benamidar*, but as a beneficial owner. That Vaman was a minor when he executed the conveyance, seems clear. The First Class Subordinate Judge, A.P., has found that he was under 21. A guardian of his person and property had been formerly appointed under Act XX of 1864, and although that guardian was dead, the effect of the appointment [159] was, I think, to prolong the minority up to 21 under the provisions of s. 3 of Act IX of 1875. The section runs as follows :—" Subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of justice and every minor under the jurisdiction of any Court of Wards shall, notwithstanding anything contained in the Indian Succession Act (X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of 21 years and not before : Subject as aforesaid every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before."

On the mere wording of the section it seems clear that Vaman remained a minor until 21, as a guardian of his person and property had been appointed. But in *Yeknath* v. *Warubai* (1) a doubt was suggested whether on the death of such guardian the position of the minor would not revert to what it was prior to the appointment. In argument on this question we were referred to decisions in *Mungniram Marwari* v. *Gursahai* (2) and *Girish Chunder* v. *Abdul Selam* (3), but they do not directly deal with the point. The case of *Rudra Prokash* v. *Bhola Nath* (4), however, is a distinct authority on the point, which has, moreover, been recently determined in this Court by the decision in *Gordhandas* v. *Harivalabdas* (5).

The next question to be determined is whether property can be conveyed by a minor. The subject is one on which I write with diffidence, for it is one of much difficulty. Apart from s. 7 of the Transfer of Property Act (which was not in force in this Presidency when this document was executed) it seems to me that a conveyance necessarily depends on a preceding contract and cannot be valid unless the party making it is competent to contract. There must be an agreement to give and to receive, and the property passes when this concurrence of intentions is arrived at, and such forms as the law prescribes, are completed. [160] The transfer may not take place till some act, such as the delivery of possession or the execution and registration of a conveyance, has been performed, but without an antecedent agreement to give and to receive there can, I think, be no transfer at all. I have not been able to find any express authority on this point, but it seems to me that the power to convey must necessarily depend on the power to contract, for it would be a strange anomaly if a person while unable to bind himself with a promise were competent to give away his property. I am, therefore, obliged to

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(1) 13 B. 285. (2) 16 I.A. 195. (3) 14 C. 55.
(4) 12 C. 612. (5) 21 B. 281.

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consider the provisions of the Indian Contract Act in order to see whether in this country a minor can contract.

The object of the Act as stated in the preamble is to define and amend parts of the law relating to contracts. In s. 2 a "contract" is defined for the purposes of the Act as an agreement enforceable by law. In s. 10 there is a further definition as follows :—All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void." Section 11 declares that "every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject." Then in s. 19 there is a special provision which enacts that "when consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused." Sir F. Pollock in discussing the question expresses a doubt whether the expression "voidable contract" is not open to objection (see p. 9 of the 6th edition of his Treatise on Contracts), but however this may be, it is clear that under the Indian Contract Act it is only the definition under s. 19 which makes the transaction therein described a contract, for it does not come within the terms of s. 10 not having been effected by free consent. There is no similar provision in regard to agreements by minors or lunatics, but s. 68 provides for the payment for necessaries supplied to persons incapable of entering into contracts. The section does not state who such [161] persons are, but illustration (*a*) leaves no doubt that lunatics are included. According to English law it appears that a contract by a lunatic or person incapable through drunkenness of knowing what he is doing, is not necessarily void when the other party was not aware of his condition. See *Imperial Loan Co.* v. *Stone* (1), *Molton* v. *Camroux* (2), and *Matthews* v. *Baxter* (3)—also Pollock on Contracts, pp. 90 and 91. But in this country the liability of persons of unsound mind to pay for necessaries and to make compensation for other services rendered to them seems to rest on the provisions of ss. 68 and 70 of the Act rather than on contract. Under the Act, minors appear to be in a similar position.

Sections 247 and 248 deal specially with the admission of minors to partnerships and their liabilities thereunder, but furnish, I think, no argument in favour of their competence otherwise to contract.

It seems, then, to follow that unless it can be held that the provisions of s. 10 of the Contract Act were not meant to be exhaustive, and it was intended to leave out of consideration agreements by minors, we must hold that in India a minor is incompetent to contract. It cannot, however, be suggested that the subject was lost sight of, for, among the qualifications for contracting, majority is specified in s. 11. The Act, it is true, does not purport to deal with the whole law of contract, but it does purport to define certain parts of it, and one of these parts is the method of effecting contracts, and if it be open to hold that agreements by minors have not been dealt with, it must be remarked that ss. 10 and 11 are very misleading. To hold now that these sections do not comprehend within their scope the subject of agreements by minors, seems to me inconsistent with the views expressed by Lord Herschell in *The Bank of England* v. *Vagliano* (4) relied

(1) (1892) 61 L.J. (Q.B.) 449.
(2) (1848) & (1849) 18 L.J. (Ex.) 68 and 356.
(3) (1873) 8 Ex. 132.
(4) (1891) A.C. 107 (144).

on by the Privy Council in *Norendra Nath Sircar* v. *Kamalbasini Dasi* (1). The passage to which I refer is as follows :—

[162] "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used."

In my humble opinion these words are applicable to the subject now under consideration.

If we hold that minors' agreements are only voidable and not void, not only must we impute to the Legislature in enacting ss 10 and 11 of the Contract Act intentions which are by no means apparent, but we shall have also to import similar intentions into the Transfer of Property Act and the Indian Trusts Act enacted ten years later. Section 4 of the former Act says that the portions relating to contracts shall be taken as part of the Indian Contract Act, and s. 7 provides that persons competent to contract are competent to transfer property. The reference in s. 127 to a person not competent to contract must apparently relate to minors and persons of unsound mind. Section 7 of the Indian Trusts Act is as follows :—

"A trust may be created—

(*a*) By every person competent to contract.

(*b*) With the permission of a principal Civil Court of original jurisdiction by or on behalf of a minor."

The assumption in this section seems to be that without the special provision contained in cl. (*b*) a minor being a person incompetent to contract would be incompetent to create a trust. This is the view taken by Mr. Agnew in his Treatise on the Law of Trusts : *vide* p. 125.

The question as to the nature of agreements by minors does not seem to me to be settled conclusively by authority either in this Presidency or in Calcutta. On the one hand, we have the **[163]** decisions in *Sashi Bhusan* v. *Jadu Nath* (2) and *Mahamed Arif* v. *Saraswati Debya* (3) that no change was made in the law on this subject by the Contract Act. But on the other hand the opposite view was taken by Mr. Justice Norris in *Fatima Bibi* v. *Debnauth Shah* (4). In *Sham Charan* v. *Chowdhry Debya* (5) the learned Judges appeared to accept the opinion that a minor's contract was voidable rather than void, but in *Jugul Kishori* v. *Anunda Lal* (6) the point was left undecided. In *Hanmant* v. *Jayarao* (7) the decision that a minor could enforce a bond passed in his favour, the consideration having been wholly received, seems in no way inconsistent with the opinion that an agreement by a minor cannot be enforced and is not a contract. In *Mahableshwara* v. *Timapa* (8) the subject is discussed by Sargent, C.J., and Candy, J., but the point is left undecided.

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(1) 23 I.A. 18 (26).
(2) 11 C. 552.
(3) 18 C. 259.
(4) 20 C. 508.
(5) 21 C. 872.
(6) 22 C. 545.
(7) 13 B. 50.
(8) P.J. (1890), p. 298.

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If the definition of an "agreement" be referred to, it will be seen that it includes a single promise as well as a set of promises forming the consideration for each other. Consequently in the case of promises made to minors for consideration wholly received there seems no difficulty in treating such promises as contracts, for they are made by persons competent to contract for consideration received. Though a minor under the Act may be incompetent to promise, it does not seem to follow that a promise made to him for consideration received is not binding. The case of *Sashi Bhusan* v. *Jadu Nath* (1) deals with such a transaction, though it must be admitted that the language of the judgment appears to suggest that an agreement by a minor is voidable rather than void.

Where the consideration for a promise to a minor consists either wholly or partially of promises by a minor, a difficulty doubtless arises. But the same difficulty will, I think, be felt whether the promise by the minor is looked upon as void or as merely voidable, for in either case there is a want of mutuality. A promise revocable at the option of the promisor can hardly be treated as consideration until it has been re-affirmed and thereby **[164]** been made irrevocable on the attainment of majority. Where owing to the promises made to him the minor has done something or delivered possession of property, the doctrine of estoppel may possibly prevent the repudiation by the adult of his obligation to perform his promises.

The conclusion, then, at which I have arrived, though not without much hesitation and regret at my inability to concur with my learned colleague, is that Vaman when he executed the deed of the 12th October, 1887, was not competent to convey and did not transfer to Subhadrabai or Sadashiv any interest in the estate. If this view of the law be correct, it follows that the property is still vested in Vaman, for it is not suggested that since he attained majority there has been any act on his part forming a fresh conveyance of the estate. If the deed of the 12th October, 1887, is invalid, the defence fails.

Moreover, even if the above opinion be erroneous, the decree of the First Class Subordinate Judge, A. P. must, I think, be confirmed on another ground. The First Class Subordinate Judge on a review of all the circumstances, and bearing in mind the fact that there was no consideration for the deed (for he evidently did not believe that Subhadrabai paid any money out of her own pocket in liquidation of the debt, and must have noticed that the deed contains no allusion to the payment of debts and merely provides for the receipt by Vaman out of the estate of an allowance of Rs. 15 per mensem) came to the conclusion that it was merely a colourable transaction. He seems to have considered that the document was, to use the language of the Privy Council in *Abdul Hye* v. *Mir Mohammed* (2), a mere pocket instrument not intended to operate according to its tenor and effect by which the property was put in the name of Sadashiv for the benefit of Vaman. It will not, I think, be disputed that, if there were no consideration for the deed and no real intention on Vaman's part to make a gift of the property to his son as against himself, the mere execution of the deed would be invalid against creditors. The decision of the Privy Council just referred to is an authority for this proposition. The want of consideration **[165]** is apparent from the language of the deed itself and the absence of any reliable evidence that Subhadrabai defrayed any debts out of her own

(1) 11 C. 552.

(2) 10 C. 616.

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pocket. The allowance of Rs. 15 per mensem was a reservation out of the estate, and no one undertook any personal responsibility for it. The question of intention is one of fact in regard to which this Court cannot on second appeal do otherwise than accept the finding of the First Class Subordinate Judge. The lower appellate Court was aware that a number of documents were drawn up in Sadashiv's name, but looking to the conduct of the parties and the circumstances of the case, came to the conclusion that the transaction was merely colourable. This decision seems to me to be binding on the Court, for the First Class Subordinate Judge does not appear to have overlooked any evidence or to have been under any misapprehension as to the law applicable to the subject. The law is clearly laid down in *Tillakchand* v. *Jitamal* (1) as follows :—" But if the sale or mortgage be only a colourable transaction, or a mere sham, and not intended to confer upon the alleged grantee or mortgagee any beneficial interest in the property, and simply (for the purpose of screening it from execution) to substitute such grantee or mortgagee as nominal owner in lieu of the real owner (the debtor), and to make such nominal owner nothing more than trustee for the real owner (the debtor), and thus to endeavour to preserve the property for the latter, such a sale or mortgage would be invalid as against the creditor and he would be entitled to attach and sell the property." Possibly in such a case the real reason may be that no property passes, because none is intended to pass. See the extract from Bracton quoted at the end of Pollock on Contracts. " *Item non valet donatio nisi tam dantis quam accipientis concurrat mutuus consensus et voluntas, scilicet quod donator habeat animum donandi et donatarius animum recipiendi.*" But however this may be, there is, I think, sufficient authority for the view of the law taken by the First Class Subordinate Judge.

I am, therefore, of opinion that the decree should be confirmed with costs both in this case and in Second Appeals Nos. 704 and 705 of 1896.

[166] The Judges having thus differed in opinion, the appeal was referred, under s. 575 of the Civil Procedure Code (Act XIV of 1882), to Farran, C. J. He agreed with Ranade, J., upon the first two of the questions above stated, but upon the third he held that there was evidence upon the record upon which the lower appellate Court was entitled to hold that the release had not been ratified. He agreed, therefore, with Fulton, J., that the decree for the plaintiff passed by the lower Court should be confirmed.

The following are the arguments and judgment on the reference :—

Branson (with *Mahadev R. Bodas*), for the appellant (defendant).—The lower appellate Court has given the plaintiff a decree and has held the property in question to be liable in execution of his decree against Vaman, on the grounds that the release was a sham, and that Vaman did not ratify it after attaining majority, but on the contrary repudiated it. As to the first point, we deny the release was a sham or that it was in fraud of creditors. All the then existing creditors were paid off, and full publicity was given to the transaction—*In re Johnson* (2); *Gnanabhai* v. *Srinivas* (3). No new debts were incurred until 1891. It was in the nature of a family settlement. A subsequent creditor is not entitled to impeach it. Fulton, J., has held that Vaman being a minor was incompetent to execute a release which implies a contract. The release here was in the nature of a grant and a grant does not necessarily imply an

(1) 10 B.H.C.R. 206 (210). (2) (1881) 20 Ch. D. 389. (3) 4 M.H.C.R. 84.

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antecedent contract. This is the case of a gift by a minor father to his minor son which can be ratified by the father on attaining majority—Simpson on Infants, pp. 5, 9, 22, 26, 46, 48 and 182. But, even regarding this as a case of contract we contend that a minor's incompetency to contract does not make his contract void, but only voidable, and it may be ratified by him on his attaining majority—*Mahamed Arif* v. *Saraswati* (1). Vaman ratified this release after he attained majority. His statements in the certificate proceedings in 1891 repudiating the release are not evidence. They were statements made in his own interest and cannot be used by the plaintiff who claims through him. Up to 1891 Vaman gave full effect to the release, which was duly registered.

[167] *Robertson* (with *N. G. Chandavarkar*), for the respondent (plaintiff).—The finding of the lower Court that the release was a sham, and was never intended to be operative except as against creditors, is binding on this Court in second appeal—*Ramratan* v. *Nandu* (2). Soon after Vaman came of age he asserted his right to the property and in 1891 he repudiated the release in the certificate proceedings. His statements there are admissible under s. 33 of the Evidence Act (I of 1872).

Under Indian law the contract of a minor is not voidable but is absolutely void—*Fatima Bibi* v. *Debnauth* (3). Only those who are of age can contract—Contract Act (IX of 1872), ss. 10 and 11. See also s. 3 of the Registration Act (III of 1877), which forbids registration of a document executed by a minor. If the release, then, was a contract, it was void. Further, there was no consideration for it. It was not love and affection under s. 25 of the Contract Act (IX of 1872), for Vaman's object was to protect himself—*Vasudeo Bhat* v. *Venkatesh* (4). If a trust, it was invalid under s. 7 of the Indian Trust Act (II of 1882). If it was a gift, it was a gift by a minor of his whole property, which is invalid—*Hearle* v. *Greenbank*(5); Simpson on Infants, p. 5; Trevelyan's Law of Minors, p. 272; Strange's Hindu Law, Vol. I, p. 271. See also *Appa Pillai* v. *Ranga Pillai* (6).

Branson in reply.—The payment of Vaman's debts out of the family estate was a sufficient consideration for the release or the undertaking by Vaman's sister to pay Rs. 15 a month to Vaman—*Bithal Das* v. *Shanker* (7); *Mantappa* v. *Baswantrao* (8).

JUDGMENT.

FARRAN, C. J.—The learned Judges who heard this second appeal having differed in opinion as to the decree which should be passed upon it, the appeal has been referred to me under s. 575 of the Civil Procedure Code. Counsel have been heard and I now proceed to give my judgment upon the several questions which are involved in the reference. In order to define with precision what these questions are, I briefly state the general facts of the case.

[168] The suit was brought by a creditor of Vaman Sadashiv seeking a declaration that certain property which he had attached was the property of Vaman. On the 12th October, 1887, Vaman had executed an instrument, styled a release, in favour of his minor son Sadashiv Vaman, represented by the minor's aunt Subhadrabai *alias* Savitribai. Vaman was her adopted brother much younger than she. The release states that the whole of the property moveable and immoveable, which had descended

(1) 18 C. 259. (2) 19 C. 249. (3) 20 C. 508.
(4) 10 B.H.C.R. 139. (5) 3 Atk. Rep. 712. (6) 6 M. 71.
(7) 17 A. 264 (271). (8) 14 M.I.A. 24.

from Vaman's (adoptive) father Sadashiv Vinayak, had been in Vaman's possession and charge after his mother's death, and goes on to release Vaman's interest in the same in favour of his minor son Sadashiv. The operative parts of the instrument run as follows. (His Lordship read the passage above set forth (p. 148) and continued:—) The Judge in appeal differing from the Court of first instance has come to the conclusion that Vaman was less than 21 years old when he executed the release. He does not find definitely what Vaman's exact age then was, but he states that the evidence, which he considers reliable, shows that Vaman was born in 1868. Vaman was thus at least 19 years of age when he executed the release, but he was, in law, a minor. His adoptive mother, who subsequently died, had been appointed guardian of his person and to administer his estate. The referring Judges are agreed that Vaman was, in law, a minor when he executed the release. They differ as to whether under the circumstances of the case the attaching creditor is bound by the release.

The questions which present themselves as calling for solution are:—

(1) Whether in second appeal we can hold that the lower appellate Court was wrong, in law, in finding that the release represented a colourable transaction, and is ineffectual to exempt the property in suit (which was comprised in the release), from attachment and sale at the instance of the plaintiff? The plaintiff's debt was incurred by Vaman long subsequent to the release.

(2) Whether such a release passed by a minor is absolutely void, or is only avoidable so as to become valid if ratified by such minor after attaining majority?

[169] (3) Whether the lower Court was wrong, in law, in holding that Vaman had not ratified the release after attaining majority?

I have stated the questions in the above order, because, if the release was invalid in its inception, the other questions need not be considered; and also because I desire to keep distinct the first and third questions, though the facts which it is necessary to refer to in order to determine them, are in some instances the same.

Now as to the first question, the execution of the deed being admitted, and it having been registered, the burden of proving that it is invalid lies, I think, upon the plaintiff. Certainly the burden of proving that it was not real, lies upon him—*Sham Chand* v. *Protap Chandra* (1). I do not say that he need bring forward direct proof that the release was unreal, or that it was fraudulent, but he must prove circumstances from which the unreality of the release, or its fraudulent character, may be legitimately inferred. It is not alleged in this case that the release was obtained by means of fraud or of undue influence exercised over Vaman by his sister Subhadrabai, nor do I think that it would be open to an attaching creditor to impeach it upon that ground. The plaintiff can only succeed by showing (*a*) that the release was made in favour of Sadashiv with the intent of actually conveying the share of Vaman to Sadashiv, but with the further intent to delay, hinder and defraud Vaman's creditors within the meaning of the Statute of Elizabeth, or (*b*) that it was, as Mr. Justice Fulton calls it, a mere pocket instrument, not intended to operate according to its tenor and effect, by which the property was put in the name of Sadashiv for the benefit of Vaman—a mere *benami* transaction. The English cases where real estate or chattels real are concerned, deal almost

(1) 24 I.A. 186.

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exclusively with the former class of fraudulent or unreal conveyances. Indeed, it may, I think, be questioned whether under English law a conveyance of real estate when delivered to the grantee does not always, where no fraud has been practised on the grantor, operate to transfer the property in the land, the subject of the conveyance, from the grantor to the grantee, though there may exist a secret trust in favour of the former giving him a right [170] to call for the reconveyance of the estate. In India where the *benami* system is common, it has been recognized by our Courts that there may be a sham conveyance, which, though registered and delivered to the grantee, not being intended to pass the property, but merely to be used as a blind to deceive creditors or others, conveys no estate to the nominal grantee : see *Tillak Chand* v. *Jitamal* (1), where English decisions relating to goods have been applied to transactions relating to immoveable property in India—*Abdul Hye* v. *Mir Mohammed* (2).

It was not contended in the argument before me, nor, so far as I can see throughout the case, that the instrument in question was of the former class. The circumstances that the then existing debts of Vaman were all paid off by Subhadrabai at or about the time when the release was executed and as part of the same transaction ; that the release was registered and publicly notified throughout the district ; that its openly avowed object expressed in the instrument itself was to protect the ancestral estate from the consequences of Vaman's imprudence and extravagant habits, preclude the idea that, *if intended to be operative between the parties to it as a release*, it was executed for the purpose of defeating, hindering or defrauding creditors. See the judgment of Mr. Justice Fry in *In re Johnson* (3).

The judgment of the lower appellate Court did not, however, I think, proceed upon the ground that the release was fraudulent within the spirit of the Statute of Elizabeth, but upon the footing that it was a colourable instrument not intended to operate as a release or to convey Vaman's share in the estate to Sadashiv or to divest Vaman of his co-parcenary rights in the property. This was the form in which the issue was raised in the lower appellate Court and this was the issue which that Court decided in favour of the plaintiff.

Upon this part of the case Mr. Justice Ranade considers "that the lower appellate Court did not correctly apprehend the true nature of the release transaction" and "that both the grounds on which the lower Court of appeal has relied, namely, the absence of consideration and prejudice to prospective creditors in support of its [171] view that the release was a colourable transaction, appear to be erroneous as reasons for upsetting a *bona fide* settlement in the nature of a voluntary conveyance duly made and acted upon ;" and that, therefore, the decree should be reversed; while Mr. Justice Fulton considers that there was evidence to support the finding of the lower appellate Court "that the release was a mere colourable transaction, and that Vaman did not intend to release his share in the estate to Sadashiv," and that, therefore, the decree should be confirmed. Mr. Justice Fulton also rested his judgment on the ground of Vaman's minority at the date of the release.

Though the learned Judges appear, at first sight, to have thus approached the consideration of the appeal from somewhat different points of view, I think that it is not really so. Mr. Justice Fulton admits, in the opening paragraph of his judgment, that 'if the intention of Vaman was to

(1) 10 B.H.C.R. 210. (2) 10 C. 616. (3) (1881) 20 Ch.D. 389.

pass a real and not a sham document, no case of fraud would arise'—the release would be good as a voluntary conveyance—but thinks that there is evidence upon which the lower appellate Court could find that the release was a sham: while Mr. Justice Ranade considers that the lower appellate Court ought, upon the evidence, to have come to the conclusion that the release was a *bona fide* voluntary conveyance, thus in effect holding that there was, in his opinion, no evidence which could support the finding that the release was colourable.

The question, therefore, narrows itself to this: Is there evidence in the case upon which the lower appellate Court's finding can be supported? In my opinion, there is not. The *onus* of proving that the instrument was colourable, rests, as I have shown, upon the plaintiff. I have already adverted to the publicity of the transaction and the payment of all Vaman's debts and the consequent clearing of the estate from all liability. It is not denied that the release was delivered to Subhadrabai and duly registered. There is nothing, therefore, in the circumstances connected with the transaction itself which can cast any doubt upon its reality. The evidence given by Vaman in the certificate proceedings in 1891 must be left out of consideration upon this part of the case. It is not evidence under s. 33 of the Evidence Act, and being in the nature of admissions in Vaman's [172] own interest, cannot be used in his favour, nor in favour of the plaintiff, who claims through him—Evidence Act, s. 21. This principle is recognized by the Privy Council in *Abdul Hye* v. *Mir Mohammed* (*supra*), where at page 623 of the report their Lordships say: "Their Lordships have considered these questions quite irrespective of the statements or declarations made by Abdul *post litem motam* in the litigation between him and Ahmed, and where his object was to defeat his own deed."

The circumstance that a voluntary family settlement like this is without consideration, other than the covenant to provide Vaman with maintenance while he lived in the family house and Rs 15 per mensem if he was not satisfied with the maintenance provided for him, does not, I think, afford any evidence that it was not the intention of Vaman and Subhadrabai that the release should be acted on. It might be otherwise if a pretended consideration had been stated in the deed, but when the true reason for the deed is set forth in its language, it is impossible I think to say that the absence of consideration affords any clue to the intention of the parties to the release or proof of an intention inconsistent with the purport of the deed. The evidence of such intention or absence of intention must be sought, therefore, wholly in the extent to which the release was acted upon. It is pointed out by the Subordinate Judge that before the date of the release the documents relating to the management of the estate were taken in the name of Vaman. It is not disputed that after the release the large majority of documents—more than 100 I believe have been put in—relating to such management were taken in favour of the minor represented by Subhadrabai and that suits also were filed and decrees were executed in the name of the minor. (His Lordship examined the evidence and continued:—)

The question is, whether under these circumstances there was evidence of the sham nature of the release. We must be careful not to outstep our duty as a Court of second appeal or to overrule the Judge on a question of this kind if there was evidence upon which he could judicially arrive at the conclusion he came to. The intention of the parties to the release is a question of fact and the lower appellate Court is the constitutional

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tribunal to decide such questions. This Court cannot interfere if there is [173] evidence to support the finding. Bearing these rules in mind I still think that the judgment of Mr. Ranade is correct upon this point. There is absolutely no evidence in the case to show that Subhadrabai did not act in perfect good faith in persuading Vaman to execute and in accepting the release on behalf of the minor, and I also think that there is no evidence that Vaman did not pass it in good faith to her, though in some instances he did not act in accord with his duty to his minor son under the release. I think that, upon the evidence, it was not open to the Judge to decide that the release was a sham.

It has been argued before me that such a transaction as the above could not have any legal effect in a joint Hindu family. The point does not appear to have been taken before. *Appa Pillai* v. *Ranga Pillai* (1) was relied upon in support of that contention. That appears to have been a question whether a united co-parcener could effectually resign his right to share in the management of the joint estate to his co-parceners. It was held that an agreement to do so in that case was void as being made without consideration. In opposition to the law laid down in the judgment, Mr. Branson cited Mayne, para. 454; *Perayya* v. *Venkata* (2); *Rai Bishen Chand* v. *Asmaida Koer*(3), where *Hurdey Narain* v. *Rooder Perkash*(4) is referred to; *Bithal Das* v. *Shankar Dat* (5); *Periasami* v. *Periasami*(6); *Mantappa* v. *Baswantrao* (7); *Pranjivandas* v. *Mancharam*(8). Upon a consideration of these cases, I think that the release in question can be supported as a family arrangement. I do not enter into the matter more fully, as the question was not raised before the referring Bench.

The next question is, whether a minor can execute a release such as that we are considering, and whether his act in doing so is voidable or void. It appears to be clear that (apart from the Contract Act) a release by an infant in the nature of a conveyance would be voidable and not void, *Boidonath* v. *Ramkishore* (9) (in notes); *Doorga Churn* v. *Ramnarain* (10) (in notes); *Mahamed Arif* [174] v. *Saraswati Debya* (11); *Hari Ram* v. *Jaitan Ram*(12). It is, I think, open to question whether the Contract Act (apart from the Transfer of Property Act which does not apply to this case) affects this question. That Act deals with contracts creating *jura in personam* and not with conveyances which create *jura in rem*; and it may well be that an infant cannot validly execute an instrument which will give rise to a personal obligation binding upon him and yet be able to create a *jus in rem* which will bind him unless repudiated, as for example by giving a horse to his daughter or conveying a farm to his son. In both transactions there must doubtless be consent, but in the one case that consent gives rise to a personal obligation; in the other case it does not. A perfected release in respect of property in which the releasor has a joint interest with the releasee falls within the category of conveyances and not of contracts. The whole subject is discussed by Mr. Austin in his 14th Lecture.

Assuming, however, that the Contract Act affects a release of this kind passed since it has become law, I agree with Mr. Justice Ranade that it does not alter the former law upon this subject. The balance of authority is certainly in favour of this view. The cases are cited in the judgments of

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(1) 6 M. 71. (2) 11 M. 403. (3) 11 I. A. 164.
(4) 11 I. A. 26. (5) 17 A. 264. (6) 5 I. A. 61.
(7) 14 M. I. A. 24. (8) P. J. (1875), p. 272. (9) 10 B. L. R. 326.
(10) 10 B.L.R. 327. (11) 18 C. 259 (263). (12) 3 B.L. R. 426.

the referring Judges, so I need not mention them in detail; but I would add to the list *Nanji* v. *Tharia Topan* (1). The difficulty of treating the question as settled by these authorities apart from their not being uniform arises from the fact that no reasons are, for the most part, given for the decisions. I must, I think, form an independent opinion and state the grounds for it.

Now the Contract Act nowhere expressly lays down that a minor's contract is void. If it is void it is rendered so by the inference which is to be drawn from ss. 10 and 11 read in conjunction with s. 2, sub-ss. (*g*) and (*h*): but that these sections were not intended to render all contracts by minors void, is demonstrated by the fact that in the same enactment certain consequences are declared to flow from an infant's contract of partnership (ss. 247 and 248). It becomes, therefore, a debateable question whether the Legislature intended [175] to lay down the general principle that no minor can enter into a contract, and that if he purports to do so, his action is void. Had the Legislature so intended, I think that they would have done so in unambiguous language. But there would have been difficulties in the way of their so treating the question. I do not find that the contract of marriage is excepted from the purview of the Act, yet in some systems of law in India marriage is treated as a contract. It can hardly be contended that the Legislature intended to declare marriages by minors void. The rights and liabilities of minors generally and their capacity to contract *sub modo* are not, therefore, I think, intended to be affected by the Contract Act except in so far as they are incidentally treated of in it. The Act does not profess to be an exhaustive enactment as to the whole law relating to contracts. It was intended to be one chapter in a more comprehensive code: see the preamble.—It lays down rules which define the principles applicable to contracts generally, but does not determine who enter into contracts beyond stating the general rule laid down in s. 11 that the persons therein generalized can make binding agreements. The provision in the Trusts Act to which Mr. Justice Fulton refers, is, I think, inconsistent with the idea that an infant cannot act at all in contractual matters. With the sanction of the Court he can bind himself absolutely in the matter of a settlement. This is inconsistent with an enactment that an infant's contract is void. So, too, s. 127 of the Transfer of Property Act recognizes that an infant can accept a transfer of property of an onerous character, but is not bound by his acceptance. He can repudiate the transaction when he comes of age; if he does not, the onerous condition binds him. I do not profess to have found this question less free from doubt than my learned colleagues, but the above interpretation of the Act seems to me to present fewer difficulties than that at which Mr. Justice Fulton has arrived.

Lastly, I come to the question of ratification. Vaman came of age in 1889. He repudiated the release some time in 1891, probably early in that year when the certificate proceedings began. The question is, whether he had ratified it before that date. He was not, I agree with the lower appellate Court, competent to [176] ratify it subsequently as against the plaintiff and other persons who were then his creditors. The lower appellate Court has not expressly considered his conduct in the interval between the above two dates. Mr. Justice Ranade considers that Vaman ratified the release. Mr. Justice Fulton has not touched upon

(1) P. J. (1882), p. 422.

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the question, as he considered the release to be incapable of being ratified. It is not suggested that Vaman either formally ratified or formally repudiated the transaction until he repudiated it in the certificate proceedings in 1891, but ratification and also repudiation can be by conduct. There certainly is some evidence of ratification, but there were also what Mr. Justice Ranade calls stray acts of self-assertion. Amongst them the receipt of the moneys under Exs. 58 and 254 and 255, against which last mentioned receipt Subhadrabai protested. Ratification can be inferred from acquiescence, as was done in the cases I have referred to in the 10th Volume of the Bengal Law Reports, but there it was complete acquiescence lasting over a long series of years. Here it was, at best, but a grumbling acquiescence, broken by repudiation, for a comparatively short period. There was no act done by Vaman to operate as a confirmation of the release such as could be pointed to in *Davies* v. *Davies* (1) and *White* v. *Cox* (2). The family arrangement was, so far as Vaman was concerned, of a character most prejudicial to his interests. Ratification of such an arrangement is not lightly to be inferred. During the period in which Vaman did not actively assert his right to set the release aside, there is nothing to show that he knew that he had the right to do so. The fact that he was, in law, a minor when he executed the release, was in all probability not known to him before the certificate proceedings. The knowledge that he could set the release aside is not brought home to him. As to the need for such knowledge, see *Gulabdas* v. *The Collector of Surat* (3); *Nanji* v. *Tharia Topan* (4).

I think that there is evidence upon the record upon which the lower appellate Court was fairly entitled to hold that Vaman did not ratify the release. I agree, therefore, with Fulton, J., that the decree should be confirmed with costs.

Decree confirmed.

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23 B. 177.

[177] APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice and Mr. Justice Candy.

MADHAVRAV GANESHPANT OZE (*Original Plaintiff*), *Applicant v.* GULABBHAI LALLUBHAI AND ANOTHER (*Original Defendants*), *Opponents.** [10th March, 1898.]

Limitation—Acknowledgment—Limitation Act (XV of 1877), s. 19—Extraordinary jurisdiction of High Court—Civil Procedure Code (Act XIV of 1882), s. 622—Evidence—Questions of admissibility of document—Document "without prejudice"—Evidence Act (I of 1872), s. 23.

In a suit for Rs. 465 the defendant pleaded limitation. In reply the plaintiff relied on an acknowledgment of the debt given by the defendant. The alleged acknowledgment was written on a post card sent by the defendant to the plaintiff. It was in Gujarati and was as follows:—"I was bound to send Rs. 30 according to my *vaida* (fixed time), but on account of the receipt of the intelligence of the death of my father I have not been able to fulfil my promise. But now, on his obsequies being over, I will positively pay Rs 38 at Shet Merwanji's. You, Sir, should not entertain any anxiety whatever in respect thereof. As to whatever

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* Application under Extraordinary Jurisdiction No. 208 of 1897.

(1) (1870) 9 Eq. 468.
(2) (1876) 2 Ch. Div. 387.
(3) P. J. (1873) No. 69.
(4) P. J. (1882), p. 422.

debts may be due by my old man, I am bound to pay the same so long as there is life in me. This is, indeed, my earnest wish. After this, God's will be done. Therefore, I will positively pay Rs. 30." The post card bore on it also the words "without prejudice" in English. The lower Courts held that it was, therefore, inadmissible in evidence and, consequently, that the plaintiff's claim was barred, and they dismissed the suit. The plaintiff thereupon applied to the High Court in its extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) and obtained a rule *nisi* to set aside the decree of the lower Courts on the ground that the post card had been improperly excluded from evidence.

Held, discharging the rule, that even if the post card were admissible in evidence, it did not amount to an acknowledgment of the debt claimed by the plaintiff, which was, therefore, barred by limitation.

Per FARRAN, C. J.—I am myself strongly inclined to the view that when Courts in the exercise of their judicial functions decide that a document is inadmissible in evidence, having exercised their judgment upon the question of its admissibility, or inadmissibility, we have no jurisdiction to interfere in the matter under s. 622. What the Courts do in such a case, assuming the document tendered to be erroneously rejected, is to make a mistake upon a question of law, and it does not appear to me to be material whether the mistake in law is made during the hearing of the case or in the final decision. A mere error in law is not, I think, an illegality or a material irregularity within the meaning of s. 622 of the Code.

[178] *Per* CANDY, J.—I doubt whether the post card was inadmissible in evidence. To exclude it from evidence it would be necessary to hold that the words "without prejudice" amounted to an express condition that the card should not be used in evidence against the writer. In England apparently the card would have been admissible—*In re Daintrey* (1).

[Cons., 2 L.B.R. 333 (338).]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of T. Walker, District Judge of Surat, confirming the decree of Khan Saheb R. M. Gimi, Subordinate Judge of Balsar.

The plaintiff sued to recover Rs. 465 due on an account dated 2nd November, 1891. The suit was filed on the 20th July, 1896.

The defendants pleaded (*inter alia*) that the claim was barred by limitation. The plaintiff contended that the defendants had acknowledged the debt on the 11th April, 1893, and that, therefore, the suit was not barred under s. 19 of the Limitation Act (XV of 1877). The alleged acknowledgment was contained in a post card, dated 11th April, 1893, addressed and sent to the plaintiff by the defendant. It had the English words "without prejudice" written in it; which, however, the plaintiff contended did not affect its admissibility, as he did not understand English. The rest of the post card was in Gujarati and was translated as follows :—

"I was bound to send Rs. 30 according to my *vaida* (fixed time), but on account of the receipt of the intelligence of the death of my father I have not been able to fulfil my promise. But now, on his obsequies being over, I will positively pay Rs. 30 at Shet Merwanji's. You, Sir, should not entertain any anxiety whatever in respect thereof. As to whatever debts may be due by my old man, I am bound to pay the same so long as there is life in me. This is indeed my earnest wish. After this, God's will be done. Therefore I will positively pay Rs. 30."

The Subordinate Judge dismissed the suit as barred by limitation, holding that the post card was not admissible in evidence under s. 23 of the Evidence Act (I of 1872).

The plaintiff thereupon applied to the High Court in its extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) and

(1) (1893) 2 Q.B. 116.

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obtained a rule *nisi* calling on defendants [179] to show cause why the decree should not be set aside on the ground that the post card had been improperly excluded from evidence.

Daji A. Khare, for the applicant (plaintiff), in support of the rule.

Govardhanram M. Tripathi, for the opponents (defendants), showed cause.

JUDGMENT.

FARRAN, C. J.—In this case the lower Courts have refused to receive in evidence a post card written by the defendants to the plaintiff on the ground that it is expressed to be written "without prejudice," and we are asked to hold that it has been wrongly excluded and on that ground to interfere in the exercise of our extraordinary jurisdiction under s. 622, Civil Procedure Code, and send the case back for retrial. I am myself strongly inclined to the view that when Courts in the exercise of their judicial functions decide that a document is inadmissible in evidence having exercised their judgment upon the question of its admissibility or inadmissibility we have no jurisdiction to interfere in the matter under s. 622. What the Courts do in such a case, assuming the document tendered to be erroneously rejected, is to make a mistake upon a question of law, and it does not appear to me to be material whether the mistake in law is made during the hearing of the case or in the final decision. A mere error in law is not, I think, an illegality or a material irregularity within the meaning of s. 622 of the Code. The case falls within the principle laid down in *Rajah Amir Hasun Khan* v. *Sco Baksh Singh* (1).

It is not, however, necessary for me to come to a final decision upon the point, nor indeed to decide whether the post card is admissible in evidence or not, as I am of opinion that even if admitted in evidence it would not prevent the bar of limitation. Beyond the personal promise of the writer to send Rs. 30 to the plaintiff, the post card does not, I think, acknowledge the existence of any debt as due to the plaintiff from the deceased. I paraphrase the card in this way: "I do not by writing this make any admission. I will send you Rs. 30 as I promised to do so. [180] As good sons we are bound to pay our father's debts whatever they may be." I cannot read into it any acknowledgment of liability for a debt admitted to be due by the deceased to the plaintiff. I also think that on the finding of fact by the District Judge, that the amount of the debt has not been proved, the applicant is out of Court. I would, therefore, discharge the rule with costs.

CANDY, J.—I doubt whether the post card was inadmissible in evidence. To exclude it from evidence it would be necessary to hold that the words "without prejudice" amounted to an express condition that the card should not be used in evidence against the writer. In England apparently the card would have been admissible. The remarks of Vaughan Williams, J., in *In re Daintrey, Ex parte Holt* (2), which the Subordinate Judge in the Court of the first instance quoted, are not, as the Subordinate Judge supposes, mere *obiter dicta*. They state the fact that the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation. That rule is to be found in many cases.

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(1) 11 I. A. 237.

(2) (1893) 2 Q.B. 116.

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But even if the card is admitted in evidence, what does it amount to? What do the words "without prejudice" mean? Simply this: "I make you an offer: if you do not accept it, this letter is not to be used against me" (*per* James, L. J., in *In re River Steamer Co.*; *Michell's Claim* (1)). In the present case the ordinary meaning has no application. For all that the post card says is this: "I was bound to send Rs. 30 according to my *vaida* (fixed time), but on account of the receipt of the intelligence of the death of my father I have not been able to fulfil my promise. But now, on his obsequies being over, I will positively pay Rs. 30 at Shet Merwanji's. You, Sir, should not entertain any anxiety whatever in respect thereof. As to whatever debts may be due by my old man, I am bound to pay the same so long as there is life in me. This is, indeed, my earnest wish. After this, God's will be done. Therefore I will positively pay Rs. 30." Clearly that is an acknowledgment of an existing [181] liability to pay Rs. 30, but no more. The writer says he will positively pay the Rs. 30, because he is bound as a son to do so. But there is no acknowledgment of any other existing liability. In any case, therefore, there is no ground for our interference.

Rule discharged.

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23 B. 181.

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Before Sir C. F. Farran, Kt., Chief Justice and Mr. Justice Candy.

MAHADEO CHINTAMAN WADEKAR (*Original Applicant*), *Applicant* v. RAO BAHADUR VASUDEV J. KIRTIKAR (*Original Auction-purchaser*), *Opponent.** [10th March, 1898.]

Civil Procedure Code (Act XIV of 1882), s. 310 A (2)—Right to apply under the section—Ownership of land—Vendor and Purchaser—Effect of contract of sale—Transfer of Property Act (IV of 1882), s. 54.

A person who has contracted to purchase land, or an interest in land, does not by such contract become the owner, in equity, or such land or such interest (s. 54 of the Transfer of Property Act IV of 1882). He has a personal right against his vendor or the assignee with notice of his vendor to compel the latter by a suit for specific performance to perform his contract: but he has no direct right over the land.

* Civil Application No. 220 of 1897 under extraordinary jurisdiction.

(1) (1871) 6 Ch. App. 827.

(2) Section 310 A, Civil Procedure Code (Act XIV of 1882):—

"Any person whose immoveable property has been sold under this chapter may at any time within thirty days of sale apply to have the sale set aside on his depositing in Court (*a*), for payment to the purchaser, a sum equal to five per centum of the purchase-money, and (*b*) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

"If such deposit is made within the thirty days, the Court shall pass an order setting aside the sale.

"Provided that, if a person applies under the next following section to set aside the sale of his immoveable property, he shall not be entitled to make an application under this section.

"Nothing in this section shall be construed to relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale."

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Held, accordingly, that a person who had contracted to purchase certain land which was subject to mortgage, and was sold in execution by the mortgagee, was [182] not the owner of the land and was, therefore, not entitled to apply to set aside the sale under s. 310-A of the Civil Procedure Code (Act XIV of 1882).

[F., 29 B. 234=6 Bom. L.R. 1013 (1014); R., 13 C.P.L.R. 163 (164).]

APPLICATION under the extraordinary jurisdiction of the High Court (Civil Procedure Code, Act XIV of 1882, s. 622) against the decision of Rao Saheb G. K. Kanekar, Subordinate Judge of Vadgaon in the Poona District.

Application under s. 310 A of the Civil Procedure Code (Act XIV of 1882) to set aside a sale in execution.

The sale in question took place on the 17th October, 1896, in execution of a mortgage-decree obtained by one Sadaram Ramchandra against Dinaji Moroba. At the sale the opponent (Rao Bahadur Vasudev J. Kirtikar) bought the property.

Subsequently the present applicant (Mahadeo Chintaman) applied to the Subordinate Judge under s. 310-A of the Civil Procedure Code to set aside the sale, alleging that on the 16th May, 1895, Dinaji Moroba had sold the property, subject to the mortgage, to his (applicant's) daughter Mothibai, and that Mothibai had afterwards by a registered agreement, dated 28th August, 1896, contracted to sell it to him for Rs. 2,200, of which he had paid a part as earnest-money.

The Subordinate Judge rejected the application, holding that the applicant had no *locus standi* to apply under s. 310 A.

The applicant applied to the High Court in its extraordinary jurisdiction and obtained a rule *nisi* calling on the opponent to show cause why the order of the Subordinate Judge should not be set aside.

Anderson with *Narayan* v. *Gokhale*, for the applicant in support of the rule:—The applicant is entitled to apply under the section. From the marginal note it would seem as if the benefit of the section was exclusively for the judgment-debtors. But the marginal notes cannot limit or affect the express words of the section any more than illustrations—*Koylash Chunder* v. *Sonatun* (1) or a preamble—*Queen Empress* v. *Indarjit*(2). As to the meaning of the words "any person" in the next s. 311, see *Asmut-un-Nissa* v. *Ashruff Ali* (3); [183] *Sheo Prosad* v. *Hira Lal*(4); *Rakhal Chunder* v. *Dwarka Nath*(5). We have bought the property and the opponent purchased it with notice of our contract. He is, therefore, a trustee for us—Indian Trusts Act (II of 1882), s. 91.

Branson and *Inverarity* (with *V. G. Bhandarkar* and *R. V. Desai*), for the opponent, showed cause:—The rights given by s. 310A are given only to judgment-debtors and the applicant is not a judgment-debtor—*In the matter of the petition of Bhagbuti Churn*(6). Section 54 of the Transfer of Property Act (IV of 1882) provides that a contract for sale does not of itself create any interest in or charge on property. A buyer may have a charge as against his vendor under s. 55 of the Transfer of Property Act, but such a charge cannot affect the property itself which by the sale in execution passed to the purchaser free of incumbrance.

JUDGMENT.

FARRAN, C. J.—We are of opinion that the view of the Subordinate Judge is correct and that the applicant who contracted to purchase the

(1) 7 C. 132. (2) 11 A. 262. (3) 15 C. 488.
(4) 12 A. 440. (5) 13 C. 346. (6) 8 C. 367.

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interest of Mothibai in the land, which interest consisted of a right to redeem the mortgage upon it, is not the owner of the land within the meaning of s. 310-A of the Civil Procedure Code.

The Transfer of Property Act, s. 54, provides "that a contract for the sale of immoveable property * * * does not, of itself, create any interest in or charge on such property." Having regard to that specific provision of the law, we cannot give effect to the argument based on varying decisions of Courts of Equity in England— as to the result of which the decision in *Rayner* v. *Preston* (1), may be consulted—or on an inference to be derived from illustrations (*g*) and (*h*) to s. 3 of the Specific Relief Act, to which may be added s. 91 of the Indian Trusts Act, that a person who has contracted to purchase land or an interest in land is the owner, in equity, of such land or of such interest therein. He has a personal right against his vendor or the assignee with notice of his vendor to compel the latter by a suit for specific performance to perform his contract : but he has no direct right over the land. We also think that because **[184]** the applicant has paid a small sum as earnest-money when entering into the contract, he cannot be treated as the owner of the land within the meaning of the section. Assuming that under s. 55 of the Transfer of Property Act the applicant as against his vendor has a lien or charge upon the subject-matter of his purchase for the earnest that he has paid, and that a person holding a simple lien over immoveable property is *pro tanto* the owner of such property within the meaning of s. 310-A—the inclination of our opinion is to the contrary view—we cannot think that the applicant can be said to be owner of even the interest over which his lien extends. The lien or charge which the section gives him is, at the most, a contingent lien which will only become absolute if he is ready and willing to perform his contract when the time for performance arrives, or if he properly declines to perform it. Neither of the cases cited in argument—*Rakhal Chunder* v. *Dwarkanath*(2) and *Bhagabuti Churn* v. *Bisheswar Sen* (3)—though they are useful as analogies, covers the present case.

Rule discharged with costs.

Rule discharged.

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23 B. 184.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

MURARRAO AND ANOTHER (*Original Defendants Nos.* 1, 2), *Appellants v.* SITARAM AND ANOTHER (*Original Defendants Nos.* 16, 17), *Respondents.** [14th March, 1898.]

Partition—Suit for partition by a purchaser from a co-sharer—Decree in such suit need not be for a general partition of the entire estate—Practice.

When a purchaser from a co-sharer in a joint family estate sues to have his share severed and given to him, the Court is not bound to force the members of the family into a partition of the whole estate. It is, no doubt, open for each and every co-sharer to ask to have his share divided off and allotted to him (in which case he would have to pay Court-fees according to his share). But, in the absence of such a request, the Court is not bound to determine what is the share

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* Cross Second Appeals Nos. 1041 and 1042 of 1897.

(1) (1881) 18 Ch. Div. 1. (2) 13 C. 346. (3) 8 C. 367.

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of each of the co-sharers, and to compel him to take that share by making a general partition.

[185] In such a case the High Court refused, in second appeal, to accede to the prayer of some of the co-sharers, who had not appeared in the Court of first instance, to have their shares divided off and allotted to them.

[F., 24 B. 128 (131)=1 Bom.L.R. 620; R., 23 B. 188 (190); 20 Ind. Cas. 177=274 P. L.R. 1913=183 P.W.R. 1913; Cons., 23 P.R. 1905=13 P.L.R. 1905; 32 P.R. 1908=151 P.L.R. 1908=75 P.W.R. 1908.]

SECOND appeal from the decision of Rao Bahadur Thakurdas M., Assistant Judge of Ratnagiri.

Suit for partition. One Zimaji Jaising was the owner of a 16-pies' share in the property in dispute. In 1865 he sold his share to Kashinath Shivram.

Out of this share Kashinath sold an 8-pies' share to plaintiff in 1884, and the remaining 8-pies' share to defendants Nos. 1 to 4.

In 1894 plaintiff filed the present suit to recover by partition the 8-pies' share he had bought from Kashinath.

Defendants Nos. 1 and 2 did not appear. Defendants Nos. 3 and 4 claimed to be the owners of the whole 8-pies' share purchased from Kashinath, and denied that defendants Nos. 1 and 2 had any interest in that share. They further stated that they had mortgaged with possession the whole of this 8-pies' share to defendants Nos. 16 and 17, that they had no objection to the plaintiffs' receiving his 8-pies' share by partition, and they prayed that their own 8-pies' share should be divided into two sub-sharers of 4 pies each, one to be awarded to each of them after the mortgage-debt was satisfied.

Defendants Nos. 5 to 15 were made parties to the suit as they were co-sharers in the rest of the family property.

The Court of first instance raised (*inter alia*) the following issue:—

Fifth Issue.—"Whether defendants Nos. 3 and 4 have an 8-pies' share, and whether the said share can be partitioned and retained in the possession of defendants Nos. 16 and 17 as mortgagees until their mortgages are redeemed."

On this issue the Court found that out of the 8-pies' share sold by Kashinath to defendants Nos. 1 to 4, defendants Nos. 1 and 2 were entitled to a 4-pies' share, and defendants Nos. 3 and 4 to the remaining 4-pies' share; and that defendants Nos. 3 and 4 had no right to mortgage the entire 8-pies' share to defendants Nos. 16 and 17.

The Court, therefore, passed a decree for partition, awarding an 8-pies' share to plaintiff, and a 4-pies' share to defendants [186] Nos. 3 and 4, and directing that this 4 pies' share should be retained by the defendants Nos. 16 and 17 until their mortgage-debt was satisfied. With respect to the 4-pies' share found to belong to defendants Nos. 1 and 2, no order was passed, as those defendants were not before the Court.

Against this decision defendants Nos. 16 and 17 (the mortgagees) alone appealed to the District Court, contending that their mortgagors (defendants Nos. 3 and 4) were owners not merely of a 4-pies' share, but of the entire 8-pies' share purchased from Kashinath, and that the fifth issue raised by the first Court was not necessary for the decision of the case.

The Assistant Judge disallowed this contention and confirmed the decree of the first Court.

Against this decision defendants Nos. 16 and 17 preferred a second appeal (No. 1042 of 1897) to the High Court. Defendants Nos. 1 and 2

also filed a separate second appeal (No. 1041 of 1897), and contended that the share found to be theirs by the lower Court ought to be decided and allotted to them.

Daji Abaji Khare, for appellants.—*Vasudev Gopal Bhandarkar*, for respondents—in appeal No. 1041 of 1897.

Vasudev Gopal Bhandarkar for appellants (there was no appearance for respondents) in appeal No. 1042 of 1898.

JUDGMENT.

PASONS, J.—We do not think that we ought now in second appeal to assent to the prayer of the defendants Nos. 1 and 2 and give them a 4-pies' share in this property to be divided off and allotted to them.

The plaintiff brought the suit as a purchaser to obtain, by partition, the share he had purchased. He valued his claim at the value of that share and paid Court-fees on that value. It was, no doubt, open for each and every one of the defendants (who represented the family) to have asked to have his share divided off and allotted to him, in which case he would have had to pay Court-fees according to his claim, but we do not think that it was compulsory on him to have done so, still less do we think that the Court was bound in such a suit as the present, in the absence of any such request, to have determined what was the share of [187] each of the defendants, and to have allotted him that share and compelled him to take it by making a general partition. No doubt there are remarks in *Harkisandas Kashidas* v. *Nagardas* (1), which favour a contrary view, but they must be taken to apply to that particular case only. We see no reason why, when a purchaser wants to have the share in a family estate that he has bought divided off and given to him, the members of the family should be forced into a partition of the whole family estate.

In the present case the defendants Nos. 1 and 2 did not appear in the Court of first instance, they did not contest the fifth issue which related to the share of the defendants Nos. 3 and 4 only, and they did not appeal against the decree which allotted them no share. They want now to take advantage of the finding on that fifth issue, since it is said to have decided in their favour that they own a 4-pies' share, which the defendants Nos. 3 and 4 had no power to mortgage to the defendants Nos. 16 and 17. As a matter of fact, however, there is no such finding on that issue which can bind the parties to this second appeal. The decision said to have been arrived at is not the actual finding, though it may be the result of the finding; the finding itself is only as to the share of the defendants Nos. 3 and 4, and we could not possibly accept it as binding upon the defendants Nos. 16 and 17, since there are no certain reasons given for it but only vague suppositions, and the 4-pies' share has been ordered to remain with the defendants Nos. 16 and 17 as it is at present, until the mortgage is paid off.

All really that the Court had to do in a suit like the present was to have determined the shares in dispute, *i.e.*, the share of the plaintiff and the shares of the defendants who claimed a share and asked for that share to be allotted to them by partition, there was no dispute between the defendants Nos. 1 and 2 and the defendants Nos. 3 and 4 *inter se* as to their respective shares, and the issue, if it be extended so as to embrace the double question whether the defendants Nos. 3 and 4 had an 8-pies'

(1) P.J. (1876), p. 10.

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share, or whether they had only a 4-pies' share, the other 4-pies share being owned by the defendants Nos. 1 and 2, was as to [188] the latter part unnecessary. Still more unnecessary was it to go into the question of the validity of the mortgage of the whole 8-pies' share by the defendants Nos. 3 and 4 to the defendants Nos. 16 and 17.

While, therefore, we confirm the decree, we must reverse the finding as to a 4-pies' and not an 8-pies' share being with the defendants Nos. 16 and 17 in right of mortgage and leave the parties to their civil rights, unfettered by any finding or order of possession in respect of the mortgage. We order each party to bear his own costs in this Court.

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23 B. 188.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

ABDUL KADAR (*Original Defendant*), *v.* BAPUBHAI AND OTHERS (*Original Plaintiffs, &c.*), *Respondents.** [15th March, 1898.]

Mahomedan law—Joint property—Partition—Suit for share of such property—Share allotted to defendant in same suit on payment of Court-fees—Practice—Procedure.

In the Presidency of Bombay a suit for partition of an inheritance by Mahomedans is hardly distinguishable from a partition suit by Hindus. In such a suit, if a defendant asks at the proper time to have his share divided off and allotted to him, such relief should be granted to him on payment of the necessary Court-fees.

[Diss., 31 B. 271 = 8 Bom. L.R. 758 (759); **F.**, 24 B. 128 (131); **R.**, 3 Bom.L.R. 94 (96); 3 S.L.R. 93 (95) ; **Commented on**, 38 B. 449.]

SECOND appeal from decision of G. C. Whitworth, District Judge of Ahmednagar.

The parties to the suit were Mahomedans. Their common ancestor was one Mahomed Shafi. He had four sons—Kadar, Sale, Fazal and Futte Mahomed.

The plaintiffs were the grandsons of the third son Fazal. Defendant No. 1 was the grandson of the fourth son Futte Mahomed and defendants Nos. 2 and 3 were the great-grandsons of the second son sale. The first son Kadar left no issue.

The lands in dispute were inam lands, which had been acquired by the family during the period of Mahomedan rule.

[189] Plaintiffs alleged that a third share of the lands belonged to them, a third to defendant No. 1 and a third to defendants Nos. 2 and 3, and that until 1883 the income had been divided between them according to their respective shares.

In 1893 the plaintiffs filed the present suit to recover their share of the lands by partition together with mesne profits for three years preceding suit.

The plaintiffs valued the suit and paid court-fees sufficient to cover their one-third share in the property.

The first defendant prayed that he too should be given his third share, and contended that, unless that was done, the plaintiffs were not entitled to their third share.

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* Second Appeal No. 954 of 1896.

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The Subordinate Judge passed a decree awarding the plaintiffs their third share, but he refused in this suit to give the first defendant his share, on the ground that the court-fees which had been paid only covered the plaintiffs' share. He held that the suit was not one for partition, but for separation of the plaintiffs' share which had been already ascertained and that the first defendant should bring a separate suit to recover his share. In his judgment he said :—

"The suit is valued and court-fee paid only sufficient to cover plaintiff's one-third share of the property. The suit is not for partition of joint family property. The shares have been ascertained since a long time before, and the parties have been receiving income of their shares accordingly, though no division by metes and bounds is yet made. Plaintiffs claim such separation of their share, and that is awarded to them. If defendant No. 1 wishes to have his share also given in his possession separately, he may bring a separate suit for that purpose."

This decision was confirmed, on appeal, by the District Judge. His reasons were as follow :—

"This is not a suit for partition of joint family property as known to the Hindu law, but a suit by Mussalmans for their share of an inheritance. It was not, I think, incumbent on the Subordinate Judge in such a case to direct separation of any defendant's share."

Against this decision defendant No. 1 preferred a second appeal to the High Court.

N. G. Chandavarkar, for appellant.

Shripad Khanderao, for respondent.

JUDGMENT.

[190] PARSONS, J.—This is the converse of the case *Murarrao* v. *Sitaram* (1) we decided yesterday, because in this suit for partition of joint property the Courts have refused to give the first defendant his share, which was found and is now admitted to be one-third, though he asked for it. The reason assigned for the refusal by the Subordinate Judge is that the court-fee paid is only sufficient to cover plaintiffs' one-third share in the property. No more, however, is ever paid in any suit for partition, and we think that it was quite in the power of the Judge to have ordered the defendant to pay the necessary court-fee on his share as a condition precedent to his obtaining his share.

The District Judge refused because this was not a suit for partition of joint family property as known to the Hindu law, but a suit by Musalmans for their share of an inheritance. In this Presidency, however, a suit for partition of an inheritance by Musalmans is hardly distinguishable from a partition suit by Hindus, and the Subordinate Judge has declared the property to be the joint property of the parties, so that the principles of an ordinary administration suit ought, at any rate, to be applied to it. It is obviously most undesirable that parties should be driven to further litigation to obtain a relief which they are entitled to, and ask for at a proper time, and which can be given to them in an existing suit.

We vary the decree by awarding the appellant his one-third share to be ascertained and divided off and given to him in execution on payment of the necessary court-fees, *viz.*, Rs. 47-4-0, being made by him into Court within such time as the Court of first instance directs. We make no order as to any costs in this Court.

(1) 23 B. 184.

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[191] ORIGINAL CIVIL.

Before Mr. Justice Fulton; on appeal before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice B. Tyabji.

ALAMAI (*Plaintiff*) *v.* POSITIVE GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LIMITED (*Defendants*).*

[15th, 17th, 18th and 22nd February and 23rd March 1898, on appeal, 12th August, 1898]

Insurance—Life insurance—Insurance effected by one person on the life of another in whose life he has no interest—Wager—Contract Act (IX of 1872), S. 30—Stat. 14 Geo. III, c. 48—Stat. 8 and 9 Vict., c. 106—Assignment of life policy to a stranger without interest in the life insured.

The defendant company issued a policy for a term of ten years for Rs. 25,000 on the 23rd August, 1894, on the life of Mehbub Bi, the wife of one Abdul Samad, who was a clerk in the employment of one Nasarwanji F. Bhandara, a barrister, practising at Hyderabad. On the 1st September, 1894, Mehbub Bi assigned the policy to the plaintiff Alamai, who was the wife of Nasarwanji F. Bhandara. On the 2nd October, 1894, Mehbub Bi died. The plaintiff as assignee of the policy brought this suit to recover Rs. 25,000 from the defendants. The defendants (*inter alia*) contended that the policy had really been effected, not by Mehbub Bi or for her use or benefit or on her account, but by the said Nasarwanji F. Bhandara for his own use and benefit, and that he had no interest in the life of Mehbub Bi, and that, therefore, the policy was void.

Held (1) on the evidence that the policy had not been effected by Mehbub Bi, or for her use and benefit, but had been effected by Nasarwanji F. Bhandara for his own use and benefit, and that he had no interest in the life of Mehbub Bi.

(2) That in India an insurance for a term of years on the life of a person in which the insurer has no interest, is void as a wagering contract under s. 30 of the Contract Act (IX of 1872), and that, therefore, the policy sued on was void.

Quære—Whether an assignment of a life policy to a stranger having no interest in the life of the insured is void?

SUIT by the plaintiff as assignee of a policy of life insurance to recover the amount of the policy (Rs. 25,000) from the defendants.

The policy in question was dated the 23rd August, 1894, and was granted in Bombay by the defendants to one Mehbub Bi, the wife of one Munshi Abdul Samad of Hyderabad in the Deccan. It insured her life for a period of ten years for Rs. 25,000.

[192] On the 1st September, 1894, Mehbub Bi assigned the said policy to the plaintiff Alamai.

On the 2nd October, 1894, Mehbub Bi died.

This suit was filed in April, 1895.

The husband of the plaintiff Alamai was one Nasarwanji Framji Bhandara, a barrister practising at Hyderabad. The above-mentioned Abdul Samad (the husband of the insured Mehbub Bi) was in his service as his munshi or clerk.

The defendants in their written statement denied that the policy was effected by Mehbub Bi or for her use or benefit or on her account, and alleged that it was effected by the said Bhandara (the plaintiff's husband) in the name of Mehbub Bi for his own use and benefit, and that he had no interest in the life of Mehbub Bi, and they contended that the policy was, therefore, void. They also alleged that the policy was obtained by fraudulent misrepresentations, *viz.*, (1) that it was effected by the said Mehbub

* Suit No. 237 of 1885. (Appeal No. 978).

Bi, (2) as to the age of Mehbub Bi, (3) as to the means and circumstances of Mehbub Bi and her husband Abdul Samad.

The defendants did not admit the alleged assignment of the policy to the plaintiff, and further contended that, if made, it was without consideration, and was made for the use and benefit of the said Bhandara (plaintiff's husband), and that the plaintiff could not sue upon the said policy.

The last clause of the written statement was as follows :—

"12. By the terms of the said policy, in the event of the death of the assured occurring in any year before the full amount of the year's premium should have been paid, the amount required to complete the year's premium would be deducted from the sum assured; only two months' premium was paid in respect of the said policy, and, if the plaintiff is held entitled to recover in this suit, the defendants claim the deduction of Rs. 402-8-0, the amount of 10 months' premium under the said policy."

The following issues were raised at the hearing :—

1. Whether the policy in the plaint mentioned was effected by Mehbub Bi, or for her use and benefit, or on her account ?

2. Whether the said policy was not effected by Nasarwanji Framji Bhandara, the husband of plaintiff, and for the use and benefit of the said Nasarwanji ?

[193] 3. Whether the said Nasarwanji had any interest in the life of the said Mehbub Bi ?

4. Whether the said policy is not void as a wagering transaction ?

5. Whether the said policy was not obtained by means of fraudulent misrepresentations as to the means and the circumstances of the said Mehbub Bi and her husband Abdul Samad ?

6. Whether the said policy is not void by reason of such fraudulent misrepresentations ?

7. Whether the said policy was not obtained by the fraudulent representation that it was effected by the said Mehbub Bi and for her use and benefit, whereas it was effected by the said Nasarwanji, not for her use and benefit but for his own ?

8. Whether by reason of such fraudulent representations the said policy is not void ?

9. Whether the said policy was assigned by Mehbub Bi to the plaintiff ?

10. Whether the said assignment, if made, was not without consideration and whether plaintiff can sue on the said policy ?

11. Whether the said Mehbub Bi died on 2nd October, 1894 ?

12. Whether plaintiff is entitled to further relief than a decree for the amount paid in Court ?

13. Whether, in the event of its being found that plaintiff is entitled to be paid the amount of the policy, the defendants are not entitled to deduct Rs. 402-8-0 from the amount so payable ?

14. Whether plaintiff is entitled to any and what relief ?

Inverarity and *Anderson*, for plaintiff.—The policy was originally for Mehbub Bi's benefit, but she assigned it to the plaintiff. That assignment was good and the plaintiff as assignee is entitled to sue. Consideration was paid, but none was necessary—Bunyon on Life Assurance, (3rd Ed.), p. 24. Section 135 of the Transfer of Property Act (IV of 1882) does not apply. The assignment was in Hyderabad, where that Act is not in force.

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Further, it was not the assignment of an actionable claim—*Shib Lal* v. *Azmat Ullah* (1). Even if it was Bhandara who insured Mehbub Bi's life, the insurance is valid. In India it is not necessary to have an interest in the life of the assured. Statute 14, Geo. III, c. 48, which was the first statute in England relating to the subject, does not apply to India. It was not extended even to Ireland until 1866, and there it only applies to insurances **[194]** effected after that date. See Bunyon on Life Assurance, (3rd Ed.), p. 5. There is no Act on the subject in India.

Lang (Advocate-General), *Scott* and *Lowndes*, for defendants.—Bhandara had no interest in Mehbub Bi's life. He effected the insurance for his own benefit. Such a contract is a wager and is void—*Howard* v. *Refuge Friendly Society* (2). The assignment to Alamai was a fraud. See Bunyon on Life Assurance, (3rd Ed.), pp. 25, 26; *Wainewright* v. *Bland* (3); *Shilling* v. *Accidental Insurance Co.* (4). Assuming the assignment was really made, the assignee cannot sue for more than he paid—Section 135 of the Transfer of Property Act (IV of 1882). Counsel also referred to Stat. 8 and 9 Vict., c. 106; *Ramloll* v. *Soojunmull* (5); *Wheelton* v. *Hardisty* (6); *Warnock* v. *Davis* (7); *Connecticut Mutual Life Insurance Co.* v. *Schaefer* (8).

23*rd March*, 1898. FULTON, J.—The plaintiff has instituted this suit to recover Rs. 25,000 due on a policy on the life of Mehbub Bi, who died on the 2nd October, 1894, after assigning her policy to the plaintiff.

The defendant company have filed two written statements denying liability and have raised the following issues:—(His Lordship stated the issues and continued).

The plaintiff is the wife of Mr. N. F. Bhandara, a barrister practising at Hyderabad in the Deccan. The insured Mehbub Bi was the wife of one Abdul Samad, who is in the service of Mr. Bhandara as munshi. The evidence shows that about May, 1894, Mr. Bhandara was much interested in insurances, and introduced several persons to Mr. Limji, the defendant company's sub-agent in Bombay, with whom he carried on an active correspondence. Among other insurances he arranged for a policy for Rs. 25,000 on the life of Mehbub Bi for a term of ten years. A proposal for Rs. 50,000 was submitted on the 16th May. After some delay it was accepted to the extent of Rs. 25,000 with effect from the 30th July. The first premium of Rs. 40-4-0 was paid **[195]** through Mr. Bhandara and received by the company on the 3rd August. The second premium was also paid through him and received on the 29th August. On the 1st September, Mehbub Bi is said to have executed an assignment of her policy to the plaintiff, who gave her Rs. 80-8-0, being the amount of the two premia already paid. On the 3rd September she fell ill, and she died on the 2nd October.

Now, assuming that the law on the subject of insurances effected on lives in which the owner of the policy is not interested is the same in this country as in England, the determination of the first two issues is most important for the decision of this case. In most cases, which depend on a true appreciation of the motives and intentions of the parties, the difficulty of arriving at a correct solution is apparent. In the present case that difficulty is greatly enhanced by the fact that the evidence of many of the witnesses has been taken on commission and that the husband of the

(1) 18 A. 265.
(2) (1886) 54 L T. 644.
(3) (1836) 1 Moo. and R. 481.
(4) (1857) 2 H. and N. 42.
(5) 4 M.I.A. 339.
(6) (1857) 8 Ell. and B. 232.
(7) (1881) 104 U. S. Rep. 775.
(8) (1876) 94 U. S. Rep. 457.

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deceased has not been examined at all. In the first instance Mr. Justice Tyabji when issuing a commission for the examination of the plaintiff and certain other witnesses at Hyderabad whose attendance in Bombay could not be secured, refused, very properly in my opinion, an application to issue a commission for the examination of Abdul Samad. At the trial the application was renewed by Mr. Anderson, for the plaintiff, on the ground that Abdul Samad was unwilling to come here during the prevalence of the plague, but, having regard to the position in which he stands to the husband of the plaintiff, it seemed to me that the objection of the defendants' counsel to the issue of a commission for his examination was well founded. The defendants were able to produce in Court the father and mother of the deceased, and it appeared to me that the plaintiff ought to have had no real difficulty in bringing forward in the same way her husband's servant.

Before proceeding to decide the issues now under consideration it will be convenient to recapitulate the evidence so far as it relates to them. Mr. Bhandara states as follows :—

"I knew the deceased Mehbub Bi. She was the wife of Abdul Samad. Abdul Samad was and still is my munshi. He did all kinds of work for me regarding my household. He has been in employ since 1887. I now give **[196]** him Rs. 200 ever since his marriage with Mehbub Bi. The marriage was about November and December, 1893. At first his pay was Rs. 50. I increased his pay from time to time up to Rs. 200 at the time of his marriage."

The witness then goes on to describe how towards the end of April, 1894, he got into correspondence with the defendants' sub-agent Limji and negotiated insurances for a number of people. Then he proceeds as follows :—

"Mehbub Bi's husband told me she wanted to insure her life. He wanted to know the cheapest system. I told him the cheapest system would be to go in for a ten years' short-term policy and renew it after ten years. I asked him how much he was ready to pay a month. He said Rs. 40 or 50.

"I told him Rs. 25,000 would be insured for about Rs. 40. He said : 'All right. Propose for that.' I said : 'You had better propose for Rs. 50,000 and they will accept about half.' After hearing that, he brought his wife the next morning. They both said in the presence of me and Mrs. Bhandara, that Mehbub Bi wished to insure her life. My wife asked why her husband did not get insured. She said : 'I insure for myself, because if I happen to have children, my husband will get married again and my children will 'remain unprovided for.' I told Mehbub Bi to get the policy drawn up in her husband's name ; otherwise, if she died without leaving children, her parents would get a share as well as her husband. She approved. I got the forms filled up. Two premia were paid through me. Mahamed Addul Samad gave me the money and I sent the premia. He asked me to send the money. Subsequently the policy was assigned to my wife. On the morning of 31st August, Mehbub Bi and her husband came to our place at Hyderabad. My wife and I were in our compound. Mehbub Bi went inside. Her husband spoke to me in presence of my wife saying that Mehbub Bi wanted her policy to be on the endowment system, that is, payable at 45 or 50 or at death, if previous, and that if somebody would buy it up and pay the premia which she had paid she would sell it to that person. I said an insurance on the endowment system would cost double the premium. He said : 'Well that

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does not matter. We will have the assurance for half the amount.' Then my wife offered to purchase it by paying the premia already paid by Mehbub Bi, and we all went inside to speak to her about it. My wife asked her whether she was going to sell her policy. She said yes because her husband had told her that policies could also be issued on the endowment system and she preferred that system to the present one. She offered to sell her then existing policy to any one who chose to buy paying the premia already paid, to her. My wife offered to purchase it and she agreed to the purchase. I told her also that she would have to pay double the premium, unless she chose to reduce the amount by half. She said she was agreeable to have the insurance for only half the amount. I said: 'I will purchase a stamp paper. Come to-morrow to receive the money and sign the deed.' The document was prepared the same day and executed the next day. I prepared it. The husband's signature was then **[197]** taken as well as Mehbub Bi's, because the policy was not received and we did not know whether it would be in her name or her husband's in consequence of my previous experience with my mother's policy." (In cross examination) "Mehbub Bi suggested that she should be insured. She said she was anxious to be insured. I have no reason to disbelieve it. She was married to Abdul Samad about November, 1893. She did not speak or read English. She could not read Urdu. She could not write. She was uneducated in reading and writing. But she was intelligent in conversation. She knew about insurance. I had never spoken to her on the subject till this proposal. Her husband told me he had been talking to her about insurance. She had said that if she died having children he would marry again and her children would be unprovided for. Then he suggested that she should insure her life. She was then 19. There was no sign of her having children. I know the doctor said she was not pregnant when he examined her. I don't know if she had any money of her own. I know nothing about her circumstances except that her father was a non-commissioned officer and they were respectable people. She was to pay the premia with her husband's money."

The evidence of the plaintiff Alamai on the subject is as follows:—

"I knew Mehbub Bi. She was wife of Mr. Bandara's clerk. She is now dead. Her life was insured for Rs. 25,000. This was two years ago. Dr. Kelly examined her medically. She knew that she was insured. She told me that lives of females are also insured and she was going to have her life insured. I asked her why did her husband not insure his life. She said: 'If I have children it will be for their benefit also.' She said that she was going to insure her life for Rs. 25,000. I knew that she had made a proposal for Rs. 50,000, as Mr. Bhandara had told her that, if she went in for Rs. 50.000, the company would accept the proposal to the extent of Rs. 25,000. I am now the owner of the policy. The policy was assigned to me. Mehbub Bi and her husband came to me. I was in the garden. Mehbub Bi came inside the house and her husband remained outside. I and Bhandara were in the garden. Mehbub Bi's husband told me that Mehbub Bi has come to speak about the policy and said she was desirous of being insured for a policy payable at 45 or 50, or at death if previous, and to dispose or sell off the present policy; after that we came inside the house and questioned Mehbub Bi as to whether she wanted to sell her policy. She replied in the affirmative. I told her I am willing to purchase the policy, and she signified her consent to sell it to me. Mr. Bhandara had told her husband outside and also spoke to Mehbub Bi inside that the premium on the policy will be a great

deal—the system which entitled the policy-holder to get the amount in his life-time at 45 or 50 years of age. Mr. Bhandara had mentioned that double premia will have to be paid. Mehbub Bi and her husband said that she would insure her life for half the sum, but on the new system. The assignment was in writing. The assignment took place the same day in the evening or the next day. I cannot remember exactly. Mr. Bhandara had asked me Rs. 5 for the expenses, &c., of [198] the stamps. I gave him the amount. The same evening, or the next day, Mr. Bhandara had written the assignment-deed and told me that the deed was ready. Mr. Bhandara read out the deed to Mehbub Bi. Mehbub Bi's husband was also present at the time. Then I brought Rs. 80 8-0 premia for two months which had been paid by Mehbub Bi at the rate of Rs. 40-4-0 per month and paid the amount to Mehbub Bi, Mehbub Bi handed over the amount to her husband. Then Bhandara asked Mehbub Bi to put her signature on the deed. Thereupon Mehbub Bi made some mark on the paper. Mr. Bhandara also asked her husband to sign. He asked why he should sign. Mr. Bhandara said that Mehbub Bi had not till then received the policy, and it was not certain whether the policy will be made out in her name or in her husband's name. Then he signed. The deed was attested by Bhandara. No other policy was taken out by Mehbub Bi because she fell sick." (In cross-examination) "Mehbub Bi did not know to read or write, but she knew all about insurance. It was her own wish, not her husband's or my husband's, that her life should be insured. She did not say how she was going to provide for premia. Previous to this I had not bought any other person's policy. My husband did not suggest that I should buy this policy. It was entirely my own idea. I thought it was a good investment. Mehbub Bi was younger than myself and she had always had very good health. My health is delicate. All the negotiations for insuring her life and for assigning the policy to me were carried on by Mehbub Bi herself, not by her husband."

Govindrajalu was the Commissioner appointed to take Mehbub Bi's affidavit of age. He stated that the affidavit was made at Mr. Bhandara's house by a woman whom he identified as Mehbub Bi. The affidavit is marked E and is attested by Mr. Bhandara and Abdul Samad.

Mahomed Abdulla Khan said:—

"Mehbub Bi asked me for a certificate for life insurance, requesting me to certify that she was keeping good health. I gave her a certificate under my signature." (In cross-examination.) "The health certificate that I gave to Mehbub Bi was filled in by Mr. Bhandara, but he was not present when I signed the certificate. I knew Mehbub Bi for a year before I gave the certificate. I knew her parents also. I had also seen Mehbub Bi. Mr. Bhandara did not ask me to sign the certificate. Abdul Samad also did not ask me to sign the certificate. Mehbub Bi did not tell me how much she was going to be insured for. She did not mention the name of the company."

Syed Mahomed said:—

"I had been to Mr. Bhandara on some business. I wanted to enter the house. A man prevented me from entering, saying there was zanana inside. After some time the man informed Mr. Bhandara of my arrival. Thereupon Abdul Samad and Mr. Bhandara came out and asked me to get in. They asked me to take [199] my seat there. There I saw Abdul Samad's

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wife, his mother, Bhandara's wife and his mother, and Dr. Kelly. Mehbub Bi was standing near the wall and Dr. Kelly made a mark on the wall corresponding to the height of Mehbub Bi. Then he measured the height of the mark on the wall. I asked Abdul Samad what was going on. Abdul Samad told me that Mehbub Bi was going to have her life insured. I asked him what insurance meant. Abdul Samad told me that he would speak to me at leisure. Then I told him that as you are not at leisure I will see you again. Mehbub Bi had no pardah with me, as Abdul Samad is related to me."

Karim Bi : mother of Abdul Samad, said :—

"Six months after Mehbub Bi's marriage she was examined by a doctor. The doctor's name is Kelly. Dr. Kelly is dead. The examination was in connection with life insurance, as she had told me that she was going in for life insurance. I asked her what life insurance meant. She said that some money has to be paid every month and after her death the children of Mehbub Bi will get some money. Three or four months after she again told me that her proposal for insurance was accepted to the extent of Rs. 25,000. I told her, may you always be happy. I don't know who is the owner of the Biwa : Two or three months after Mehbub Bi's death I asked my son about the insurance money. Abdul Samad said she made it over to Bai in her life-time. Mehbub Bi did not tell me that I would also get some share of the insurance money after her death. Mehbub Bi did not tell me for how much she wanted to be insured. I asked her particularly. Even then she did not tell me. I did not ask my son. Four or five months after Dr. Kelly's examination, Mehbub Bi told me that she had been accepted for Rs. 25,000. At this time I did not ask her for how much she was proposed. I don't know who negotiated all the transactions regarding the life-insurance. Mehbub Bi never told me in her life-time that she had assigned her policy to Mrs. Bhandara. Mehbub Bi knew to read and write a little."

All these witnesses, excepting Mr. Bhandara, were examined on commission.

I now come to the next two witnesses whose statements it is necessary to refer to, namely, the father and mother of Mehbub Bi, who gave their evidence in Court. (In cross-examination) Abdul Majid, the father, said :—

"My daughter informed me that her life was insured. She did not ask me to make an affidavit about her age. My daughter once came in the Mohorrum and then she told me all about this insurance. She said : 'My husband puts some money into Sirkar every month in my name, Rs. 15 per month. The amount was to be paid for ten years.' She told me that some amount was to be got even after her death. She did not mention the sum. She said the amount was to be paid every month, and she had been examined by the doctor. It may be [200] that she told me that Rs. 40-4-0 were to be paid every month, but I do not remember. She mentioned the amount, but I forget it. Whatever the amount I understood that the husband paid the Sirkar during her life-time. That is what she mentioned to me. I don't know whether I could get any of the insurance money as her father. That is a matter of law. I am an ignorant person. My daughter never told me she wished to change her policy. She told me that something was to be paid and that something was to be received, but for whose benefit she did not say. She had spoken to me before her illness about the insurance but not during the illness. She talked much with my wife, but not with me."

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Amina Bi, the mother of Mehbub Bi, said :—

"I came to know in Mohorrum when she came to my house and said that she had been examined by a doctor and her life had been insured. She did not know how to read or write. Rs. 15 were to be paid in respect of the insurance. She did not tell me anything about the amount to be recovered. She appeared to be pleased about it. I was constantly with her when she was ill. During her illness she said to me that Abdul Samad and his mother were talking about the insurance. Bhandara and his wife and Abdul Samad and his mother were talking about it. I asked my daughter what they were talking about. She said they were talking about the insurance on her life. Then I kept quiet. I did not know who was to get the insurance money. Mehbub Bi told me that there would remain some money in deposit with Sirkar and after her death we should not be put to any trouble. When she came to us I asked why she had got her life insured, and she said it was for our good." (In cross-examination) "I heard from Mehbub Bi that her husband would go on paying every month to the Sirkar. I understood that he would pay it out of his salary. I have now for the first time heard of the insurance being sold to Bhandara."

Now on this evidence it is clear that Mehbub Bi knew that her life was insured and had some idea that on her death her husband or family would get something. But I think it is equally apparent that she did not really understand the nature of the transaction. If her father and mother are to be believed, she thought her husband paid only Rs. 15 a month, whereas the premium was really Rs. 40-4-0. When pressed in cross-examination the father, it is true, admitted that possibly she might have mentioned Rs. 40-4-0, but it is evident that, unless he was intending to give false evidence, the real impression on his mind was that she said Rs. 15. However this may be, it seems clear that she never mentioned the assignment to her father, mother or mother-in-law during her illness. The only reference she is said to have made to the money to be received on her death was in **[201]** a remark to her mother reported as follows :—"Mehbub Bi told me that there would remain something in deposit with the Sirkar and after her death we should not be put to any trouble." This remark shows that she was thinking of death, which was only natural having regard to the serious nature of her illness. Surely, then, if she had understood that she and her husband had just made over to the plaintiff all their interest in the policy, she would have been full of regret at having done such a foolish act. It is quite evident, however, that she never expressed any regret at all.

The evidence of her father and mother, confirmed as it is by that of Abdul Samad's mother, proves that she never mentioned the assignment, and this silence on her part is hardly consistent with the supposition that she was aware of it. She is not said to have mentioned to her father, mother, or mother-in-law her alleged desire for a different kind of policy, and the story that she had such a desire rests entirely on the evidence of Mr. and Mrs. Bhandara. The account given by these two witnesses of the transaction is a strange one. It pictures Mehbub Bi well versed in questions of insurance, taking an intelligent interest in the subject, but leaves it difficult to conjecture why her interest ceased just when, if she had rightly understood the situation, she must have known that she and her husband had made a lamentable mistake.

The question which has now to be considered is whether when Mr. Bhandara first obtained the policy in her name he intended it to be for

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her or her husband's benefit, or whether throughout he intended to procure the benefit of it for himself or his wife. In the case of *Wainewright* v. *Bland* (1) Lord Abinger put a similar question of fact to the jury in the following terms:—" Who was the party really and truly effecting the insurance? Was it the policy of Miss Abercromby? Or was it substantially the policy of Wainewright, the plaintiff, he using her name for purposes of his own. If you think it was the policy of Miss Abercromby effected by her for her own benefit, her representative is entitled to put it in force, and it would be no answer to **[202]** say that she had no funds of her own to pay the premiums; Wainewright might lend her the money for that purpose and the policy still continue her own. But on the other hand, if looking to all the strange facts which have been proved before you, you come to the conclusion that the policy was in reality effected by Wainewright; that he merely used her name, himself finding the money, and meaning (by way of assignment or by bequest or in some other way) to have the benefit of it himself, then I am of opinion such a transaction would be a fraudulent evasion of the Statute of 14, Geo. III, c. 48, and that your verdict should be for the defendants." In appeal the case was decided in favour of the defendants on another issue, but the summing up was approved by the Court of appeal in *Shilling* v. *Accidental Insurance Co.* (2).

Assuming, then, that if it were found that this policy was effected on pretended behalf of Mehbub Bi, but really for the use and benefit and on account of the plaintiff or her husband, the contract would be void under s. 30 of the Contract Act (IX of 1872), the question to be decided would be similar to the issue raised in the above-mentioned cases. For deciding such an issue I can only regret that I have not the assistance of a jury, but as it is I must be guided by the probabilities of the case and cannot give undue weight to the deeply interested evidence of Mr. and Mrs. Bhandara.

Now it seems to me, looking to the rapidity with which the assignment followed the insurance, that there is reasonable ground for suspecting it to be part of the same transaction. It is difficult to believe the story that Mehbub Bi wanted an endowment policy. Possibly she and her husband might thus quickly have changed their minds as to the sort of policy required, but if they had had any ordinary prudence (assuming that they really wished for a policy) they would have taken care to secure the new one before abandoning the old. Mr. Bhandara must have known, after his experience of the impossibility of increasing the insurance on his mother's life. how difficult it would be to obtain a further policy on Mehbub Bi's; and, if he was acting fairly towards her and her husband, **[203]** and there was no pre-arrangement between him and Abdul Samad, he would naturally have cautioned them against parting with one policy before getting the other. But he has not been accused of acting unfairly towards them. Abdul Samad, who appears to have been the great loser by the assignment, seems never to have uttered a complaint at the way in which his chances of succeeding to Rs. 25,000, or a large part thereof, have been frustrated. He merely told his mother that his wife had made over the policy to the Bai in her lifetime. Surely this looks as if he knew that he and his wife had no real interest in it; as if he regarded the assignment as the last act in a transaction in which his wife's name was used. but in which he was not truly concerned; and as if, therefore,

(1) (1835) 1 Moo. and R. 481 (487.)
(2) (1857) 2 H. and N. 42.

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he had nothing to grumble about. According to Mr. and Mrs. Bhandara there had been no suggestion of an assignment till the 31st August, but the quick way in which everything was settled, suggests pre-arrangement between Mr. Bhandara and Abdul Samad.

Another consideration pointing in the same direction is the improbability of Bhandara's taking all the trouble of correspondence for effecting the insurance and remitting the premia unless he intended to have the benefit of the speculation. Mr. Anderson urged that he was an enthusiast about insurance and had helped many others to insure. Mr. Bhandara ascribed his zeal to a desire to befriend Mr. Limji, the Bombay sub-agent. While, however, making all due allowance for these motives it is difficult to attribute to pure benevolence his eagerness about Mehbub Bi's insurance. The correspondence shows that he believed in insurance as a speculation, and on the whole it seems more likely that he was speculating for himself or his wife than for Mehbub Bi or her husband. The mere fact that Mehbub Bi knew of the insurance and expected that her heirs would get something out of it, is not conclusive proof that the policy was obtained by Bhandara for her benefit; for according to Lord Abinger's summing up, the real question is not what she knew, but what he intended. If the law renders void an insurance on the life of a stranger, and if Mr. Bhandara effected this insurance, intending by assignment or otherwise to get the benefit of this policy, it would, in the language of Lord Abinger, **[204]** be an evasion of the law which would disentitile him to recover and also his wife, who was clearly acting in concert with him when she took the assignment.

In every case the decision depends on special circumstances peculiar to it, and, therefore, the verdict in *Wainewright* v. *Bland* is no help on the facts. A decision to a contrary effect will be found referred to on p. 24 of Bunyon on Life Assurance (3rd Ed.); *Vezina* v. *New York Life Co.* (1). In the latter case, in which a policy was assigned almost immediately, the transaction was upheld, but there apparently the Supreme Court was satisfied that, in the first instance, the contract had been made for the benefit of the insured.

In the present case in determining whether Bhandara when purporting to be negotiating an insurance for Mehbub Bi was really working to get the policy for himself or his wife, the arguments on either said seem to be as follows:—

For the reality of the policy:—

1. Bhandara negotiated insurances for many persons and was deeply interested in the subject.

2. Mehbub Bi's husband probably acquired a good deal of knowledge about insurance and communicated it to his wife.

3. She was anxious to provide for possible children.

4. She understood the effect of the insurance, as she told her father and mother about it and her mother-in-law that she was insured for Rs. 25,000.

5. The insurance was effected openly, and her father affixed his seal to a draft affidavit of her age.

6. The desire for an endowment policy was reasonable and explains the assignment.

7. There is no reason for disbelieving the plaintiff and his wife.

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(1) 6 Canada, S. C. 30.

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8. Abdul Samad is an intelligent man hardly likely to let his wife's name to be used in the manner suggested.

[205] 9. Abdul Majaid and his wife are untrustworthy witnesses whose accounts of the conversation with Mehbub Bi are unreliable.

Against the reality of the policy :—

1. Mehbub Bi was an illiterate Mahomedan woman and it is most unlikely that she understood anything about life insurance.

2. Her mother-in-law and her parents were ignorant of its nature. So was Syed Mahomed.

3. If she had understood anything about it, she, a healthy young woman of 19, would never have insured for ten years as if she expected to die in that period.

4. She did not understand what was due, as she could not tell her parents what the premium was. It is doubtful if she told Karim Bi the amount of insurance, for Karim Bi is not a very reliable witness, being the mother of Abdul Samad, who is under Bhandara's influence.

5. Abdul Majid denies having sealed the draft affidavit of age, or knowing anything of the insurance till his daughter's visit at the Moharrum.

6. The kind of policy selected marks it as the insurance of a speculator gambling on Mehbub Bi's life.

The speculator can only have been Abdul Samad or Bhandara.

7. Bhandara's letters and his proceedings in reference to his mother's insurance show him to be a speculator in insurance.

8. The speculator cannot have been Abdul Samad, unless we attribute to him great vacillation in assigning thus quickly without attempting to get another policy in exchange.

9. If he knew much about insurance he must have known of the difficulty of insuring native female lives, and was not likely, if speculating on his own account, to have parted with the policy he had got before getting another.

10. There is nothing to show that Abdul Samad was a speculator, and it is most unlikely that he should have undertaken to pay Rs. 40-4-0 per mensem, a large sum to a person in his [206] rank of life, on the mere chance of making a profit on the death of his wife, who was several years younger than himself.

11. After his wife's early death he is not shown to have expressed any disappointment at having allowed the money to slip through his fingers. He seems to have borne the loss with equanimity, though most people would have murmured a good deal.

12. The story of Mehbub Bi's desire for an endowment policy and the whole account of the assignment as an unpremeditated transaction is so improbable that it cannot be believed. Mr. Scott in argument characterised it as a ridiculous story.

13. Mehbub Bi apparently knew nothing about the assignment, as she never mentioned it. She told her mother that some money would remain with the Sirkar after her death, and that her parents would have no trouble. Her ignorance of the facts shows that she was a mere tool in the hands of others.

14. There is no reason for disbelieving Abdul Majid and his wife, who gave their evidence fairly and did not attempt to conceal Mehbub Bi's knowledge of the insurance. They were confirmed by Karim Bi as to her silence about the assignment.

15. Bhandara doubtless knew that he could not insure direct on a stranger's life, and, therefore, took out the policy in her name. He was apparently contemplating taking or recommending other insurances on female lives, as he was asking for forms.

16. The evidence of Mr. and Mrs. Bhandara is unreliable. He is in money difficulties and the interest at stake is large.

Such, I think, are the arguments on either side, and looking at all the circumstances together I am forced to the conclusion that the insurance was effected by Bhandara not for the benefit of Mehbub Bi or her husband, but with the intention of securing by assignment the benefit for himself or his wife. His wife comes forward with a policy assigned to her by an illiterate Mahomedan woman within a few weeks of the acceptance of the risk. The policy was wholly negotiated by him and the premia were remitted by him. It is difficult to conceive a state of circumstances more clearly throwing on him the burden of proving affirmatively that when he negotiated the policy he [207] was acting for the benefit of the woman or her husband and not for his own benefit or that of his wife. The interested evidence of himself and his wife seems insufficient to discharge that burden, weakened as that evidence is by the fact that Abdul Samad is not known to have expressed any regret at the loss of the money, and that Mehbub Bi apparently did not know of the assignment.

I, therefore, find on issues 1 and 2 for the defendants.

In discussing this subject I have carefully avoided reference to Mehbub Bi's early death, for as there is no allegation or proof of foul play, that death is wholly irrelevant in endeavouring to ascertain Bhandara's intentions just as it obviously would have been if she had been killed by a railway accident.

The next question to consider is whether in India an insurance for a term of years on the life of a person in whom the insurer has no interest, is void under s. 30 of the Contract Act (IX of 1872). Irrespective of authority it seems difficult to say in what respect an agreement by A to pay an annuity on condition that the annuity is to terminate and a large sum is to be received in case of the death of B within prescribed period differs in principle from an agreement to pay a small sum if a horse loses a race on the condition that a large sum is to be paid by the other party if he wins, or, to make the analogy mere close, if he passes the winning post within a certain time. The latter transaction would undoubtedly be treated as a wager and be avoided by the section. It is difficult, then, to see why the former does not fall within the same category as being a wager in which odds are given against the chances of a person dying within a certain number of years. But it may be said that though the analogy between life insurance and a bet looks stronger in case of short-term policies on the lives of strangers, the argument really applies with equal force to all life insurances(1). Consequently, it may be urged that as life insurance is within certain limits recognised as a valid transaction by the Courts in England notwithstanding the law against gaming and wagering, no form of life insurance falls within the term an "agreement by way [208] of wager" used in s. 30 of the Contract Act. I do not think that this argument, however, is sound. We cannot interpret the words of an Indian Act quite irrespective of English decisions and the phraseology of English Acts. The distinction between insurances that are

(1) Bunyan on Life Insurance (3rd. Ed.), p. 6.

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legitimate and insurances that are by way of gaming and wagering is clearly recognised in numerous decisions. The Act of 14 Geo. III, c. 48, forbids insurances "on the life or lives of any person or persons or on any other event or events whatsoever wherein the person or persons for whose use, benefit or on whose account such policy or policies shall be made shall have no interest or by way of wagering or gaming." Since that Act a certain class of policies, which would include the policy sued on in this case if my decision on issues 1 and 2 be correct, have always been described in judicial decisions as wagering policies. In *Howard* v. *Refuge Friendly Society* (1) certain policies on lives in which the person to be benefited had no interest, were described in one place as "wagering policies" and in another as "wagers," and were said to come within the prohibition not only of Stat. 14 Geo. III, c. 49, but also of the more recent Act of 8 and 9 Vict., c. 109, s. 18. In argument it was contended that this reference of Mr. Justice Matthew to the latter Act was unnecessary, and that his decision really rested on the Act of Geo. III, but it seems to me to show that in his opinion certain policies had in legal phraseology acquired the title of wagering policies and that, therefore, they were equally rendered void by s. 8 of 8 and 9 Vict., c. 109, which dealt with all agreements "by way of gaming or wagering" as well as by the earlier Act of Geo. III, which only related to a particular class of agreements, *viz.*, "policies by way of gaming or wagering."

In *Shilling* v. *Accidental Insurance Company* (2), in the plea which held good, the policy was described as a "gaming or wagering policy" contrary to the statute. In *Dalby* v. *India and London Life Assurance Company* (3) it is said that if there is an interest at the time of the policy it is not a "wagering policy." In the American case of *Connecticut Mutual Life Insurance Company* v. **[209]** *Schaefer* (4) an interesting history of the subject will be found. In that judgment, policies on lives in which the person effecting the insurance has no interest are called wager policies. What constitutes a wager policy is discussed, and it is said that to make a policy valid, the essential thing is that the policy shall be obtained in good faith and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. The same expression "wager policy" is used in *Warnock* v. *Davis* (5) while in *Scott* v. *Roose* (6), a similar policy is spoken of as a "gambling policy."

It simply comes to this: what is the meaning of the phrase "agreements by way of wager" in s. 30 of the Contract Act which I prefer to consider rather than s. 1 of Bombay Act III of 1865, the applicability of which to this case might possibly be questioned. Can it be that the words mean something different in India from what the corresponding words "agreements by way of wagering" mean in England? I do not see how such an argument can be maintained, or how the fact that 14 Geo. III. c. 48, is not in force in India affects the question. In *Hampden* v. *Walsh*, Cockburn, C. J., defined a wager as a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not happening, and said that since the passing of 8 and 9 Vict., c. 109, there is no longer as regards actions any distinction between one class of wagers and another, all wagers being made null and void at law by that statute. In *Thacker* v. *Hardy* (7), Cotton, L.J.,

(1) (1886) 54 L. T. 646.
(2) (1857) 2 H. and N. 42.
(3) (1854) 15 C. B. 365.
(4) (1876) 94 U.S. Rep. 460
(5) (1881) 104 U. S. R. 775.
(6) (1841) Long and Town. Ir. Rep. 54.
(7) (1878) 4 Q. B. D. 685 (695).

said that the essence of gaming and wagering was that one party was to win and the other was to lose upon a future event, which at the time of the contract was of an uncertain nature; but he also pointed out that there were some transactions in which the parties might lose and gain according to the happening of a future event which did not fall within the phrase. Such transactions, of course, are common enough, including the majority of forward purchases and sales.

A certain class of agreements such as bets, by common consent, come within the expression "agreements by way of wager." **[210]** Others, such as legitimate forms of life insurance, do not, though looked at from one point of view they appear to come within the definition of wagers. The distinction is doubtless rather subtle and probably lies more in the intention of the parties than in the form of the contract. In such doubtful cases it seems to me that the only safe course for the Courts in India is to follow the English decisions, and that where a certain class of agreement has indisputably been treated as a wagering agreement in England it ought to receive the same treatment in India (1). The framers of the Indian Codes were English lawyers, and where they have used words or phrases which have received a technical signification it must, I think, be presumed that they have used them in the technical sense. An insurance for a limited term of years on the life of a stranger certainly comes within the definition of a wager given by Cockburn, C. J., and it would, therefore, I think, be necessary for any one contending that it did not come within the intention of s. 30 of the Contract Act to point to some technical consideration in support of such a contention. It seems impossible, however, to suggest any such considerations, inasmuch as the term "wager" has frequently, as above pointed out, been applied to policies of this class which have usually been treated as wagers of a most objectionable kind (see remarks of Lush, J., in *Evans* v. *Bignold* (2) and of Richard, B., in the case of *Scott* v. *Roose* (3)).

On the third issue I find that Mr. Bhandara had no interest in the life of Mehbub Bi, and on the fourth that the policy is void under s. 30 of the Contract Act.

On the other issues of fact I will only briefly record my findings.

Issue 5.—I do not think it proved that the policy was obtained by fraudulent misrepresentations as to the means and circumstances of Mehbub Bi. The misrepresentations are said to be contained in letters, Exs. 22, 26 and 28. It is impossible to point to any material statement which is certainly false. It may be improbable that Abdul Samad's salary was Rs. 200 per month, **[211]** but it is impossible to say that it was not. Mehbub Bi's father does not think it was so much, and one would not expect a man in Abdul Samad's position to get so much, but we do not know enough about him, or the duties which he performed, to make it safe to pronounce definitely on the subject. It is impossible to be sure that he did not keep a horse, and the allegation, that he got some landed property from his father, seems true. He got one house from his father and now appears to have others, and it is clear that a considerable sum was spent on his marriage.

As the allegations are not shown to be untrue, it is unnecessary to consider what their effect on the policy would have been if false.

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(1) See *Trimble* v. *Hill* (1879) (5 Ap. Ca. 342) and *Kathama Natchiar* v. *Dorasinga* (2 I.A. 169 (186).)

(2) (1869) L. R. 4 Q. B. 622.

(3) (1841) Long and Town Ir. Rep. 54.

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Issue 9.—I do not think the assignment by Mehbub Bi is proved. I dare say she did make her mark, but that is not enough. She could not read or write, and it is for the plaintiff, who puts forward the paper, to show not only that she made her mark, but also that she understood the nature of her act, or, in other words, that she made what is called by the Privy Council in *Ramrutton* v. *Musst. Nandu* an intelligent signature. The story that she said she wanted an endowment policy seems hardly credible, and her subsequent silence about the assignment indicates pretty clearly that she did not know she had assigned. Her application of 16th May was for a policy in favour of her husband Abdul Samad. On the 3rd September the policy had not been received and it was not known whether it would come in her name or her husband's. In these circumstances the signatures of both were taken, but apparently Mehbub Bi did not really understand what was being done. I think this issue really goes with issues 1 and 2. If there was an understanding throughout between Bhandara and Abdul Samad, that Mehbub Bi's name only was to be used and an assignment taken as soon as possible, probably no great effort would be made to explain to her what she was executing, and her subsequent silence on the subject would be intelligible, as also Abdul Samad's indifference about the loss of the money. If, on the other hand, the policy was really intended to be for her use, there would, of course, be less reason to doubt the reality of the assignment.

[212] On the 11th issue I find that Mehbub Bi died on 2nd October, 1894. The fact was not disputed.

On the various points of law arising on the other issues it is unnecessary to express an opinion.

On the interesting question much discussed in argument whether an assignment of a life policy to a stranger having no interest in the life of the insured is void, I am not prepared to give a decision. But I may point out that, if the contract of insurance is good in its inception, the assignment to a stranger cannot render it void as a wager under s. 30 of the Contract Act. There is no fresh contract between the assignee and the company, and there is no wager between the assignee and the assignor who sells his policy outright. It may be, however, that such an assignment is void as contrary to public policy; but if so the question would usually only arise as in the American cases of *Warnock* v. *Davis* (1) and *Cammach* v. *Lewis* (2) between the assignee and the representatives of the insured. As against the company the policy would remain valid, whether for the benefit of the assignee or the representatives, and the contest would ordinarily be between them alone. In the present case doubtless if the assignment were pronounced void, the present plaintiff could not recover; but while the American cases would receive full and respectful consideration if the decision turned on this issue, the English authorities on the question of "public policy" would have to be carefully studied.

As the findings on issues 1 to 4 are sufficient for the determination of this case, it is unnecessary for me to pursue this subject further.

I dismiss the claim with costs.

Suit dismissed.

The plaintiff appealed. The appeal came on for hearing before Farran, C. J., and Tyabji, J., on 12th August, 1898.

(1) (1881) 104 U. S. Rep. 775.

(2) (1872) 15 Wallace 643.

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Macpherson and *Anderson*, for appellant (plaintiff).
Branson and *Scott*, for respondents (defendants).

[213] In addition to the authorities cited in the lower Court, the following cases were referred to :—*Macgregor* v. *Fergusson*(1) ; Arnold, Vol. I, p. 123 ; *Ashley* v. *Ashley* (2) ; *Ætna Life Insurance Co.* v. *France* (3) ; *New York Mutual Life Assurance Co.* v. *Armstrong* (4).

JUDGMENT.

The Appeal Court confirmed the decree of the lower Court with costs.

Appeal dismissed.

Attorneys for the plaintiff (appellant) :—Messrs. *Bicknell, Merwanji and Motilal.*

Attorneys for the defendants (respondents) :— Messrs. *Crawford and Co.*

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ORIGINAL CRIMINAL.

Before Mr. Justice Candy.

EMPRESS v. DURANT. [6th October, 1898.]

Practice—Procedure—Witness—Accused person calling as witnesses persons charged with him and awaiting a separate trial for same offence—Criminal Procedure Code (Act V of 1898), s. 342, cl. 4—Evidence Act (I of 1872), s. 132.

The accused D, a European British subject, was charged together with others who were natives of India, under ss. 384, 385 and 389 of the Penal Code (Act XLV of 1860), with conspiring to commit extortion. D claimed to be tried by a mixed jury under s. 450 of the Criminal Procedure Code (Act V of 1898). The other accused, who were natives of India, then claimed to be tried separately under s. 452. The trial of D then proceeded, and at the close of the case for the prosecution, he proposed to call as his witnesses the persons who had been charged with him and who were awaiting their trial. They objected to be called.

Held, that he was entitled to call them as witnesses and to examine them on oath.

The words "the accused" in cl. 4 of s. 342 of the Criminal Procedure Code (Act V of 1898) mean the accused then under trial and under examination by the Court.

[F., 9 Cr.L J. 370=4 L.B.R. 362 (363) ; R., 33 C. 1353 (1359)=10 C.W.N. 962=4 Cr.L.J. 145 ; 3 Bom.L.R. 437 (438) ; 15 C.P.L.R. 112 (114) ; D., 7 A.L.J. 86 =11 Cr.L.J. 21=5 Ind. Cas. 21.]

THE accused, who was a European British subject, was charged with four other persons (three of whom were natives of India) **[214]** under ss. 384, 385 and 389 of the Indian Penal Code (Act XLV of 1860) with conspiring to commit extortion.

They all claimed to be tried.

Durant being admittedly a European British subject claimed under s. 450 of the Criminal Procedure Code (Act V of 1898) to be tried by a mixed jury, of which not less than half should be Europeans or Americans, or both Europeans and Americans.

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(1) (1850) Taylor and Bell 378.
(2) (1829) 3 Sim. 149.
(3) (1876) 94 U. S. Rep. 561.
(4) (1887) 117 U. S. Rep. 591.

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The three accused who were natives of India, then claimed under s. 452, cl. 2, of the Code to be tried separately.*

The trial of Durant then proceeded. He defended himself.

At the close of the case for the prosecution, Durant opened his case and addressed the jury. He then called as his witnesses the three persons who had been charged with him and who were awaiting their trial, *viz.*, Dhanjibhai D. Dady, Cursetji M. Mehta, and Sorabji R. Bottlewalla. Their counsel, however, who were present watching the case, objected to their being called as witnesses.

P. M. Mehta, for the accused Dhanjibhai D. Dady, submitted that an oath could not be administered to his client, who was a co-accused with Durant and was awaiting his trial on the same charges.

He cited *Reg.* v. *Hanmanta* (1) ; *Empress of India* v. *Asghar Ali* (2) ; *Queen-Empress* v. *Dala* (3). The law in India is different from English law—*Winsor's case* (4).

Anderson and *Bahadurji*, for Cursetji M. Mehta and Sorabji R. Bottlewalla, also objected.

Durant contended he was entitled to call the co-accused. The cases cited were cases in which accused persons who are illegally pardoned were called as witnesses for the prosecution.

Macpherson, for the prosecution.—Under English law the co-accused could certainly be called as witnesses—Archbold's Criminal Pleading (20th Ed.), p. 318. The word "accused" in **[215]** the Criminal Procedure Code must mean the accused actually under trial. He referred to s. 132 of the Evidence Act (I of 1872).

JUDGMENT.

CANDY, J.—As to the English law on this subject there can be no doubt. Besides the passage from Archbold referred to by the learned counsel for the prosecution, reference may also be made to Roscoe's Criminal Evidence (4th Ed.), p. 122, where it is clearly shown that so long as the co-accused is not being tried jointly, he can be called as a witness. Mr. Mehta referred to the report of *Winsor's case* (4), but the question dealt with in that report was whether the jury were rightly discharged when the prisoners were tried together before Baron Channell in March, 1865. At the next assizes before Keating, J., in July, 1865, the two prisoners were again put on their trial, and then counsel for prosecution applied for leave to call the younger prisoner (Harris) as a witness against Winsor. Mr. Prideaux said that on the part of Harris he could make no objection to such a course of proceeding, but he would submit whether it would not be necessary that she should be first acquitted. The learned Judge said he had considered the point, and he thought that it was not necessary. Harris was then taken from the bar and Winsor was put upon her trial alone. Mr. Folkard, for Winsor, made no objection on that ground, but submitted that Winsor could not be put on her trial again, the jury in the former case not having been legally discharged. But Keating, J., held (p. 382) that the objection was not tenable ; the trial proceeded and Winsor was convicted.

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* One of the accused, who was a European, was tendered a pardon under s. 337 of the Criminal Procedure Code (Act V of 1898).

(1) 1 B. 610. (2) 2 A. 260. (3) 10 B. 190. (4) (1865) 4 F. and F. 363.

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In January, 1866, the case came before the Queen's Bench (1) on a writ of error, and Mr. Folkard, for Winsor, argued (*inter alia*) that the evidence of Harris was improperly admitted.

The Judges all gave judgment for the Crown. There is one important passage in the judgment of Cockburn, C.J., which has been quoted in subsequent cases. He said (pp. 311-2):—

"In all cases where persons are joined in the same indictment, and it is desirable to try them separately in order that the evidence of one may be received against the other, I think it necessary, for the purpose of securing the greatest possible amount of truthfulness in the person coming to give evidence, to take a **[216]** verdict of not guilty as to him, or, if the plea of not guilty be withdrawn by him and a plea of guilty taken, to pass sentence; so that the witness may give his evidence with a mind free of all corrupt influence which the fear of impending punishment, and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce."

But in the course of argument in the subsequent case of *The Queen* v. *Payne* (2), Cockburn, C.J., alluded to this passage and said (p. 354): "A notion has gone abroad that I laid down that one of these courses must be taken. That is very different from what I did say. I only spoke of what is convenient."

Payne's case is particularly instructive, because in that case Curtis had actually been called before the Magistrates as a witness on behalf of Payne. Subsequently Curtis was included in the indictment and was tried with Payne. Payne's counsel wanted to call Curtis as a witness, and naturally complained that it was very hard that his client should be deprived of Curtis's evidence by Curtis being made an accused person. To this Cockburn, C.J., said: "The remedy for that is to apply to have the prisoners tried separately. And, if the witness were improperly included in the indictment, the Judge would, no doubt, grant such an application."

It may be remarked that under s. 239 of the Criminal Procedure Code (Act V of 1898) it is left to the discretion of the Court to try accused persons together or separately. In *Payne's case* it was held that Curtis could not be examined as a witness on behalf of Payne, because it is a principle of English law that the jury, which has to decide on the guilt or innocence of an accused person, cannot hear that person examined and cross-examined.

Another case in which one accused person was called as a witness on behalf of his co-accused, is the well-known case of *Reg.* v. *Bradlaugh* (3). Bradlaugh with Ramsay and Foote was indicted for publishing blasphemous libels. Before the jury were sworn, Bradlaugh applied that he might be tried separately and first, arguing (*inter alia*) that he might desire to call his co-accused as his witnesses. Sir H. Giffard, for the Crown, opposed, but Coleridge, C.J., granted the application. When Bradlaugh was called on to enter on his defence, and it was suggested that **[217]** he might call the other defendants as his witnesses, Avory on behalf of Ramsay objected that this could not be done, unless a verdict of acquittal was taken as against Ramsay. He cited the observation of Cockburn, C. J., in *Winsor's case* (*supra*). Coleridge, C. J., said that there the fellow-prisoner had been called for the Crown. Avory urged that this did not matter, as if the co-defendant were called for the defence he would be liable to cross-examination

(1) (1866) L.R. 1 Q.B. 289.
(2) (1872) L.R. 1 C.C.R. 349.
(3) (1883) 15 Cox. 217.

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and could hardly avoid criminating himself. Coleridge, C.J., said he "should endeavour to avoid that by not allowing questions to be asked or answered which might have that effect." As to the dictum cited, he observed "that Cockburn, C. J., did not go the length of saying that the course taken was not legal, even when the fellow-prisoner had been called for the prosecution, to make out a case against the prisoner being tried. Here, however, the co-defendant was to be called for the defendant under trial. He could not prevent this, nor compel the prosecution to take a verdict of acquittal as to the co-defendant to be called. The co-defendant was to be called simply to disprove publication by the defendant Bradlaugh, and any questions to show publication by anybody else would either not be admissible, or, if they tended to criminate the witness, he would not be compellable to answer." I shall have occasion, at a later stage of these remarks, to refer to the difficulties felt by Coleridge, C. J.

Turning to the Indian cases quoted by Mr. Mehta, it may be remarked that *Asghar Ali's case* (1) and the case of *Dala Jiva* (2) are on all fours with *Hanmanta's case* (3), which they followed. It will suffice, therefore, to critically examine *Hanmanta's case* (3). In that case two men, Moro and Ramchandra, were before the Magistrate as accused persons. They under the influence of illegally tendered pardon gave evidence as witnesses. M. Melvill and Kemball, JJ., relied on ss. 344 and 345 of Act X of 1872 (the then Code of Criminal Procedure), and their Lordships said:

"The effect of these sections is to render it illegal for a Magistrate to convert an accused person into a witness, except when a pardon has been lawfully granted under s. 347. Moro and Ramchandra being accused persons, and [218] not having been legally pardoned, could not be examined as witnesses until they had been acquitted, or discharged, or convicted. Their evidence must, therefore, be rejected as absolutely inadmissible."

Their Lordships then referred to and distinguished the English case of *R.* v. *Rudd* (4), which was also the case of an illegally pardoned accomplice.

Now an obvious consideration which must occur to one on reading this decision in *Hanmanta's case* is that it refers solely to the evidence of an illegally pardoned accomplice, and is based on the combined effect of ss. 344 and 345 of the then Code of Criminal Procedure. The provision in s. 345 stood by itself as a separate section, and was not, as it now is in the present Code of Criminal Procedure, part of s. 342, which deals with the examination of an accused person at the trial of that accused person, and provides that for the purpose of that examination in that trial no oath shall be administered to that accused person. Their Lordships in *Hanmanta's case* did not profess to deal with the case of an accused person, who has been indicted jointly, but is to be tried separately by a different jury or by different assessors, being called as a witness for his co-accused.

There was a case from Burma, ultimately decided by the High Court of Calcutta, in which the decision in *Hanmanta's case* was apparently not followed. It is to be found in Selected Judgments of the Judicial Commissioner, Burma, Vol. I, p. 246, and reference to it will be found at p. 667 of the I. L. R., 16 Bom. In that case from Burma an illegally pardoned accomplice had given evidence. The Judicial Commissioner

(1) 2 A. 260. (2) 10 B. 190. (3) 1 B. 610. (4) (1775) 1 Cowp. 331.

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(J. Jardine) said: "The Courts have been strict in excluding evidence on illegal pardons * * *—*Hanmanta's case*, *Asghar Ali's case*. I hold, therefore, following *Hanmanta's case*, that as he (the witness in question) was not legally pardoned, he could not have been examined as a witness." As the Recorder differed from this view, the case was referred to the Calcutta High Court, which held (Mitter and Field, JJ.) that the evidence was admissible, though of course it would have to be carefully weighed. They said: "Under the Evidence Act, admissibility is the rule and exclusion the exception, and circumstances, which under **[219]** other systems might operate to exclude, are under the Act to be taken into consideration only in judging of the value to be allowed to evidence when admitted."

That the decision in *Hanmanta's case* required a restricted application was evidently felt by Jardine, J., in *Queen-Empress* v. *Mona Puna* (1). He distinguished the Burma case on the ground that the accused person in that case had not been actually placed before the Magistrate, though the Magistrate had at the request of the Police Superintendent illegally forwarded a pardon, under the influence of which the said person gave evidence as a witness. So Jardine, J., while admitting that the word "accused" is used in several sections of the Criminal Procedure Code as designating supposed offenders, went on to say: "But if we are to follow *Hanmanta's case*, the question arises, what is the meaning of the last sentence of s. 342, "No oath shall be administered to the accused"? The decision can best be explained by holding that by "the accused" is meant a person over whom the Magistrate or other Court is exercising jurisdiction; and on the whole we think this restricted meaning best suits the context."

I would go further and say that "the accused" in s. 342 must mean the accused then under trial and under examination by the Court. It cannot include an accused over whom the Court is exercising jurisdiction in another trial. I may be trying a murder case in this High Court, and an important witness, either for the Crown or for the defence, may be an accused person who has pleaded to a charge of house breaking, and whose trial is to come on directly after the murder case. It would be absurd to say that no oath shall be administered to that accused person when he is tendered as a witness in the murder case. As the Judge said in *Asgher Ali's case* (*supra*), an accused person cannot be put on his oath or examined as a witness in the case *in which he is accused*. Dady, Mehta and Bottlewala are not accused persons in the case in which Durant is accused. Their case is to be tried separately. They were co-accused: they are not so now. If they were being tried jointly with Durant, it would be impossible to say that their statements recorded under s. 342 of the Code of Criminal Procedure, whether amounting **[220]** to confessions or not, could not be taken into consideration by the jury in favour of Durant. Why, then, should Durant be deprived of the benefit of these statements, because these men are not being tried jointly with him? But as they are not now being tried in this case, the only way in which they can make statements is as witnesses, and if they are witnesses, then they must be sworn.

For all these reasons I have no doubt that these persons, whom Durant has tendered as his witnesses, can be examined as witnesses, and, therefore, on oath. The only difficulty in my mind arises from the provisions of s. 132

(1) 16 B. 661.

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of the Evidence Act. As shown above in *Bradlaugh's case*, Coleridge, C.J., said that he would not allow questions to be asked or answered which might have the effect of incriminating the witness. That course is not open to this Court; for by s. 132 of the Evidence Act a witness is not excused from answering any question as to any matter relevant to the matter in issue in any civil or criminal proceeding upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate such witness. When an accused person is making a statement under s. 342 of the Code of Criminal Procedure, he can refuse to answer any question. As a witness he is not excused from answering any question as to any matter relevant to the matter in issue. There is, however, an important proviso to s. 132 of the Evidence Act, *viz.*, that no such answer which a witness shall be compelled to give shall be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer. As then the jury now trying Durant, and hearing his witnesses examined and cross-examined, will not be the jury which will have to decide as to the guilt or innocence of such of those witnesses as may be subsequently put on their trial, and as the answers which those witnesses may be now compelled to give cannot be proved against them in the subsequent trial, I rule that the witnesses now called by Durant on his behalf can be duly examined and cross-examined on oath.

Attorneys for the prosecution.—Messrs. *Craigie, Lynch and Owen.*
Accused in person.

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[221] APPELLATE CRIMINAL.

Before Mr. Justice Parsons and Justice Ranade.

QUEEN-EMPRESS *v.* RAGHU.* [14th March, 1898.]

Criminal Procedure Code (Act X of 1882), s. 533—Confession—Confession not signed by the accused—Admissibility of such confession—Parol evidence admissible to prove the terms of the confession.

Section 533 of the Code of Criminal Procedure (Act X of 1882) is intended to apply to all cases in which the directions of the law have not been fully complied with. It applies to omissions to comply with the law as well as to infractions of the law.

Queen-Empress v. *Visram Babaji* (1) followed.

Jai Narayan Rai v. *Queen-Empress* (2) dissented from.

The accused was charged with murder. At the trial a confession made by him before the committing Magistrate was tendered in evidence against him. The Sessions Judge rejected the confession as inadmissible, as it did not bear the mark or signature of the accused, and, as there was no other reliable evidence to bring home the charge to the accused, he was acquitted.

Held, reversing the order of acquittal, that though the record of the confession was inadmissible, parol evidence could be given of the terms of the confession, and those terms, when proved, might be admitted and used as evidence against the accused under s. 533 of the Code of Criminal Procedure (Act X of 1882). The accused was, therefore, ordered to be re-tried.

[F., 4 Bom. L.R. 785 (786); R., U.B.R. (1903), 1st Qr, Cr. Pro. Code, p. 13 (16.)]

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* Criminal Appeal No. 24 of 1898.

(1) 21 B. 495.

(2) 17 C. 862.

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APPEAL by the Local Government from an order of acquittal passed by C. H. Jopp, Sessions Judge of Ahmednagar.

The accused was charged with the murder of his wife and child.

He was alleged to have made a confession before the committing Magistrate.

The confession was taken down in the Marathi language, in the form of question and answer, by a clerk in the presence of the Magistrate who made a memorandum in English.

The confession did not bear the mark or signature of the accused.

At the trial in the Court of Session the confession was retracted by the accused. Thereupon the prosecution examined the [222] clerk who had written the confession. He stated that he wrote down what the accused said, that the statement was read over to the accused, and admitted by him to be correct, and that he told a kulkarni to get the accused to make his mark, but he did not do it.

The Sessions Judge held that the confession was inadmissible in evidence, and there being no other evidence sufficient to connect the accused with the offence, the Sessions Judge, concurring with the assessors, acquitted the accused. The following extract from the judgment gives the reasons for the acquittal :—

"The error of the Magistrate in omitting to ask the accused to sign the statement was, having regard to the probable intention of the Legislature, of such a nature as may have seriously prejudiced the accused in his defence on the merits. It may have deprived the accused of the opportunity given him by the law of denying the accuracy of the confession, and the statement is inadmissible in evidence under s. 91 of the Evidence Act and under s. 533 of the Code of Criminal Procedure, which so far from affording a remedy for a defect of this kind expressly excludes from the operation of this section errors which have injured the accused as to his defence on the merits. It may be noted that as the kulkarni, who was told to take the accused's signature, has not been examined, it cannot be pronounced for certain that the accused did not at the last moment refuse to make his mark and deny that the statement was correct.

"As the confession cannot be considered against the accused, and as the evidence in the case is insufficient by itself to establish the accused's guilt, it is plain that it is not proved that the accused caused the death of Ambi or of his infant daughter.

"The Court, agreeing with the assessors, directs that the said Raghu Mahadu be acquitted and discharged."

Against this order of acquittal the Local Government appealed to the High Court.

Rao Bahadur *Vesudev J. Kirtikar*, Government Pleader, for the Crown.—The Sessions Judge was wrong in holding that the confession of the accused was inadmissible in evidence merely because it was not signed by the accused. *Reg.* v. *Bai Ratan* (1) is not applicable to the present case. That ruling is, no doubt, followed in *Reg.* v. *Shivya* (2) *Reg.* v. *Apa* (3) and *Imp.* v. *Sirsapa* (4). But all these cases were decided under the old Code of Criminal [223] Procedure (Act X of 1872). But the law is now altered by s. 533 of the present Code. Such an omission can now be cured by taking evidence that the accused duly made the statement

(1) 10 B. H. C. R. 166.
(2) 1 B. 219.
(3) 10 B.H.C.R. 181, foot note.
(4) 4 B. 15.

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recorded, and when the statement is so proved, it is admissible notwithstanding the provisions of s. 91 of the Evidence Act. In accordance with this section the statement of the accused has been proved in this case by the clerk who wrote down what he said. The clerk deposes that the whole statement was read over to the accused, who admitted it to be correct. The Sessions Judge holds that the omission to ask the accused to sign the confession may have prejudiced him in his defence. But of this there is no proof. The statement is, therefore, admissible in evidence, and should be taken into consideration against the accused.

M. B. Chaubal, for accused.—No doubt the Full Bench ruling in *Bai Ratan's* case(1) and the cases in which it is followed are all decisions under the Code of 1872, but the principle laid down in those cases still holds good under the present Code. The reason why the accused is required to sign a confession, is that the law gives him a *locus penitentiæ*, a final opportunity, before the completion of the record, of showing that the confession was not voluntary, or made under improper influences, or that it is not accurately recorded. The accused is deprived of this opportunity when he is not asked to sign the incriminating statement. If it is not signed, the record is incomplete. Section 533 of Act X of 1882 was not intended to cure such a defect. When a confession is complete, the law requires the Magistrate to make certain endorsements at the foot of the confession. If any of these endorsements are omitted, s. 533 would allow evidence to be taken to show that the provisions of the law were substantially complied with; but it cannot apply where the statement is not complete on the part of the person making it. The conviction would be based, not on what the accused himself had actually stated, but upon evidence of what he intended to state. Such a confession is no confession and cannot be used against the accused. Even if evidence be taken under s. 533, it must show that the confession was *duly* made by the accused. The word "duly" **[224]** means in accordance with the provisions of the law in that respect, and where the accused is not asked to sign what he has stated, or being asked, has refused to do so, no evidence can prove that the confession was duly made.

JUDGMENT.

PARSONS, J.—This is an appeal by the Local Government against the order passed by the Sessions Court of Ahmednagar, acquitting Raghu Mahadu of the offence of murder with which he was charged. The chief ground of the appeal is that the Sessions Judge improperly rejected, as inadmissible in evidence, the confession made by the accused to the committing Magistrate.

It is somewhat difficult to ascertain what were the precise reasons which led the Sessions Judge to hold that the confession was inadmissible, and could not be treated as evidence, as he did after he had examined the karkun who took it down in writing, and after he had allowed it to be read and recorded in the case. It is true that the Magistrate had not fully complied with the requirements of the law in recording the confession, for he had not obtained the mark of the accused upon it, but the Sessions Judge evidently thought that this omission was not fatal in itself, for he says that the argument of the pleader to that effect does not commend itself to him. It seems that the omission *plus* the prejudice that the Sessions Judge thinks was caused to the accused in his defence by the omission was the reason

(1) 10 B. H. C. R. 166.

which led to the rejection of the confession, for the Sessions Judge says: "The error, therefore, of the Magistrate in omitting to ask the accused to sign the statement was, having regard to the probable intention of the Legislature, of such a nature as may have seriously prejudiced the accused in his defence on the merits. It may have deprived the accused of the opportunity given him by the law, of denying the accuracy of the confession, and the statement is inadmissible in evidence under s. 91 of the Evidence Act I of 1872 and under s. 533 of the Code of Criminal Procedure (Act X of 1882), which so far from affording a remedy for a defect of this kind expressly excludes from the operation of the section errors which have injured the accused as to his defence on the merits."

It becomes, therefore, necessary to ascertain exactly what s. 533 of the Code of Criminal Procedure means. In the present [225] case we have a confession recorded under s. 364 tendered in evidence, but it is found that one of the requirements of the section has not been observed, *viz.*, the record is not signed by the accused. On this account the record is inadmissible in evidence. Under the provisions of s. 91 of the Indian Evidence Act, oral evidence would be inadmissible to prove the terms of the confession, and this was the law under the Code of 1872 as regarded confessions taken otherwise than in the course of a preliminary inquiry. (See the case of *Bai Ratan* (1) and *Reg.* v. *Daya Anand and Ranchod Khalpo* (2)). The Code of 1882, however, has in s. 533 introduced an important alteration. It expressly allows oral evidence to be given that the accused duly made the statement recorded, and it provides that notwithstanding any thing contained in the Indian Evidence Act, s. 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits. This seems to me to be capable of but one meaning. I can see no ground for the nice distinction drawn in *Jai Narayan Rai* v. *The Queen-Empress* (3) between omissions to comply with the law and infractions of it. That ruling was doubted in *Lalchand* v. *Queen-Empress* (4), dissented from in *Queen-Empress* v. *Visram Babaji* (5), and I agree with Strachey, J., entirely on this point, and I think that s. 533 is intended to apply to all cases in which the directions of the law have not been fully complied with.

The result in this. The record of the confession is inadmissible owing to a failure to comply with the law, and nothing can make it admissible, but parol evidence may be given of the terms of the confession, and those terms, if and when proved, may be admitted and used as evidence in the case. As regards confessions made and recorded by a Magistrate in the course of a preliminary enquiry, there does not seem to have been any material alteration in the law. Section 246 of the Code of 1872 permitted evidence to be given of the statement made where the record was informal. In the case of *Reg.* v. *Deva Dayal* (6), the Judges deal with such a confession and use it in evidence although it is not signed, [226] holding that the defect had not in any way under the circumstances prejudiced the accused, and this, too, when there was no evidence adduced to prove the statement. I notice that the note by the editor of this report is very misleading, since it ignores the distinction that there was between the confession in the two cases it refers to, and erroneously calls them similar confessions. There is, however, a proviso to the section, namely,

(1) 10 B, H. C. R. 166. (2) 11 B. H. C. R. 44. (3) 17 C. 862.
(4) 18 C. 549. (5) 21 B. 495. (6) 11 B.H.C.R. 237.

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that the error has not injured the accused as to his defence on the merits. This is, of course, a question to be determined on the merits of each particular case, and it is impossible to lay down any rule on the subject. In the present case the Sessions Judge only says that the error may have deprived the accused of the opportunity, given him by the law, of denying the accuracy of the confession. It is, however, a matter of evidence whether he was actually so deprived or not. If, after the record had been made conformable to what the accused declared to be the truth, his signature to it was not taken by mere oversight, it is difficult to see how he could be prejudiced by the omission. It might be different if he had denied the accuracy of the statement as recorded, and if on that account his signature was not taken, though in that case the objection would be not so much one of prejudice as one of no confession at all. We observe that in the Sessions Court the accused denied making the statement. The Sessions Judge ought on this point to have taken the evidence of the kulkarni to whom was deputed the duty of asking the accused to put his mark to the record, and of the Magistrate who examined the accused, and have ascertained whether the accused duly and voluntarily made the statement recorded, and why his signature was not taken, and then decided whether or not the statement should be admitted.

As there has been no proper inquiry in the present case on the above points, and as the confession after being admitted in evidence has been held inadmissible on insufficient reasons, we reverse the order of acquittal, and direct that the accused be retried.

RANADE, J.—This is an appeal under s. 417 from an order of acquittal passed by the Sessions Judge of Nagar, who, concurring with the assessors, found that the charges of murder and culpable homicide brought against the accused were not proved. **[227]** The alleged murders took place on 1st May, 1897, when the victims, who were the wife and daughter of the accused, first disappeared. On 13th May, 1897, accused is alleged to have made a self-incriminating statement before the Committing Magistrate, F.C., in which he admitted having, in a fit of anger, struck his wife twice—once before and again after she had dashed the child with her on the ground. The statement was taken down in Marathi by a clerk, who was examined as a witness in the case, in the presence of the Magistrate, who made an English memorandum of the same. The vernacular statement was not signed by the accused, nor did it bear his mark. According to the clerk, he read over the statement to the accused, who admitted its correctness, and then he made it over to a kulkarni to make a mark for the accused, but the kulkarni did not make the mark. The Sessions Judge held that this statement was inadmissible in evidence, and as accused denied all knowledge of the charge, and there was no other reliable evidence the accused was acquitted and discharged. It was contended before us that under the circumstances the defect in the statement was cured by the evidence of the clerk, and that the Sessions Judge was in error in excluding this confession from his consideration. Sections 533 lays down that, if the error had not injured the accused as to his defence on the merits, evidence may be taken to prove that the accused person duly made the statement in respect of which the record was defective. The Session Judge in this case was of opinion that the omission to obtain the signature or mark of the accused person was a defect which affected the defence on the merits, and he, therefore, held that the defect was not cured under the provisions of s. 533. The point for consideration is thus whether the defect

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was only one of form which could be cured or was one which affected the merits of the defence. The decisions of this Court in *Reg* v. *Bai Ratan* (1) and the other case, *Reg.* v. *Daya Anand* (2), which followed that ruling, went the length of interpreting the provisions of the corresponding section of the old Act so strictly as to exclude all oral evidence in cases of defects in the record, represented by the failure of the accused to sign or make his mark, or when the statement was not taken down in the form of question and answer [228] (*Reg* v. *Shivya* (3)) or when the statement was not authenticated by the Magistrate's endorsement of its accuracy. When the certificate was not recorded at the time, but was appended after some days, it was similarly held that the irregularity was one which made the confession inadmissible (*Empress* v. *Daji Narsoo and Govinda Natha* (4). The strictness of these rulings apparently suggested the change in the wording of the present s. 533. The other High Courts have not interpreted the old section with the same strictness. In *Empress* v. *Ramanjyya* (5) the decision of this Court noted above (*Reg* v. *Shivya*) was not followed, and that High Court held that oral evidence was admissible. In *Empress of India* v. *Bhairon* (6), failure to append the memorandum in due form was held not to render the confession inadmissible. In the *Queen* v. *Kala Chand Pal*(7) similarly, the High Court of Calcutta sent the case back for the examination of the Magistrate with a view to remove the defects caused by non-compliance with the provisions of the old s. 346. In *Empress* v. *Munshi Sheikh* (8) the High Court of Calcutta held that the defect represented by the taking down of the statement in the form of narrative, and not in the form of question and answer, did not prejudice the defence of the accused. The strictness of the ruling in *Jai Narayan Rai* v. *The Queen-Empress* (9) was not approved by the same Court in *Lalchand* v. *Queen-Empress* (10) when the defect, in both cases, was represented by the answers being taken down in a language other than that in which the accused gave them to the Magistrate. In *Reg* v. *Deva Dayal*(11), this Court held that failure to sign the statement did not affect the admissibility of it in evidence, if it did not prejudice the prisoner. The true principles which should govern such cases were clearly laid down in *Queen-Empress* against *Viran* (12). As stated there, s. 533 merely gives legal sanction to the maxim "*Omnia Præsumuntur rite esse acta.*" When no attempt has been made to comply with the provisions of the law, s. 533 will [229] not render a confession admissible. Judging by this test, it cannot be said in the present case that the Magistrate made no attempt to comply with the provisions of the law. He made a memorandum in English. He put the questions and answers which were taken down in his presence by the clerk, and these were read to the accused, and admitted by him to be correct. The memorandum and certificate are all in proper form. The failure of the kulkarni to make the mark of the accused was apparently not noticed through inadvertence. It does not appear that there is any room for presuming, as the Sessions Judge has apparently done, that the accused might have changed his mind, and that admitting the oral evidence of the Magistrate and of the kulkarni under s. 533 would prejudice the defence on the merits. It must be admitted that the clerk's evidence by itself was insufficient for the purposes for which it was given. The prosecution should have given the evidence of the Magistrate himself who

(1) 10 B. H.C.R. 166. (2) 11 B. H.C.R. 44. (3) 1 B. 219.
(4) 6 B. 288. (5) 2 M. 5. (6) 3 A. 338.
(7) 24 W. R. Cr. R. 29. (8) 8 C. 616. (9) 17 C. 862.
(10) 18 C. 549. (11) 11 B.H.C. R. 237. (12) 9 M. 224.

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put the question, and recorded the answer. It is also not clear how the prosecution could not find out the whereabouts of the kulkarni, who was asked by the clerk to make the mark for accused. Such further evidence appears to me to be clearly admissible under s. 533, and in such a case as this, where the confession is the only reliable evidence, it seems to be necessary, in the interests of justice, that this evidence should be received, and the case re-tried. I would accordingly reverse the order of acquittal and direct such re-trial under s. 423.

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APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

TOTAWA AND ANOTHER (*Original Plaintiffs*), *Appellants v.* BASAWA AND ANOTHER (*Original Defendants*) *Respondents.**

[21st March, 1898.]

Hindu law—Inheritance—Daughters—Succession among daughters—The poorest daughter entitled to inherit the whole estate—Comparative poverty.

In the Presidency of Bombay, the principle of law which governs the succession of daughters *inter se* as heirs to their father's estate is, that though the Courts ought not to go minutely into the questions of comparative poverty, yet where the difference in wealth is marked, the whole property passes to the poorest daughter.

[230] SECOND appeal from the decision of A. Butterworth, District Judge of Dharwar.

Suit for partition. The two plaintiffs were the sisters of the first two defendants, and they sued for a partition of their father's property consisting of three fields and a dwelling-house.

They alleged that he had died without male issue; that their mother had died two years before suit; and they claimed that on her death they and their sisters (defendants Nos. 1 and 2) were entitled to succeed to their father's property in four equal shares.

The third defendant was the son of defendant No. 1, and as he was in possession, he was made a party to the suit.

Defendants Nos. 1 and 2 pleaded (*inter alia*) that they were the poorest of the four sisters and were, therefore, entitled to inherit their father's estate to the exclusion of the plaintiffs, who were in affluent circumstances.

The Court of first instance found that all the sisters were married; that the respective husbands of the plaintiffs were possessed of lands and houses: that the husband of the first defendant was also in comfortable circumstances, that defendant No. 2 was a widow possessed of neither land nor house, and was the poorest of the four sisters. The Court, therefore, held that she alone was entitled to succeed to the property. Plaintiffs' claim was, therefore, rejected.

On appeal this decision was upheld by the Distrtict Judge. His reasons were as follows:—

"3. There is no doubt, I think, that the second defendant is much poorer than the plaintiffs. All the sisters were married before their mother's

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* Second Appeal No. 1177 of 1897.

death, and it is admitted by the husbands of plaintiffs Nos. 1 and 2 that they own respectively (1) 59 acres of land and a house and (2) 36 acres of land and a house. The 36 acres belonging to the second plaintiff's husband were, however, it appears, under mortgage with possession (for a period of nine years) at the time of her mother-in-law's death. On the other hand, the second defendant seems to have been almost, if not quite, destitute at that time. The second plaintiff's husband admits that the second defendant's husband, who died three or four years before suit, had no land or house in the village; that she herself owns neither; and that she is the poorest of the sisters. The witness added that defendant No. 2 lives by selling butter; that she has moveable property worth Rs. 700 or 800; that he himself is as poor as she is; and that her husband [231] traded in cotton with a small capital of Rs. 300 or Rs. 400. Another witness says defendants Nos. 1 and 2 are the poorest of the sisters; that defendant No. 2 owns no house or land, and that her husband also was a poor man; but he adds that defendant No. 1 is as poor as defendant No. 2. Another witness gives similar evidence. The first defendant, too, declares that defendant No. 2 is poor and that because she is so poor, and has no house or lands, she (the first defendant) gave her a portion of the suit property. One of the plaintiffs' own witnesses has added his testimony to prove that the second defendant is the poorest of the sisters.

"4. As against the plaintiffs I think that the Subordinate Judge's finding, that the second defendant is entitled to the whole of the property, is justified by the evidence. The first plaintiff is clearly well-to-do, and although the second plaintiff's husband's land is mortgaged, there is little doubt that she is considerably better off than the second defendant.

"5. The respective titles of the first and second defendants are not actually in suit now, but the evidence shows that the first defendant is much better off than the second defendant. The statements of certain witnesses to the effect that the first and the second defendants are on an equal footing as regards wealth, are obviously untrustworthy.

"6. The contention that, even if the second defendant is the poorest, the plaintiffs still have a right to demand a share, cannot be admitted in view of the circumstances of the case. No doubt, the Courts ought not to go minutely into questions of comparative poverty; but where the difference in the wealth is marked, as, I think, it is in this case, then the law, as it has been interpreted by authority, requires that the whole property shall pass to the poorer sister."

Against this decision the plaintiffs preferred a second appeal to the High Court.

M. B. Chaubal, for appellants (plaintiffs).—The general rule is that all daughters succeed to their father's property in equal shares. The only exception to this rule is that, if any of the daughters is absolutely indigent or destitute, she alone inherits the property to the exclusion of the others. The texts bearing on this subject show this beyond dispute; see Mayne's Hindu Law, para. 514. But, if all the daughters are more or less provided for, the Courts cannot inquire into the question of their comparative indigence or poverty, and must distribute the inheritance equally among all the daughters.

Daji Abaji Khare, for respondents (defendants).—It is found as a fact that defendant No. 2 is not only the poorest of all the sisters, but is absolutely without any property at all. She has [232] no lands and no

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houses. She earns her living by selling milk, whilst her sisters own each between 60 and 40 acres of land and besides several houses. There can be no comparison between her condition and that of her sisters. That being the case, she alone is entitled to succeed to the whole of her father's estate—*Bakubai* v. *Manchhabai* (1); *Poli* v. *Narotum* (2); *Audh Kumari* v. *Chandra Dai* (3); *Srimati Uma Deyi* v. *Gokoolanund* (4).

JUDGMENT.

RANADE, J.—In this case, the sole question for consideration is whether the Courts below have correctly laid down the principle of law which governs the succession of daughters *inter se* as heirs to their father's estate.

The two appellants and the first two respondents are full sisters, and all of them were married during their father's lifetime. The original claim was brought by the appellants to recover their half share in their father's lands and house, and the defence was that the first two respondents were entitled to their father's property in preference to the appellants, as they were the poorest among the sisters. Both the Courts below have found that respondent No. 2 was the poorest of the four sisters, and that she alone was entitled to succeed as heir to her father. The appellants' claim was accordingly rejected.

Mr. Chaubal, for the appellants, contended before us that it was only the absolutely indigent married daughter who had a preferential claim over her well-to-do sisters, and that when all the daughters are more or less provided for, there was no preference, and all shared equally. The lower appellate Court appears to us to have correctly laid down the principle of law when it stated that, though the Courts ought not to go minutely into the question of comparative poverty, yet where the difference in wealth is marked, the law requires that the whole property should pass to the poorest sister. The principle was first laid down in *Bakubai* v. *Manchhabai* (1), namely, that in this Presidency, as between married daughters, succession was regulated by their comparative endowment or non-endowment. The Sanskrit words used in the original texts for "endowed" and "unendowed" are "*sadhan*" (with wealth) and "*nirdhan*" **[233]** (without wealth). It was accordingly ruled in *Poli* v. *Narotum* (2), that comparative poverty was the sole criterion for settling the claims of the daughters among themselves. It is true that in the *Mithila* country, no distinction is recognized between poor and rich sisters, and in the Bengal school the criterion is the actual or potential capacity of having male issue. This difference in the three schools is due to the diversity of the interpretation put upon the word "*apratishthita*," used in a text of Gautama, which has been translated "unprovided for" with wealth by some, and with children by other, commentators. In *Audh Kumari* v. *Chandra Dai* (3), a case which bears close resemblance to the present, this point was carefully considered. In that case, also, the dispute lay between four sisters, two of whom had brought separate suits, each for her half share of their father's property, against strangers who pleaded that there were two other sisters in indigent circumstances who were preferential heirs. These two sisters were subsequently joined as co-defendants. All the four sisters were married, and the Court held that as the plaintiffs were in much better circumstances than their sister-defendants, they were not

(1) 2 B.H.C.R. A.C.J. 5.
(2) 6 B.H.C.R. A.C.J. 183.
(3) 2 A. 561.
(4) 5 I.A. 40.

entitled to succeed as heirs, and accordingly reversed the decree of the lower Court, which had ordered equal division as between the four sisters on the ground that none of them were absolutely indigent or beggars. In *Danno* v. *Darbo*(1) this same view was enforced in a contest between two married sisters, and it was further held that the words "provided for" did not necessarily mean provided for by the father, but that it was the equivalent of "possessed of means." Their Lordships of the Privy Council in *Srimati Uma Deyi* v. *Gokoolanund* (2) similarly held that the claim of the indigent or unprovided-for sister to maintain the suit was superior to that of her richer sister. The Courts below have thus correctly interpreted the law, and we see no ground to interfere. We accordingly confirm the decree of the lower Court and reject the appeal with costs.

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Appeal dismissed.

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23 B. 234.

[234] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BAI RAMBAI (*Original Plaintiff*), *Appellant v.* BAI MANI (*Original Defendant*), *Respondent.** [22nd March, 1898.]

Hindu law—Gift—Gift of moveable property—Delivery of possession not necessary if deed of gift be registered - Transfer of Property Act (IV of 1882), ss. 123, 129—Registration.

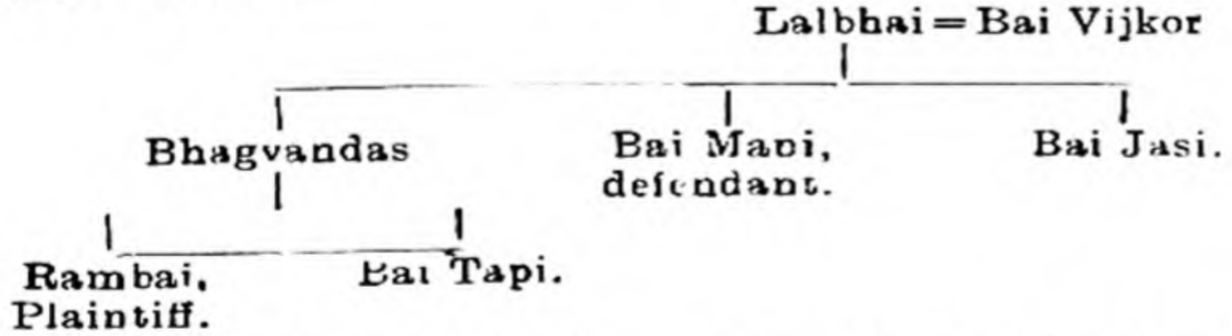
The rule of Hindu law, that delivery of possession is essential to complete a gift, is abrogated by s. 123 of the Transfer of Property Act (IV of 1882).

Dharmodas Das v. *Nistarini Dasi* (3) followed.

[F., 34 C. 853 (858) = 6 C. L. J. 233 = 11 C.W.N. 956 ; 5 O.C. 89 (90)]

SECOND appeal from the decision of T. Walker, District Judge of Surat.

Suit for partition. The relationship of the parties will appear from the following pedigree :—



The property in dispute, both moveable and immoveable, originally belonged to Lalbhai. His son Bhagvandas predeceased him, leaving two daughters, Rambai (the plaintiff) and Tapi.

Lalbhai died in January, 1891. By his will he bequeathed his property to his widow Bai Vijkor for life and after her death to his daughters and the daughters of his predeceased son in equal shares.

Bai Jasi died on 9th May, 1891, and Bai Vijkor on 24th March, 1894.

In 1895 the present suit was filed by Bai Rambai to recover by partition her share in the property in dispute.

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* Second Appeal No. 1095 of 1897.

(1) 4 A. 243. (2) 5 I.A. 40. (3) 14 C. 446.

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Pending the suit, Bai Tapi died. In accordance with her directions her husband executed a deed of gift conveying her share of the property to the plaintiff. This deed was duly registered.

[235] On the strength of this deed of gift, plaintiff claimed to recover Bai Tapi's share as well as her own.

Defendant Bai Mani pleaded that the gift of Bai Tapi's share was invalid, as it was not accompanied by delivery of possession.

The Court of first instance held that under ss. 122 and 123 of the Transfer of Property Act (IV of 1882) delivery of possession was not necessary to validate the gift. A decree was, therefore, passed, awarding to the plaintiff Bai Tapi's share as well as her own.

On appeal the District Judge held, on the authority of *Vasudev Bhat* v. *Narayan Daji* (1), that the gift was invalid, as actual possession was not given to the donee. He, therefore, varied the decree by awarding to the plaintiff her ¼th share only in the property in suit.

Against this decision plaintiff preferred a second appeal to the High Court.

K. M. Jhaveri (with *G. M. Tripathi*), for appellant.—Under the provisions of s. 123 of the Transfer of Property Act (IV of 1882), delivery of possession is not necessary to validate a gift of immoveable property. The transfer can be effected by a deed duly registered—*Dharmodas Das* v. *Nistarini Dasi* (2).

Ganpat Sadashiv Rao, for respondent.—Under the Hindu law transfer of possession is necessary to give validity to a gift of immoveable property. Registration does not give the donee either actual or constructive possession, and cannot, therefore, be treated as equivalent to delivery of possession—*Vasudev Bhat* v. *Narayan Daji* (1). This rule of Hindu law is not affected by s. 123 of the Transfer of Property Act. Section 129 of the Act leaves the rule of Hindu law on this subject untouched.

JUDGMENT.

PARSONS, J.—We need not discuss the question of consent of co-parceners, because we are not dealing with the case of a gift by a co-parcener in undivided family property. The parties are beneficiaries under the will of Lalbhai, who left his property to his widow for her life and then to be divided among his children and grandchildren, that is, to the parties in this suit, one of **[236]** whom has given her share to the plaintiff, who sues for this as well as for her own share. To such a transfer the provisions of s. 44 of the Transfer of Property Act apply and the plaintiff has the right to enforce a partition of the property. This has hardly been contested in argument before us by the pleader for the respondent, who has directed his attack upon the validity of the gift to the point that the gift was not accompanied by delivery of possession. We think that this was not necessary under the law then and now in force.

Section 123 of the Transfer of Property Act, 1882, provides that the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. This has been done. Nothing is said about delivery of possession, and if this was an additional requirement it surely would have been so stated. It was argued that no mention of it was necessary, because s. 129 preserves all the rules of Hindu law, but it only does so save as provided by s. 123. The Calcutta High Court have construed these sections in the case of

(1) 7 B. 131.

(2) 14 C. 446.

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Dharmodas Das v. *Nistarini Dasi* (1) and decided that the Hindu rule of law, that delivery of possession is essential to complete a gift, has been abrogated by them. That case was decided as long ago as 1887, and its correctness has not, as far as we are aware, ever been doubted, and the Legislature has not amended the Act, as we think it would have done had the decision been contrary to the intended provision of the law upon such an important point. We follow that decision, and, therefore, hold the gift to be a valid transfer of the share.

We vary the decree of the lower appellate Court by substituting ½ for ¼th share and give the appellant her costs in this Court. The costs in the Court of first instance and in the lower appellate Court will be in the proportion of ½ to ¾ as between the parties in those Courts.

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23 B. 237.

[237] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

MURIGEYA (*Original Defendant*), *Appellant* v. HAYAT SAHEB AND OTHERS (*Original Plaintiffs*), *Respondents.** [22nd March, 1898.]

Civil Procedure Code (Act XIV of 1882), ss. 244, 278 to 283 - Questions arising between the decree-holder and the representatives of the judgment-debtor—Claims to attached property where representative judgment-debtor claims to hold the attached property as trustee of third party—Execution of decree.

The plaintiffs sued for a declaration that certain property was liable to be attached in execution of a decree obtained by them in suit No. 591 of 1888 against the estate of one Gulaya, deceased, who had been the head of a *math* situate in the Dharwar District. The property had been attached in execution, but the defendant, who was Gulaya's successor in office, had obtained the removal of the attachment on the ground that the property belonged to the *math* and not to Gulaya personally, and was not, therefore, liable to satisfy the decree. The plaintiffs thereupon brought this suit. The lower appellate Court passed a decree for the plaintiffs and granted the declaration. On second appeal it was contended that under s. 244 of the Civil Procedure Code (Act XIV of 1882) the question ought to have been decided in execution of the decree in suit No. 591 of 1888, and that a separate suit would not lie.

Held, on the merits, that the decree of the lower appeal Court should be reversed and the suit dismissed.

Per RANADE, J.—Where the representative of a judgment-debtor puts forward a personal claim to property which is attached as assets of the judgment-debtor in his hands, the investigation of the claim must be made in execution under the provisions of s. 244 of the Code of Civil Procedure (Act XIV of 1882). But where he asserts that he holds the property in trust for, or on behalf of, or as manager of some third person or body of persons, or of a religious charity or institution, the claim must be investigated under the provisions of ss. 278 to 283, and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit.

Per PARSONS, J.—Sections 279 to 283 of the Code of Civil Procedure have no reference to any claim preferred or objection made by any person who is on the record as a party to the suit. Whenever a question arises between the representative of a judgment-debtor on the record (whether originally sued as such or added before or after decree) and the decree holder as to whether property in the hands of the representative was of the assets of the deceased or not, that question must be determined by order of the Court executing the decree under the provisions of s. 244.

[F., 31 M. 125=18 M.L.J. 21=3 M.L.T. 325; 12 Ind. Cas. 411; R., 23 B. 195 (201); 6 C.W.N. 63 (65); 20 C.L.J. 481=19 C.W.N. 517.]

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* Second Appeal No. 1200 of 1897.

(1) 14 C. 446.

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23 B. 237.

[238] SECOND appeal from the decision of L. Crump, Assistant Judge of Dharwar.

One Gulaya was the *Swami* or spiritual head of a *math* situate in the Dharwar District. He died in 1874. The defendant was his disciple and successor in office.

The plaintiffs obtained a decree (in suit No. 591 of 1888) against the assets of the deceased Gulaya in the hands of the defendant.

In execution of this decree, plaintiffs attached certain lands as forming part of the deceased's estate.

The defendant objected to the attachment on the ground that the lands were the property of the *math* and not the personal property of the deceased Gulaya. This objection prevailed and the attachment was raised.

Thereupon the plaintiffs in 1894 filed the present suit to obtain a declaration that the lands were liable to attachment and sale in execution of their decree.

The defendant pleaded (*inter alia*) that the lands belonged to the *math* ; that the deceased Gulaya had no personal interest in them, and that under s. 244 of the Code of Civil Procedure (Act XIV of 1882) the question ought to be decided in execution of the former decree, and that the present suit was not maintainable.

The Subordinate Judge following the ruling in *Seth Chand Mal* v. *Durga Dei* (1) held that the suit was not barred by s. 244 of the Civil Procedure Code. He further held that the lands in dispute were attached to the *math* and that the deceased Gulaya did not hold them in his personal capacity. He, therefore, held that the lands were not liable to attachment and sale in execution of the plaintiff's decree in suit No. 591 of 1888. This suit was accordingly dismissed.

On appeal, the Assistant Judge held that the lands were the personal inam of the deceased Gulaya, and as such liable to be attached and sold in execution of the plaintiff's decree. He, therefore, reversed the first Court's decree and granted the declaration sought.

[239] Against this decision defendant preferred a second appeal to the High Court.

Maneksha Jehangirshah, for appellant (defendant).—Section 244 of the Code of Civil Procedure is a bar to the present suit. The order passed in the execution proceedings for the removal of the attachment was an order between the parties to the suit and their legal representatives, and one relating to the execution of the decree. It falls, therefore, under cl. (*c*) of that section. The only remedy, therefore, open to the party aggrieved by the order was to have it set aside in appeal and not by a separate suit—*Chowdhry Wahed Ali* v. *Mussamut Jumaee* (2); *Nimba* v. *Sitaram*(3); *Lallu* v. *Lallu* (4) ; *Punchanun* v. *Rabia Bibi* (5) ; *Ravunni* v. *Kunju* (6) ; *Seth Chand Mal* v. *Durga* (1).

Assuming that the suit is not barred by s. 244 of the Code, we contend that the decision in *Jamal* v. *Murgaya* (7) is applicable to the present case, and the lands in dispute must be held to belong to the *math*, as they stand on the same footing as the lands which were the subject-matter of that suit.

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(1) 12 A. 313. (2) 11 B.L.R. 149. (3) 9 B. 458.
(4) P. J. (1896), p. 754. (5) 17 C. 711. (6) 10 M. 117.
(7) 10 B. 34.

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Daji Abaji Khare, for respondents (plaintiffs).—The plaintiffs seek to attach property, which they allege belongs to their deceased judgment-debtor. The defendant objects to the attachment on the ground that it is trust property. The defendant does not claim the property as his own, but sets up a *jus tertii*. His objection to the attachment was made, not on his own behalf but on behalf of the *math* of which he is the trustee. The case thus falls under s. 278 and not under s. 244 of the Code of Civil Procedure. If so, the order for removal of the attachment can only be set aside by a regular suit as provided by s. 283—*Roop Lall Dass* v. *Bekani* (1); *Rajrup* v. *Ramgolam* (2); *Seth Chand* v. *Durga Dei* (3); *Sudindra* v. *Budan* (4).

JUDGMENT.

RANADE, J.—In this case the respondents-plaintiffs were mortgagees of certain land under a mortgage executed by one Gulaya, [240] who was *jangam guru* of the appellant. On Gulaya's death, appellant, as his disciple and successor in the *matha*, brought a suit to eject the respondents from the possession of the lands, and obtained a decree in his favour, the mortgage being held to be invalid, and not binding on the appellant. The respondents thereupon sued for the money due on the mortgage-bond, and obtained a decree against the personal assets of the deceased Gulaya in the hands of the appellant. In execution of this decree, lands other than those mortgaged were attached as being the *jat inam* property of the deceased Gulaya, but the attachment was removed on the application of the appellant.

Thereupon the respondents brought the present suit for a declaration that the lands were *jat inam* of Gulaya, and liable to be attached and sold in respect of his debts, and this claim was disallowed in the Court of first instance. The Assistant Judge in appeal reversed that decree, and gave the declaration sought by the respondents.

The appellant has preferred this second appeal from the decree of the Assistant Judge, and Mr. Manekshah, pleader for the appellant, raised the objection that the respondents had no right to bring a separate suit, and that their remedy was by way of appeal from the order passed against them in the miscellaneous execution proceeding. It was contended that the order was an order between the parties to the suit and their legal representatives relating to the execution of a decree, and as such fell within cl. (*c*) of s. 244, and not under s. 280, and no separate suit could be brought to set aside the order. The question for consideration is thus whether the order in the miscellaneous proceedings must be regarded as an order relating to a question arising between the parties and their legal representatives in the matter of the execution, discharge, or satisfaction of a decree, or whether it is an order under s. 280, in which latter case a separate suit is maintainable.

The distinction between the two sets of orders was considered by the Allahabad High Court in *Bahori Lal* v. *Gauri Sahai* (5), and by the Calcutta High Court in *Punchanun Bundopadhya* v. [241] *Rabia Bibi* (6). In the last of these cases, it was laid down that s. 244 must be liberally construed, and whatever diversity of opinion might have at one time prevailed on this point, it is now settled law that all objections by the legal representative of a judgment-debtor that the attached property is not part of the

(1) 15 C. 437. (2) 16 C. 1. (3) 12 A. 313.
(4) 9 M. 80. (5) 8 A. 626. (6) 17 C. 711.

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assets of the deceased judgment-debtor available for satisfaction of the decree against him, but belongs to the legal representative, in his own independent private right, must be disposed of under s. 244—*Chowdhry Wahed Ali* v. *Mussamut Jumaee* (1); *Ravunni* v. *Kunju* (2); *Nimba* v. *Sitaram* (3); *Lallu Tribhowan* v. *Lallu Bhagwan* (4); *Rajrap Singh* v. *Ramgolam Roy* (5); *Punchanun Bundopadhya* v. *Rabia Bibi* (6); *Seth Chand Mal* v. *Durga Dei* (7). At the same time, an exception has been recognized in the case of objections raised by the legal representative as trustee for a religious endowment or charity, that the property attached is not liable to be sold in execution of a decree against his predecessor-in-title. Such objections have always been considered as made under s. 278, and from orders passed on such applications there is no appeal, and a separate suit is the only remedy. This distinction is based on the wording of s. 280, which expressly applies not only to cases where the property attached is not in the possession of the judgment-debtor, or of some person in trust for him, but also to cases in which the judgment-debtor's possession was not on account of himself, or as his own property, but on account of or in trust for other persons. The incumbent for life of devasthan or *wakf* property comes within this latter class of cases.

When a judgment-creditor attaches such property in execution of his decree against the incumbent for life, and the legal representative objects on the ground that it is trust property, a different set of issues arise which have no relation to the execution, discharge, or satisfaction of the decree as between the parties to it. Besides, even if the legal representative remains quiet, the attachment might be with equal efficacy questioned by a third **[242]** party interested in the worship of the shrine, and the legal representative thus really asserts a *jus tertii* in such matters, *i.e.*, rights of persons who are not parties to the decree, or their representatives. The force of these considerations has been acknowledged in a large number of decisions. In *Sudindra* v. *Budan* (8), it was expressly laid down that a new trustee of a *matha* could not raise in execution proceedings any question about the non-liability of the *matha* property to be attached in execution of a decree against the previous trustee. In *Nath Mal Das* v. *Tajammul Husain* (9) a suit by a Mutavalli judgment-debtor to have it declared that certain property attached in execution of a decree against him was *wakf* property, was allowed on the ground that such a suit was brought by him in a character separate from his private capacity. The cases of *Shankar Dial* v. *Amir Haidar* (10) and *Nimaye Churn* v. *Jogendro Nath* (11) are still earlier authorities on the same point. In *Roop Lali Dass* v. *Bekani Meah* (12) it was held that when a judgment-debtor objected to the attachment of property on the ground that it was *wakf*, the case fell under s. 280, and not s. 244. In *Rajrup Singh* v. *Ramgolam Roy* (5), Mr. Justice Wilson expressly recognized this exception to the general rule laid down by him, as resting on considerations which did not apply to cases falling under s. 244. In *Seth Chand* v. *Durga Dei* (7), a similar exception was made on the same grounds.

In our own Presidency, the point has not yet been formally decided. In *Gangadhar Bhikaji* v. *Gangadhar Trimbak* (13), the point was incidentally raised, but the case was decided on other grounds. In *Shri Ganesh*

(1) 11 B.L.R. 149. (2) 10 M. 117. (3) 9 B. 458.
(4) P.J. (1896), p. 754. (5) 16 C. 1. (6) 17 C. 711.
(7) 12 A. 313. (8) 9 M. 80. (9) 7 A. 36.
(10) 2 A. 752. (11) 21 W.R. 365. (12) 15 C. 437.
(13) P.J. (1891), p. 207

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Dharnidhar v. *Keshavrao* (1), an opinion was expressed that there was nothing to prevent a succeeding trustee of devasthan property from questioning in execution proceedings the alienations made by a previous trustee. On the authority of this case, it was laid down in *Vennbai* v. *Dhondo* (2) that a manager of sansthan might dispute the validity of a **[243]** decree passed against his predecessor in execution proceedings without being obliged to bring a separate suit. None of these decisions go to the length of ruling that such new trustee or manager is obliged to raise his objection in execution, and that no separate suit will lie.

In the present case, the suit was brought, not by the new manager or trustee of the *matha*, but by the judgment-creditor. His right to bring such a suit rests on the same foundation as that of the legal representative or successor of the judgment-debtor in the incumbency of the devasthan or charity. It may, therefore, be safely laid down that the respondents' suit in this case was properly instituted. I would, therefore, overrule the objection raised by the appellant's pleader.

On the merits, the case must follow the ruling in *Jamal Saheb* v. *Murgaya Swami* (3), which was a decision between the parties to this suit in respect of other lands, but the contentions of the parties were virtually the same as in the present case. The nature of the tenure of the lands must depend upon the terms of the inam settlement made in regard to it. The extracts clearly show that both the lands are attached to the Virakta *matha*, and that both Gulaya and appellant are only vahivatdars. The statement made by Gulaya's *guru* before the Inam Commissioner is a self-serving statement, and as such cannot be received as evidence so as to destroy the effect of the trusts created by the Government grant.

Under these circumstances, following the ruling in *Jamal Saheb* v. *Murgaya Swami* (3), I would reverse the decree of the District Judge, and restore that of the Court of first instance, with costs throughout on the respondents

PARSONS, J.—My learned colleague has fully stated the facts and mentioned all the cases which bear upon the first point that was argued before us, and has come to the conclusion that, where the representative of a judgment-debtor puts forward a personal claim to property which is attached as assets of the judgment-debtor in his hands, the investigation of the claim must be made **[244]** in execution under the provisions of s. 244 of the Code of Civil Procedure, but that, where he asserts that he holds the property in trust for, or on behalf of, or as manager of, some third person or body of persons or a religious charity or institution, the claim must be investigated under the provisions of ss. 278 to 283, and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit. He holds, therefore, that the present suit has been properly brought, and that the Courts below had jurisdiction to hear and determine the suit and the appeal.

I do not agree with this, but I do not consider it necessary or advisable to dissent therefrom, seeing that, first, this litigation dates from 1888, the decree sought to be executed was passed in 1892, and that this suit was filed in 1894, and, secondly, that in this second appeal we are dealing with the appellate decree in appeal of the same Court as would have heard the appeal from the order in execution, so that, if we reversed the present proceedings and referred the respondents to an appeal from the order,

(1) 15 B. 625. (2) P.J. (1892), p. 250.
(3) 10 B. 34 (40).

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the second appeal to this Court would be precisely the same as this and would have to be decided on the very same materials, and with the same result. I shall, therefore, content myself with placing on record my opinion that ss. 278 and 283 have no reference to any claim preferred or objection made by any person who is on the record as a party to the suit. If this were not so, it would not have been necessary to have used the general words in s. 278 "as if he was a party to the suit." I do not see that any distinction can be drawn from the fact that the words used in s. 280 "on account of or in trust for some other person" are joined to the words "not on his own account or as his own property" by the word "but." These words, I think, refer only to the nature of the proof to be adduced and the case to be established. In my opinion, whenever a question arises between the representative on the record (whether originally sued as such or added before or after decree) and the decree-holder, as to whether property in the hands of the representative was of the assets of the deceased or not, that question must be determined by order of the Court executing the decree under the provisions of s. 244.

[245] I admit that the balance of authority seems opposed to this view, but I think that the point has not received the attention it deserves. In most of the cases cited, the claim was of a personal nature and there was an opinion only expressed as to the other claim. No doubt the decision in *Seth Chand Mal* v. *Durga Dei* (1) is distinctly contrary to my opinion, but the decision in *Kuriyali* v. *Mayan* (2) is, I submit, in favour of it, for there the claim in respect of two parcels of land was that they were tarvad property which the deceased judgment-debtor had no power to alienate and of which the representative was then in possession as the manager of the tarvad. I lay stress on this latter case because it was quoted with approval by their Lordships of the Privy Council in *Prosunno Coomar* v. *Kasi Das*(3). I also citein my favour the opinion of O'Kinealy, J., in *Punchanun Bundhopadhya* v. *Rabia Bibi* (4) to the effect that ss. 278 to 283 do not cover the case of any contest between parties to the suit or their representatives on the record of the suit in regard to the execution, discharge or satisfaction of a decree, whether the claim set up be a claim on the ground that the property is that of a person on the record or belongs to any third party. It seems to me (he says) that the effect of the decision between such parties is, that the right to enforce or oppose execution against the property in dispute is decreed and finally determined under s. 244, subject to the result of such appeal as is given to them by law. Prinsep, J., was of the same opinion.

Upon the next point, I agree with my learned colleague. The Assistant Judge wrongly placed the *onus* of proving the inalienability of the lands in suit upon the appellant. The statement in Ex. 20, said by the Assistant Judge to be that of Gulaya, but which really is the statement of his predecessor in management, Shidlinga, that the lands were his, ought not to have been given any weight to, especially when taken along with the other statements made by him as to how the lands were acquired. It is clear from the Exs. 56, 57, 42 and 43 that the lands belonged to the *math* and were not the private inam property of any manager, much less of Gulaya. The *ratio decidendi* adopted **[246]** in the case between the same parties reported at I.L.R., 10 Bom., p. 34, though it deals with other

(1) 12 A. 313.
(2) 7 M. 255.
(3) 19 I. A. 166.
(4) 17 C. 711.

lands of the *math* is applicable to these lands, the title to which rests upon exactly the same basis. The decision of the Subordinate Judge in this case is undoubtedly correct, and it is only by a clear error of law that the Assistant Judge has come to a different finding.

We reverse the decree of the lower appellate Court and restore that of the Court of first instance, with costs throughout on the respondents.

Decree reversed.

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23 B. 246.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

GOVIND (*Original Plaintiff*), *Appellant v.* GANGAJI (*Original Defendant*), *Respondent.** [22nd March, 1898.]

Limitation Act (XV of 1877), sch. II, art. 138—Article applicable to suits by assignees of auction-purchaser—Assignee of auction-purchaser.

Article 138 of the Limitation Act (XV of 1877) is not limited to suits by the auction-purchaser himself but applies also to suits by his assignees.

Limitation runs from the date of the sale.

Mohima Chunder v. *Nobin Chunder* (1) dissented from.

[F., 31 C. 681 (682)=8 C.W.N. 476 ; **Appl.**, 25 B. 275 (279).]

SECOND appeal from the decision of Rao Bahadur Thakurdas Mathuradas, Assistant Judge of Ratnagiri.

The defendant Gangaji Anaji Ghane was the owner of certain land which was sold on the 5th March, 1884, in execution of a decree obtained against him. It was purchased by one Atmaram Janardhan Desai.

The sale was confirmed on 30th May, 1884, but Atmaram was not put into possession.

On the 19th July, 1890, Atmaram sold his rights as auction-purchaser to the plaintiff.

On the 29th May, 1896, plaintiff filed the present suit to recover possession of the land from defendant.

The Court of first instance dismissed the suit as barred by limitation under art. 138, sch. II, of Act XV of 1877, as **[247]** the suit was filed more than twelve years after the date of the Court-sale (5th March, 1884).

This decision was upheld, on appeal, by the Assistant Judge. His reasons were as follows :—

"The question is whether the period of limitation is to be counted from the date of sale under art. 138 of sch. II of the Limitation Act, 1877, or from the date of the confirmation of the sale, that being the date on which the plaintiff alleges that his vendor became entitled to get possession of the property in suit. Neither the plaintiff nor his vendor was ever put into possession of the property under the sale certificate, and the possession has all along remained with the judgment-debtor, *viz.*, the defendant. In the case of *Mohima* v. *Nobin* (I. L. R., 23 Cal. 49) the Calcutta High Court held that the period was to be computed, in a case like this, from the date of the confirmation of the sale, the suit not being by an auction-purchaser, but by an assignee from him. On the other hand, the Madras High Court held that the period was to be calculated from the date of the

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* Second Appeal No. 1187 of 1897.

(1) 23 C. 49.

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sale under art. 138—*Arumuga* v. *Chockalingam* (I. L. R., 15 Mad., 331). In the opinion of the Calcutta High Court, the assignee of the auction-purchaser became first entitled to possession when the sale was confirmed and the period of twelve years was to be counted from that date under art. 136. With every respect for the Judges who decided the case of *Mohima* v. *Nobin*, I am of opinion that there is no reason why art. 138 should apply to the auction-purchaser and art. 136 to his assignee suing for possession. I think both should be governed by art. 138, and hold that the suit is barred."

Against this decision plaintiff preferred a second appeal to the High Court.

V. G. Bhandarkar, for appellant.

There was no appearance for the respondent.

JUDGMENT.

PARSONS, J.—We prefer the decision of the Madras High Court, *Arumuga* v. *Chockalingam* (1), to that of the Calcutta High Court, *Mohima Chunder* v. *Nobin Chunder* (2). We think that the learned Judges of the latter Court construed the article (138) of the Limitation Act too strictly when they held that it was limited to suits by the purchaser himself and did not apply to suits by his assignees. We can see no valid reason why it should not include his assignees, who stand in his shoes and ordinarily have, as such, no rights greater than that possessed by him. The same line of reasoning apparently would exclude his heirs also. We dismiss the appeal.

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23 B. 248.

[248] CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

KALA GOVIND *v.* THE MUNICIPALITY OF THANA.* [24th March, 1898.]

Municipality—Bombay District Municipal Act (Bom. Act VI of 1873), s. 48—Re-erection of a structure formerly existing not within the section.

Section 48 of the Bombay District Municipal Act (Bom. Act VI of 1873) refers to the erection of a thing for the first time, and not to the re-erection of an old structure which had been taken down for a temporary purpose only.

The accused was the owner of a shop in a public street at Thana. The shop had planks attached to it in front, overhanging a public gutter. These planks had been in existence before the District Municipal Act came into operation at Thana. In April, 1897, the planks were temporarily removed under the orders of the plague authorities. The plague having ceased, the accused replaced the planks in October, 1897, without the permission of the municipality. For this he was prosecuted and fined under s. 48 of Bombay Act VI of 1873.

Held, reversing the conviction and sentence, that the refixing of the planks was not an "erection" within the meaning of s. 48 of the Act.

[Appl., 6 Ind. Cas. 431=6 N.L.R. 53 (60).]

APPLICATION under s. 435 of the Code of Criminal Procedure (Act X of 1882).

The applicant was prosecuted by the Municipality of Thana under s. 48 of Bombay Act VI of 1873 for causing an obstruction to the public road under the following circumstances.

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* Criminal Revision No. 51 of 1898.

(1) 15 M. 331.

(2) 23 C. 49.

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The applicant was the owner of a shop in a public thoroughfare at Thana.

The shop had planks attached to it in front to serve the purpose of a platform, where the owner sat and on which he exposed his goods for sale.

The planks overhung the public gutter and had been in existence before the District Municipal Act of 1873 came into force at Thana.

In April, 1897, the planks were temporarily removed under the orders of the plague authorities. In October, 1897, after the epidemic had subsided, they were refixed without the permission of the municipality.

For this act the present prosecution was instituted against the applicant under s. 48 of Bombay Act VI of 1873.

[249] Rao Bahadur A. G. Kotwal, Magistrate First Class at Thana, convicted the accused and sentenced him to pay a fine of Rs. 5, or in default to suffer five days' simple imprisonment.

Against this conviction and sentence the applicant moved the High Court under its revisional jurisdiction.

Trimbak Ramchandra Kotwal, for the applicant.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

JUDGMENT.

PARSONS, J.—The applicant owns a shop in the main street at Thana. As is very commonly the case with such shops, there were planks attached to it in front which extended over the gutter and formed a sort of shelf or platform, on which the owner could sit and display his wares. No doubt while they thus greatly increased the dimensions of the shop, they were an encroachment upon the public road. By reason, however, of their having been lawfully erected before the District Municipal Act VI of 1873 came into operation in Thana, the municipality could only have removed the planks after making reasonable compensation to the owner as provided for by s. 42 of the Act. In April last, the plague authorities, under the very wide powers vested in them by law, caused the planks to be removed, in order, we presume, to be able more effectively to flush and keep clear the gutter of the street. In October last the plague having ceased, and all prohibitions and restrictions of the plague authorities having been removed, the applicant refixed the planks, and for this he has been prosecuted and fined under s. 48 of the Act, in that after the Act came into operation he had erected what was an obstruction in the public street.

The conviction is, we think, illegal. We must construe the words used in s. 48 of the Act as referring to the erection of a thing for the first time, and not to the simple re-erection of an old structure, which had been taken down for a temporary purpose only. This view receives support from the decisions of this Court upon the meaning of the word "erect" used in s. 33 of the same Act (Criminal Ruling 63 of August 30th, 1888, and *Krishnaji Narayan Pokshe* v. *The Municipality of Tasgaon*)(1). We find that the same construction of a very **[250]** similar provision in their local enactments has been taken by the Calcutta High Court in *Eshan Chunder* v. *Banku Behari Pal* (2) ; and by the Madras High Court in *Municipal Council, Tanjore* v. *Visvanatha Rau* (3). For this reason we reverse the conviction and sentence.

(1) 18 B. 547. (2) 25 C. 160. (3) 21 M. 4.

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Before Mr. Justice Parsons and Mr. Justice Ranade.

GOPAL BALAKRISHNA KENJALE (*Original Plaintiff*), *Appellant v.* VISHNU RAGHUNATH KENJALE AND ANOTHER (*Original Defendants*), *Respondents.** [4th April, 1898.]

Hindu law—Adoption—Adoption by a daughter-in-law of A after the estate has vested in A's widow—Permission by A to adopt—Non-consent of widow—Divesting of estate once vested—Widow's authority to adopt in Bombay—Daughter-in-law must have permission—Co-widows—Adoption by one co-widow—Adoption of a son older than adoptive mother.

An adoption cannot divest a person of an estate which has once vested in him, unless such adoption is made with his consent. An exception to this rule is where a co-widow adopts. Such an adoption will divest the younger widow of her estate. Another exception is where a daughter-in-law adopts with the authority of her father-in-law, who is head of the family, as in *Vithoba* v. *Bapu* (1).

Unless prohibited expressly or by implication, a widow in the Presidency of Bombay has authority to adopt, but a daughter-in-law, *i e.*, the widow of a predeceasd son, must be specially authorized by her father-in-law in order that she may make a valid adoption binding as against the heirs of her father-in-law.

Sakubai was the widow of Balkrishna, who died in 1877 in the life-time of his father Raghunath. Fourteen years later, *viz.*, in 1891, Raghu died, leaving a widow Saibai, who succeeded to his estate as his heir. In March, 1892, Sakubai adopted the plaintiff Gopal, who was older than herself, as son to her husband, alleging that she had Raghu's permission to do so. The plaintiff sued for a declaration that as adopted son of Balkrishna he was entitled to succeed as heir to the property of Raghu, as against the defendant Vishnu, who claimed to have been adopted by Saibai as son to Raghu. The lower appellate Court disallowed the plaintiff's adoption on the grounds (1) that Saibai had not consented to it, and (2) that the plaintiff was older than his adoptive mother Sakubai.

[251] *Held* (confirming the decree of the lower Court), that as the adoption of the plaintiff Gopal was made by Sakubai without proper authority and without Saibai's consent, it was inoperative and invalid. As Saibai did not give her consent to the plaintiff's adoption, that adoption did not divest her of her exclusive right to succeed as heir of Raghu.

Semble—The fact that an adopted son is older than the adopting mother does not make his adoption invalid. The rule prescribing a difference of age in favour of the adopting mother is only directory and not mandatory.

[D., 29 B. 410 (414) = 7 Bom. L. R. 436.]

SECOND appeal from the decision of Khan Bahadur M. N. Nanavati, additional First Class Subordinate Judge with appellate powers.

The plaintiff sued for a declaration that he was the adopted son of one Balkrishna Raghunath and as such entitled to the estate of Balkrishna, and of Balkrishna's father, one Raghunath Ganesh.

Balkrishna had died about 1877 in the lifetime of his father (Raghu) and had left a widow named Sakubai. Fourteen years later, *viz.*, on 13th December, 1891, Raghu died and left a widow named Saibai (defendant No. 2).

The plaintiff alleged that before he died, Raghu, with Saibai's consent, gave his daughter-in-law Sakubai permission to adopt a son to her (Sakubai's) husband Balkrishna, and that she accordingly had adopted him (the plaintiff) on the 3rd March, 1892, in the presence and with the

* Second Appeal No. 957 of 1897.

(1) 15 B. 110.

consent of Saibai. He further alleged that on the 7th March, 1892, Sakubai executed an adoption deed which was duly signed.

As evidence of Raghu's permission to adopt, the plaintiff relied upon a letter (Ex. 72) written by Raghu to Sakubai's father, dated 7th December 1891, the material part of which was as follows :—

"I am suffering from fever for the last five or six days and I feel very weak. Consequently you should come to Gulunche with Annapurnabai, as we want to give a boy in adoption to Sakubai as previously arranged between you and us. I had a mind to effect the adoption in the month of Shravan last, but as my wife had to leave this place on account of my father-in-law's death, the adoption did not take place. I have sent for my wife and you should all come here when an auspicious day will be fixed and the ceremony will be performed."

[252] Defendants Nos. 1 and 2 (Vishnu and Saibai) contended that Sakubai had no right to adopt, and they denied that she had got Raghu's permission to do so. They alleged that the right to adopt was Saibai's, who had succeeded as heir to her husband Raghu ; that in exercise of that right, and carrying out Raghu's wish, she had duly adopted the first defendant Vishnu on the 25th November, 1892. They further alleged that the plaintiff was not fit to be adopted by Sakubai, as he was older than she was.

The Court of first instance passed a decree for the plaintiff, holding that he had been duly adopted by Sakubai with Raghu's permission, though without Saibai's consent. It also held that the fact of the plaintiff being older than his adoptive mother Sakubai did not affect the adoption, and that the result of the plaintiff's adoption with the permission of Raghu was to divest Saibai (defendant No. 2) of her husband's estate which on his death had vested in her.

On appeal the Judge reversed the decree and rejected the plaintiff's claim. He was of opinion that Raghu's intention with regard to plaintiff's adoption died with him and he held that plaintiff's adoption was invalid on the grounds that Saibai did not consent to it and that the plaintiff was older than his adoptive mother Sakubai.

The plaintiff preferred a second appeal to the High Court.

P. P. Khare, for the appellant (plaintiff).—Sakubai clearly had Raghu's permission to adopt. That being so, the consent of Saibai (defendant No. 2) was not necessary. The fact that plaintiff was older than Sakubai, is immaterial. An adoption is made to the father and not the mother—*Bhagvandas* v. *Rajmal* (1) ; West and Bühler (3rd Ed.), pp. 971, 973, 987. In Bombay there is no restriction as to age in cases of adoption. A minor or a bachelor can adopt. A married man may be adopted—Tagore Law Lectures, 1888, pp. 364, 365 ; *Raje Vyankatrav* v. *Jayavantrav* (2) ; *Nathaji* v. *Hari* (3) ; *Dharma* v. **[253]** *Ramkrishna* (4). The permission given to Sakubai by Raghu was a prohibition to Saibai.

Chintaman A. Rele, for the respondents (defendants).—Raghu's estate has vested in his widow Saibai (defendant No. 2). The plaintiff's adoption would divest it. That being so, her consent to his adoption was necessary—*Bhoobun Moyee* v. *Ram Kishore* (5) ; *Shri Dharnidhar* v. *Chinto* (6) ; *Vasudeo* v. *Ramchandra* (7) ; Mayne's Hindu Law (5th Ed.), 209, 210. The letter (Ex. 72), which is relied on as showing Raghu's permission to

(1) 10 B.H.C.R. 241. (2) 4 B.H.C.R. A.C.J. 191. (3) 8 B.H.C.R. A.C.J. 67.
(4) 10 B. 80. (5) 10 M. I. A. 279. (6) 20 B. 250.
(7) 22 B. 551.

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adopt, is not a testamentary writing, and merely shows his intention at the time to adopt. But that intention died with him. The letter cannot be construed as a direction to adopt after his death.

The son who is adopted must be younger than the mother—West and Bühler, 1055; Mayne, p. 152; Mandlik, pp. 473-4. He must be the reflection of a son.

JUDGMENT.

RANADE, J.—The facts of this case are somewhat peculiar. The appellant, original plaintiff, claims to have been taken in adoption by one Sakubai, the widow of the predeceased son of Raghu Kulkarni, and brought the original suit for a declaration of his right to succeed as sole heir, and to recover possession of the property of Raghu against his natural brother, respondent No. 1, who claims to have been adopted as son to Raghu by his widow Saibai, respondent No. 2.

The undisputed and proved facts of the case are that Raghu died on 13th December, 1891. His son Balkrishna, who was Sakubai's husband, had died some thirteen years before. During his last sickness, Raghu expressed an intention that Sakubai should adopt a son, and invited her parents to come to his village, but by the time they arrived, Raghu became unconscious, and died on the same day, leaving Sakubai, his daughter-in-law, and Saibai, his widow, behind him. On the 3rd March, 1892, the adoption ceremony was performed, and appellant was given in adoption by his natural mother to Sakubai, and a deed of adoption was prepared and registered on 7th March, 1892. Both the **[254]** Courts below have found that Sakubai had Raghu's permission to adopt, and that Saibai was not present at, and did not give her consent to, the adoption of the appellant by Sakubai. They also find that Sakubai was younger in age than the appellant.

The Court of first instance found that Raghu had given permission to Sakubai to adopt appellant, and that this authority held good after his death, and that respondent No. 2 had no such permission, and could not, therefore, validly adopt respondent No. 1 as son to Raghu, and that appellant's adoption by Sakubai according to Raghu's direction had divested respondent No. 2 of the estate vested in her after Raghu's death. The lower appellate Court, however, held that the permission of Raghu was general, and not particular in respect of appellant's adoption by Sakubai; that the intention of Raghu died with him, and that the estate of Raghu vested in respondent No. 2, and Sakubai's adoption of the appellant did not divest respondent No. 2 of her rights as sole heir, as respondent No. 2 did not assent to the adoption. Finally, it held that the appellant's adoption was invalid because of this want of Saibai's consent, and the fact that Sakubai was younger in years than the appellant. The lower Court of appeal accordingly reversed the decree of the Court of first instance; and the appellant contends in second appeal that the lower appellate Court was in error in disallowing the adoption on the ground of the want of consent of respondent No. 2, and appellant's being older than his adoptive mother Sakubai. These were the only two points argued before us.

As regards the want of consent, it is to be noted that appellant in his plaint rested his case strongly on the allegation that respondent No. 2 had given her consent to Sakubai's adoption of the appellant. As a matter of fact, however, both Courts have found that respondent No. 2 did not

give such consent. The contention now raised before us is that such consent was immaterial, as Raghu's permission was operative as a sanction to the adoption, whether his widow, respondent No. 2, was or was not a consenting party. Independently of this permission, it is admitted that, as between the daughter-in-law, widow of the predeceased son of Raghu, and the mother-in-law, widow of Raghu himself, the right of the latter was every way superior. **[255]** The estate vested in her as heir, and unless she chose to divest herself of this right, no act of the daughter-in-law could divest respondent No. 2 of her rights as sole heir of Raghu. Sakubai's husband Balkrishna was living in union with his father Raghu at the time of his death, and his widow Sakubai had no independent right to adopt without the sanction of her father-in-law.

This point may be regarded as settled by a long course of authorities. It is only necessary to refer to *Shri Dharnidhar* v. *Chinto* (1), where, as in this case, the plaintiff was adopted by the widow of a predeceased son, and the claim was resisted by her brother-in-law who had succeeded as heir. The Full Bench decision in *Vasudeo* v. *Ramchandra* (2) also related to a case of adoption by the widow of a predeceased son, and it was held there that such adoption did not divest the daughters, who had succeeded as heirs to their father, of their inheritance even when there was reason to think that one, if not both the daughters, had assented to the adoption. The authority of the decision in *Babu* v. *Ratnoji* (3) has been questioned by the Chief Justice in the Full Bench case noted above on another point, but it well illustrates the principle of law that nothing but the consent of the person in whom the estate has vested by inheritance can divest him of the same by reason of any such adoption by the daughter-in-law. See also *Gayabai* v. *Shridharacharya* (4) and *Chandra* v. *Gojarabai* (5), where all previous authorities are reviewed at great length.

The case of a younger co-widow is an exception to this rule, for the elder widow may by subsequent adoption divest such younger widow of her rights in the estate. The case of *Vithoba* v. *Bapu* (6) also may be referred to as an exception. There the claim of a person adopted by the widow of a predeceased son, when the adoption was authorized by her father-in-law who was head of the family and guardian of the widow, was allowed to prevail against the rights of the widow's brother-in-law. Apart from these special exceptions, the general proposition, as stated above, holds good in all cases.

[256] The next question for consideration is whether there was the father-in-law's authority in the present case which brought it within the exception, and took it out of the rule. The lower appellate Court has found, as a fact, that there was no such authority which survived after Raghu's death. Raghu indeed during his lifetime expressed a wish to allow Sakubai to adopt a son, but nothing was done to give effect to this wish. The letter (Ex. 72) confers no authority or power. It is a mere expression of a casual wish contained in a note of invitation sent to Sakubai's father to come to Raghu's place. There was no particular reason why the presence of Sakubai's parents was necessary. Raghu could have easily himself carried out the adoption as he desired, more especially as his wife was with him for several days before his death. He made no will, and gave no power to Sakubai. He gave no directions to his widow (respondent No. 2) not to adopt, and, unless prohibited

(1) 20 B. 250. (2) 22 B. 551. (3) 21 B. 319.
(4) P.J. (1881), p. 145. (5) 14 B. 463. (6) 15 B. 110.

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expressly or by implication, a widow in this Presidency has an implied authority to adopt. This cannot be said of the daughter-in-law, who is the widow of a predeceased son. She must be specially authorized by the father in-law to make a valid adoption binding against the heirs of her father-in-law. As respondent No. 2 did not give her consent to the adoption of the appellant by Sakubai, the adoption did not divest her of her exclusive right to succeed as heir to Raghu.

It is not strictly necessary to discuss the validity of the other objection arising out of the difference of age between his adopting mother and the appellant. But it may be as well to notice the point briefly. Appellant was about 32 years old when he was examined and Sakubai was 2 or 3 years younger. The lower Court of appeal has relied on Mayne, para. 130, and West and Buhler, p. 1055. The original authorities referred to by these text-writers are the same, being collected from Steele's Hindu Law and Customs, and the opinions of shastris. As regards the earlier Smriti texts, there seems to be no definite rule laid down on the point. The inference in favour of the adopted son being younger than his adoptive father, is extended to the mother by a somewhat loose analogy and interpretation of the text that the adopted son should be the reflection of a legitimate son. But in a system of law where bachelors and [257] widowers are permitted to adopt, and where minors also can adopt, if they have arrived at the age of discretion, and where further married men with children have been held to be fit subjects for adoption these strict interpretations of the old texts seem to be not a little out of place —*N. Chandrasekharudu* v. *N. Bramhanna* (1); *Nagappa* v. *Subba* (2); *Jumoona* v. *Bamasoonderai* (3); *Rajendro Narain* v. *Saroda Soonduree Dabee* (4); *Dharma* v. *Ramkrishna* (5); *Nathaji* v. *Hari* (6); *Lakshmappa* v. *Ramava* (7); *Mhalsabai* v. *Vithoba* (8); *Rangubai* v. *Bhagirthibai* (9). If a male person at any time of life may adopt a man of any age, and such male person is also permitted to marry a female minor of any age, it is obvious that the rule prescribing a difference of age in favour of the adopting mother must be only regarded as a directory rule, and not a command, the infraction of which invalidates the adoption. As observed above, it is not necessary to decide this point in the present appeal. As the adoption of appellant was made by Sakubai without proper authority, and without respondent No. 2's consent, it is inoperative and invalid for the purposes of the present claim. We would, therefore, reject the appeal, and confirm the decree with costs.

Decree confirmed.

(1) 4 M.H.C.R. 270.
(2) 2 M.H.C.R. 367.
(3) 3 I.A. 72.
(4) 15 W.R. 548.
(5) 10 B. 80.
(6) 8 B.H.C.R.A.C.J. 67.
(7) 12 B.H.C.R. 364.
(8) 7 B.H.C.R. Appx. 26.
(9) 2 B. 377.

23 B. 257.

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Before Mr. Justice Parsons and Mr. Justice Ranade.

AMBABAI AND ANOTHER (*Original Plaintiffs*), *Appellants* v. GOVIND AND ANOTHER (*Original Defendants*), *Respondents.** [12th April, 1898.]

23 B. 257.

Hindu law—Jains—Gujarati Jains settled in Belgaum—Succession among Jains—Rights of illegitimate sons of a Jain—Division into four castes—Inheritance—Illegitimate sons—Ordinary Hindu law, that of Brahmins—Kshateiyas and Vaishyas—Jains mostly Vaishyas—Four divisions of Jains—Dassa-Porwad caste of Jains.

The Courts in India have always recognized the existence of four castes, *viz.*, Brahmins, Kshatriyas, Vaishyas and Shudras.

[258] Jains are dissenters and are mostly of Vaishya origin. A Jain converted into orthodox Hindu faith returns to the caste from which he traces his first descent.

The four main divisions of Jains are : Pramar, Oswal, Agarwal and Khandewal.

Unless a special custom to the contrary be established, the ordinary Hindu law governs succession among the Jains. Ordinary Hindu law is that of the three superior castes.

Under the ordinary Hindu law, illegitimate sons do not inherit, but are only entitled to maintenance.

Held, that a Jain of the Dassa Porwad caste was governed by the general Hindu law applicable to the three regenerate castes, being, though not a Brahmin, certainly not a Shudra, but a Vaishya by origin, and having as such carried this law with him from Gujarat to the Belgaum District.

Held, therefore, that his widow was his sole heir, and that his illegitimate sons were only entitled to maintenance.

Quære—Whether even among Shudras the widow is altogether excluded from inheritance by illegitimate sons ?

Rahi v. *Govinda* (1) doubted.

[Diss., 33 M. 226=4 Ind. Cas. 299=20 M.L.J. 359 (361)=7 M.L.T. 26 ; **F.**, 7 A.L.J. 349=12 Bom. L.R. 402=11 C.L.J. 454=14 C.W.N. 545=6 Ind. Cas. 272=20 M.L.J. 439 (442) (**P.C.**)=8 M.L.T. 3 ; **Rel.**, 16 C.W.N. 834=13 Ind. Cas. 691 ; **R.**, 31 C. 11 (27) (**P.C.**).**]**

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum.

One Bapucband was a Gujar trader of the Dassa Porwad caste settled in the Belgaum District. This caste is one of the four main divisions of the Jain community of Gujarat, who are mostly of Vaishya origin.

After Bapucband's death his widow, Ambabai, as his heir brought this suit against the defendants to recover Rs. 1,600, together with interest, which she alleged had been lent to them by the deceased.

Defendants denied the alleged loan, and alleged that Bapuchand was a Shudra by caste, and that they were his illegitimate sons by his concubine, and that as such they were his heirs in preference to his widow (the plaintiff).

The Court of first instance, without deciding whether the plaintiff or defendants were the heirs of the deceased Bapuchand, held that the alleged loan was a provision made by the deceased for the maintenance of the defendants, and dismissed the suit.

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* Second Appeal No. 1235 of 1897.

(1) 1 B. 97.

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23 B. 257.

On appeal, the District Judge remanded the case to the first Court for a finding as to whether the plaintiff or defendants were the heirs of Bapuchand.

[259] The first Court found that defendant No. 2 was an illegitimate son of Bapuchand by his concubine Jamna; and that as Bapuchand was a Vaishya belonging to one of the regenerate classes, his widow and not defendant No. 2 was his heir.

On appeal the District Judge held that Bapuchand was a Shudra and that, therefore, defendant No. 2 as his illegitimate son was his heir and not the plaintiff. The plaintiff's claim was, therefore, rejected.

His reasons were as follows :—

"There can, I think, be no reasonable doubt that Bapuchand regarded the two defendants as his sons (by his concubine Jamna), and that the second certainly was so.

"Now as Bapuchand was certainly a Shudra, no pretence being made that he was a Brahmin, it follows that his illegitimate sons or son are or is his heir. In this Kaliyug there are according to the authorities only two classes among the Hindus, the regenerate Brahmanas and unregenerate Shudras—West and Buhler, p. 1135. Pure Kshatriyas and Vaishyas are not now recognized—Steele, 89, 90. On this broad ground alone, then, the case would be concluded against the plaintiffs. It has been pleaded that Bapuchand was a Dassa Porwad Wania of Gujarat. And it has been argued that these are not Shudras. Now the brother-in-law of the deceased Bapuchand distinctly says and repeats that he is a Shudra, and if he is a Shudra, Bapuchand must have been a Shudra also. This is the best possible evidence, and I cannot agree with the learned Judge below in brushing it aside with the remark that 'it must have been a mistake.' It is incredible that any man who was not in fact a Shudra should have deliberately described himself as such twice over. On the other hand, it is natural enough that men who are really Shudras should affirm that they belong to a higher class, and that consideration disposes of the evidence of Bapuchand's so-called caste-fellow. It was further argued that among the Dassa Porwad Banias, *pat* marriage was forbidden, and illegitimate sons did not succeed as heirs. Some evidence was taken on commission to prove that point. But it is insufficient. No instances are given, and that kind of proof which is required to establish a special custom according to all the authorities is not to be found here. The suit is brought by the widow of Bapuchand to recover a debt due to the estate. The second plaintiff is the brother of the first and not an heir. Obviously, then, if neither plaintiff is an heir, the suit fails. Holding that defendant No. 2 is the heir, the necessary result is that this suit must be dismissed."

Against this decision plaintiffs preferred a second appeal to the High Court.

Branson (with him *B. A. Bhagvat* and *S. R. Bakhle*), for appellants.—The question is, who is the heir of the deceased Bapuchand [260]—his widow or the defendants who claim to be his illegitimate sons by a concubine? The lower Court holds that the deceased was a Shudra, but the reasons given for this finding are very curious. In the opinion of the lower Court, there are only two castes among Hindus—Brahmins and Shudras; he who is not a Brahmin is a Shudra. There is no authority for such an opinion. On the contrary the Courts have always recognized four main divisions or castes among Hindus, of which Brahmins, Kshatriyas and Vaishyas constitute the three superior or regenerate classes. See

Rahi v. *Govinda* (1) ; *Chuoturya Run Murdan Syn* v. *Sahib Purhulad* (2). Now the deceased was a Jain of the Dassa Porwad caste. Jains are generally Vaishyas by origin and not Shudras ; and though they are dissenters from the orthodox Hindu religion, they are governed by the ordinary Hindu law in matters of inheritance and succession—*Bhagvandas* v. *Rajmal* (3) ; *Rukhab* v. *Chunilal Ambushet* (4) ; *Chotay Lall* v. *Chunno Lall* (5) ; *Amava* v. *Mahadgauda* (6). That being the case, the defendants, as illegitimate sons of the deceased, are only entitled to maintenance, but do not inherit—*Rahi* v. *Govinda* (1). The plaintiff, who is the widow of Bapuchand, is, therefore, his heir.

M. V. Bhat, for respondents.—It is found as a fact that the deceased was a Shudra. It is admitted by plaintiffs' brother that he was a Shudra, and there is no evidence to the contrary. This finding is, therefore, conclusive in second appeal. If so, the illegitimate sons inherit in the absence of legitimate sons, daughters or daughter's sons—*Rahi* v. *Govindà* (1) ; *Sadu* v. *Baiza* (7). Defendants are, therefore, Bapuchand's heirs to the exclusion of his widow, and her suit was rightly dismissed.

JUDGMENT.

RANADE, J.—In this case, the appellant No. 1 is the widow of deceased Bapuchand, and she and her brother, appellant No. 2, who manages her affairs, brought the original suit on a book entry for 1,600 rupees signed by respondent No. 1 on 28th September, 1892, in the accounts of deceased Bapuchand. **[261]** Respondent No. 1 was described in the plaint as the son of one Jamna, and his brother, respondent No. 2, was similarly described, and joined as co-defendant as living with respondent No. 1.

Both respondents denied appellant-plaintiff's right to sue, and claimed themselves to be the heirs of Bapuchand, as their mother Jamna was in Bapuchand's keeping and they were Bapuchand's illegitimate sons. They also denied that the sum of 1,600 rupees was advanced as a loan, and contended that it was a provision made by Bapuchand for their maintenance, and that the book entry was made by respondent No. 1 to protect himself from his creditors.

The Court of first instance did not at first decide the question of heirship, but dismissed the claim after finding that the book entry related to a sum which was advanced by deceased Bapuchand, not as a loan, but as a provision for the maintenance of the respondents. The District Judge, in appeal, sent down the case for a definite finding on the question of heirship, and thereupon the Court of first instance found that, as Bapuchand was of the Dassa Porwad caste, he was a Vaishya, or a member of the first three regenerate castes, and that of the two respondents, respondent No. 1 was not Bapu's son, and that respondent No. 2 was his illegitimate son but not his heir, as Bapuchand was not a Shudra. When the District Judge finally dealt with the case, he held that Bapuchand was a Shudra by caste, and that his illegitimate son, respondent No. 2, if not respondent No. 1 also, was his son and heir, and not his widow, appellant No. 1. The District Judge recorded no finding on the third issue about consideration, but expressed an opinion that, if appellant No. 1 were Bapuchand's heir, the suit in its present form would lie.

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(1) 1 B. 97. (2) 7 M.I.A. 18. (3) 10 B.H.C.R. 241. (4) 16 B. 347.
(5) 6 I.A. 15. (6) 22 B. 416. (7) 4 B. 37.

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The principal point argued in second appeal relates to the question of the caste status of the deceased Bapuchand. He was admittedly a Gujarati Jain trader of the Dassa Porwad caste settled in the Belgaum District. The chain of reasoning which led the District Judge to reverse the finding of the Court of first instance on this point appears to be based on the assumptions that there are at present only two castes, the regenerate Brahmins and the unregenerate Shudras; pure Kshatriyas and pure Vaishyas **[262]** are not now recognized. If, therefore, Bapuchand was not a Brahmin, he must be regarded as a Shudra. The District Judge was also led to think that the Dassa Porwad caste to which Bapuchand belonged was a Shudra caste, chiefly because Bapuchand's brother-in-law admitted that he was a Shudra, and that the evidence of a caste custom, modifying the general rule about the succession of illegitimate sons of Shudras, was not sufficient to prove such a custom.

It appears to us that the District Judge was in error in the cardinal assumption that there are now only two principal castes, and that if a man is not shown to be a Brahmin, he must belong to the Shudra class, as pure Kshatriyas and pure Vaishyas are not now recognized. The authorities cited in support of this view (West and Buhler, p. 1135, and Steele, pp. 89, 90) are clearly insufficient to prove any such position. Both these compilers do not state any such conclusion as their own, but only represent the opinion which Brahmin shastris and pandits hold on the point. These latter opinions have no juridical value. As will be seen from a study of the original texts, they assume all through that there are representatives of the Kshatriya and Vaishya castes all over the country.

In both these works, elaborate lists of numerous castes are given which claim to be Kshatriyas or Vaishyas. The Kayasthas are mentioned in Steele as claiming to be Kshatriyas. The Maratha families of the Bhosles of Satara and Kolhapur, and the Patankars, Ghorpades, Ghatges and Shirkes are mentioned as claiming to be Kshatriyas. Steele mentions that there are pure Vaishyas in Southern India. The Courts in India have always recognized the fourfold division. In *Rahi* v. *Govinda* (1) the three regenerate castes are specially mentioned as being distinguished from the fourth Shudra caste in respect of the rights of illegitimate sons. In his judgment in this case, Westropp, C.J., tried to explain a certain position of Lord Cairns in *Inderun Valungypooly* v. *Ramasawmy* (2) by the supposition that Padmanabha, whose property was in dispute, was not a Shudra, but a Kshatriya. In an early case relating to the Lingayats, the marginal note describes the parties as belonging to the Vaishya **[263]** caste. The leading case, however, on this part of the subject is that of *Chuoturya Run Murdun Syn* v. *Sahib Purhulad Syn* (3), where the opinion of the pandits, that Kshatriyas and Vaishyas have become extinct as castes, was discussed and negatived, and the existence of Rajputs as Kshatriyas was affirmed in the most positive manner. This ruling is of special importance, for the dispute in that case related to the claims of illegitimate sons. All these authorities make it perfectly clear that there is no foundation for the supposition that there are now only two principal caste divisions. The Kshatriyas were, according to this view of the pandits, exterminated by Parshuram, and yet in the two next incarnations of Rama and Krishna we have the solar and lunar races again in the ascendant, and the present Rajputana chiefs claim descent from them. There is no such mythical explanation even suggested for the extinction of the Vaishyas.

(1) 1 B. 97. (2) 13 M.I.A. 141. (3) 7 M.I.A. 18.

We cannot, therefore, accept the correctness of this myth ; and it must be discarded in a judicial settlement of questions relating to caste and status.

In the present case there is a further reason for setting aside such mythical considerations. Bapuchand was a Gujar trader of the Dassa Porwad caste, which caste is a sub-division of the Gujarati Jains. The Jains are dissenters, and purely orthodox traditions about caste status can have no place when they are applied to Jains. Though settled in Belgaum, it is obvious that Bapuchand carried his personal law with him from Gujarat. The Marwadi Jains, who were parties to the case of *Bhagvandas* v. *Rajmal* (1), were similarly held to carry their own personal law with them to Ahmednagar. A series of decisions commencing with the case noted above, and coming down to the present day, have made it clear that this personal law of the Jains is the ordinary Hindu law of the place where they are settled—*Rukhab* v. *Chunilal* (2) ; *Amava* v. *Mahadgauda*(3); *Dalip* v. *Ganpat*(4); *Lalla Mohabeer Pershad* v. *Mussamut Kundun Koowar* (5); *Chotay Lall* v. *Chunno Lall* (6) ; *Manik Chand* v. **[264]** *Jagat Settani Pran Kumari Bibi* (7). The Jains have caste divisions of their own, which exist in full force in Eastern and Southern India. A Jain converted into the orthodox Hindu faith returns back to the caste from which he traces his first descent. These extracts are taken from the judgment of Westropp, C.J., who quotes from Elphinstone, Erskine, Colebrooke, Mackenzie and Wilson. These writers state definitely that the Jains are mostly of Vaishya origin, and they employ Brahmins in their temples and at their marriages, along with their yatis.

On the authority of these opinions, the Courts have invariably held that, unless a special custom to the contrary be established, the ordinary Hindu law governs succession disputes among the Jains—*Lalla Mohabeer Pershad* v. *Mussamut Kundun Koowar* (5). The word "ordinary" here indicates the general or normal Hindu law, the law of the three regenerate castes. As the Jains are mostly Vaishyas, it is plain that the exceptional rules laid down for Shudras can have no place in matters relating to Jains. The ordinary Hindu law being that of the three superior castes, to the third of which division the Jains mostly belong, under that law illegitimate sons do not inherit, but are only entitled to maintenance—*Rahi* v. *Govinda* (8) ; *Narayan* v. *Laving* (9) ; *Chuoturya Run Murdun Syn* v. *Sahib Purhulad Syn* (10) ; *Narain Dhara* v. *Rakhal Gain* (11) ; *Sadu* v. *Baiza* (12) ; *Jogendro Bhuputi* v. *Nittyanund* (13) ; *Viraramuthi Udayan* v. *Singaravelu* (14). The last of these cases related to parties who were Jains of the Southern Maratha Country.

The Porwad caste of Gujarati Jains finds a place in Mr. Borradaile's Collection of Gujarati Caste Customs. The word "Porwad" is apparently a corruption of Pramar, being one of the four main divisions of the Jain community. The other three divisions are Oswal, Agarwal and Khandewal. There are express decisions as regards the Oswal and Agarwal divisions, and **[265]** as they all belonged originally to the Vaishya caste, the Porwads must be similarly treated. The District Judge has laid too much stress on a statement of witness, Ex. 52, who is brother of appellant No. 1. He appears to have stated that he was a Jain *Shudra*. This admission must be set down to inadvertence or ignorance. The

(1) 10 B.H.C.R. 241. (2) 16 B. 347. (3) 22 B. 416. (4) 8 A. 387.
(5) 8 W.R. 116. (6) 6 I.A. 15. (7) 17 C. 518. (8) 1 B. 97.
(9) 2 B. 140. (10) 7 M.I.A. 18. (11) 1 C. 1. (12) 4 B. 37.
(13) 11 C. 702. (14) 1 M. 306.

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evidence of the Dassa Porwad witnesses examined in the case, Exs. 85, 86, 87, 88, and two examined on commission, was too summarily disposed of as being self-interested evidence. On the whole, it is quite clear, from the authorities stated above, that Bapuchand, as being a Jain of the Dassa Porwad caste, was governed by the general Hindu law applicable to the three regenerate castes, being though not Brahmin, certainly not a Shudra, but a Vaishya by origin, and as such he carried this law with him from Gujarat to the Belgaum District.

Lastly, it may be noted that even if the view that Bapuchand was a Shudra be accepted, it does not follow that his illegitimate sons would take the whole estate to the exclusion of the widow. Illegitimate sons of Shudras are, no doubt, their heirs, taking with legitimate sons, daughters and daughters' sons only half the share of the legitimate son. The ruling in *Rahi* v. *Govinda* (1) no doubt laid it down that widows are absolutely excluded where there are only illegitimate sons, as they would be in the case of legitimate sons. But the ruling, though supported by West and Buhler, has been strongly dissented from by the Madras High Court—*Parvathi* v. *Thirumalai* (2); *Ranoji* v. *Kandoji* (3); and Mr. Mayne also has spoken doubtfully on the point of its correctness. In *Shesgiri* v. *Girewa* (4), Sargent, C.J., apparently thought that the widow would not be altogether excluded by illegitimate sons. It is, however, not necessary to decide the point, as we feel satisfied that in this particular case the appellant-widow alone was sole heir, and the respondents as illegitimate sons were only entitled to maintenance. It follows that the District Judge must be asked to find on the contention about the true nature of the transaction, and the liability of the **[266]** defendants, or either of them, in respect of the same. We ask the District Judge to record findings on these issues :—

1. Whether the book entry represented a loan or a provision for maintenance?

2. Whether the defendants, or either of them, are liable, and if so, for what amount?

He should certify his findings on these points within two months.

Issues sent down.

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23 B. 266.

ORIGINAL CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Strachey.

RAGHUNATH MUKUND (*Plaintiff*) *v.* SAROSH K. R. KAMA AND OTHERS (*Defendants*).* [25th March, 1898.]

Civil Procedure Code (Act XIV of 1882), *ss.* 278-283—*Attachment of same property in execution of decrees obtained by different creditors—Claim made in one suit to attached property under s.* 278—*Order made under s.* 281—*Suit by claimant to establish right—All attaching creditors made defendants to suit—Parties—Practice—Civil Procedure Code (Act XIV of* 1882), *s.* 28—*Small Cause Court—Jurisdiction—Declaratory decree.*

The first and second defendants obtained a decree in suit No. 1548 of 1897 against Runchordas, described as the owner of the Wahalan Mills, and attached property on the mill premises. Twelve other creditors also brought twelve other

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* Small Cause Court Reference No. 9585 of 1897.

(1) 1 B. 97. (2) 10 M. 334. (3) 8 M. 557. (4) 14 B. 282.

similar suits and obtained decrees against other persons who were also described as owners of the Wahalan Mills, and attached the same property. In suit No 1548 of 1897, Raghunath Mukund (the present plaintiff) under s. 278 of the Civil Procedure Code (Act XIV of 1882) claimed the property. His claim was disallowed, and he was ordered to bring a suit under s. 283. No claim or order was made in the case of the other twelve suits. Raghunath now sued, in pursuance of the above order, to recover his property, and he included as defendants not merely those (defendants Nos. 1 and 2) who had been plaintiffs in suit No. 1548 of 1897, but also those who had been plaintiffs in the twelve other suits, and who had attached the property in execution of their decrees. It was objected that no suit would lie against the latter, as in their suits no claim had been made to the goods which they had attached and no order made under s. 281 of the Civil Procedure Code (Act XIV of 1882).

[267] *Held* (1) that the suit lay against the defendants (other than Nos. 1 and 2), although no claim had been made or order passed under s. 281 of the Civil Procedure Code. The summary remedy given by s. 278 of the Civil Procedure Code (Act XIV of 1882) is alternative to the remedy by way of suit. The object of s. 278 is not to deprive a claimant of his remedy by suit, but to give him, if he is diligent, a more speedy and summary remedy.

(2) That the Court of Small Causes had jurisdiction to try the suit. In substance the suit was a suit for goods, though as a matter of form the decree might contain a declaration. A suit for the release of goods wrongfully seized is not a declaratory suit under s. 42 of the Specific Relief Act (I of 1877).

(3) That although the value of the property claimed by the plaintiff was admittedly over Rs. 2,000, the Court of Small Causes had jurisdiction. The plaintiff was entitled to abandon part of his claim.

(4) That the plaintiff might join in one suit as defendants persons who had decrees against different persons. The right to relief was in respect of the same matter and, therefore, fulfilled the requirements of s. 28 of the Civil Procedure Code, 1882.

[Diss., 5 O.C. 190 (191); **F.**, 4 A.L.J. 574 (578) = 27 A.W.N. (1907) 207; 10 M.L.J. 234 (236); U B.R. (1897—1901) 267 (269); **R.**, 25 M. 736 (746); 27 M. 94 (97) = 13 M. L.J. 479; 14 Bur. L.R. 135 = 4 L.B.R. 252 (253); 9 O.C. 339 (348); **Cons.**, 1 P. R. 1905 = 83 P.L.R. 1905.**]**

CASE stated for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge :—

"1. This is a suit brought by the plaintiff to recover from the defendants a sum of Rs. 2,000, being a portion of a larger sum of Rs. 3,000, the value of certain goods mentioned in the schedule annexed to the plaint, which goods were attached by the defendants in execution of certain decrees of this Court. The plaintiff in the alternative seeks to recover the said sum of Rs. 2,000 for damages sustained by the plaintiff by reason of the defendants' wrongful acts in attaching or causing to be attached and sold in execution of their decrees the goods which belonged to the plaintiff and in which their judgment-debtors had not any right, title or interest, or for money had and received for plaintiff's use.

"2. The facts which it is necessary to state for the purposes of this reference are as follows.

"There is, in Bombay, a mill known as the Wahalan Mill, and the business of the mill is, or was, carried on in the name of the Wahalan Spinning and Weaving Company. The proprietorship of the mill and the business is in dispute, and it is a question which will doubtless have to be determined by the Courts sooner **[268]** or later, if not in this suit. It is sufficient now to say that the business of the mill ended in a loss, and the proprietor or proprietors became heavily involved, and eventually the mill had to cease working. The creditors then proceeded to file suits. The first suit filed in this Court was suit No. 1548 of 1897, in which the first and second defendants were plaintiffs and one Runchordas Goculdas,

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described as 'proprietor of the Wahalan Spinning and Weaving Company,' was defendant. Twelve more suits were filed, in which the defendants in this suit (other than defendants Nos. 1 and 2) were the several plaintiffs and one Lakshmishankar Pranshankar was defendant. A fourteenth suit was filed by another creditor (not a defendant in this suit) in which Lakshmishankar Pranshankar, his two brothers Shivshankar, Pranshankar and Nathushankar Pranshankar, and Raghunath Mukund (the present plaintiff) were all joined as parties defendants. I believe that other suits have been filed subsequently, but they are not in question here.

"3. In all the suits above mentioned, decrees were passed and all the judgment-creditors levied attachments on the moveable property lying on the mill premises, consisting of machinery, mill stores and the like. In Suit No. 1548 of 1897 the present plaintiff and Lakshmishankar Pranshankar preferred a claim to the attached property, alleging (as the plaintiff now alleges) that the plaintiff was the real owner of the Wahalan Mill, and that the property attached was his property. The claimant notice came on before me for hearing on the 1st July, 1897. It then appeared that Lakshmishankar Pranshankar, who was absent, was not properly represented. It was also conceded on all sides that the question of the ownership of the attached property was too intricate to be satisfactorily decided on a claimant notice. I, therefore, formally disallowed the claim and relegated the plaintiff to a substantive suit under s. 283 of the Civil Procedure Code (Act XIV of 1882) to be filed within six months.

"4. The plaintiff accordingly on the 13th August, 1897, filed the present suit and joined as defendants not only the plaintiffs in Suit No. 1548 of 1897 in which the claim was preferred, but also the plaintiffs in the twelve suits above mentioned in which Lakshmishankar Pranshankar was the sole defendant. In those **[269]** twelve suits no claim was preferred, or objection made, to the several attachments.

"The suit came on before me for hearing on the 17th November, 1897. The main issue raised by all the defendants was whether the goods in question were, in fact, the goods of the plaintiff, but besides that issue there were several preliminary issues on which the opinion of their Lordships is now solicited."

The following were the preliminary issues :—

1. Whether this suit will lie against the defendants (other than defendants Nos. 1 and 2), no claim having been preferred, or objection made, in their suits under s. 278 of the Civil Procedure Code, and no order having been passed under s. 281 ?

2. Whether this Court has jurisdiction to try this suit, it being, in effect, a suit for a declaratory decree ?

3. Whether this Court has jurisdiction, because the value of the property claimed by the plaintiff as his own is admittedly over Rs. 2,000, and plaintiff cannot, as he purports to do, abandon the excess ?

4. Whether the plaintiff can join in one suit, as parties-defendants, plaintiffs who have decrees against different persons ?

Raikes, for plaintiff.

Vicaji, for defendants Nos. 1 and 2.

The following authorities were cited :—*Sundar Singh* v. *Ghasi* (1) ; *Varajlal* v. *Kachia* (2) ; *Lulchand* v. *Sakharam* (3) ; *Venkapa* v. *Chenbasapa* (4), *Krishnaji* v. *Bhaskar* (5) ; *Nito Kalee* v. *Kripanath* (6) ;

(1) 18 A. 410. (2) 22 B. 473. (3) 5 B.H.C.R. A.C.J. 139 (143).
(4) 4 B. 21. (5) 4 B. 611. (6) 8 W.R. 356.

Deen Dyal v. *Poran Dass* (1); *Chandra Bhusan* v. *Ram Kanth* (2); art. 11 of sch. II of Limitation Act (XV of 1877); ss. 19 and 20 of Act XV of 1882 (Presidency Small Cause Courts Act); *Colvin* v. *Mrs. Barbara Owen* (3); *Nathu* v. *Kalidas* (4); **[270]** *Gordhan* v. *Kasandas* (5); *Chhaganlal* v. *Jeshan Rav* (6); *Pagi Partap* v. *Varajlal* (7); *Khursedji* v. *Pestonji* (8).

JUDGMENT.

FARRAN, C. J.—We answer the first question in the affirmative, being of opinion that the suit will lie against the defendants (other than defendants Nos. 1 and 2), though no claim has been preferred or objection made in their suits under s. 278 of the Civil Procedure Code, and no order passed under s. 281. The summary remedy given by s. 278 of the Civil Procedure Code to a person whose property has been wrongfully attached, appears to us to be alternative with the more elaborate one by way of suit, which he if so minded, may adopt. The context of the section shows, we think, that this is so. If the claimant desires to adopt the summary remedy he must do so without delay. No period within which he must make his claim under s. 278 is specified, but if he unduly delays to make it, the section enacts that he shall be relegated to a suit. The object of the section is not, therefore, to deprive a claimant of his remedy by suit, but to give him, if he is diligent, a more speedy and summary remedy. The case cited by the Chief Judge, *Man Kuar* v. *Tara Singh* (9), has been dissented from in *Sundar Singh* v. *Ghasi* (10) and, we think, rightly so. Our view of the law is in accordance with *Lalchand* v. *Sakharam* (11), and *Chandra Bhusan* v. *Ram Kanth* (2). The *cursus curiæ* has, we believe, as observed in *Sundar Singh* v. *Ghasi*(10), run in this direction for many years in all the High Courts.

The second question must also, we think, be answered in the affirmative. The direct object of a claimant whose goods have been seized by the Sheriff is to get his goods released from attachment, and not merely to have it declared that they are his goods. In substance the suit is a suit for the goods, though as a matter of form the decree may contain a declaration. A declaratory suit properly so called is a suit of the nature described in s. 42 of the Specific Relief Act. When a man's goods **[271]** are wrongfully seized, there is no discretion vested in the Court as to whether it will entertain a suit for their release or not. The plaintiff is entitled to have them released. It would be an error to call a suit intended to have such a result a suit for declaration.

As to the third question, we think the plaintiff was entitled to abandon part of his claim so as to bring the case within the limits of the Small Cause Court jurisdiction.

The fourth question must also be answerd, we think, in the affirmative. The right to relief against all the attaching creditors is in respect of the same matter, and so the suit fulfills the requirements of s. 28 of the Civil Procedure Code. Mr. Vicaji contends that as some of the claimants have attached the property as that of Runchordas Goculdas, while others have attached it as the property of Lakshmishankar Pranshankar, the provisions of s. 28 do not cover the case, but that does not appear to us to vary the plaintiff's right of suit. Both sets of creditors have attached

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(1) 9 W.R. 474. (2) 12 C. 108. (3) 2 B.L.R. 212. (4) 2 B. 365.
(5) 3 B. 179. (6) 4 B. 503. (7) 8 B. 259. (8) 12 B. 573.
(9) 7 A. 583. (10) 18 A. 410 (412). (11) 5 B. H.C.R. 139 (143).

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goods which the plaintiff claims as his. The plaintiff must establish his ownership as against both. The law does not compel him to establish it as against each attaching creditor, or against each set of attaching creditors. It would be very unfortunate, we think, if it did, though it might be an advantage to the legal profession.

The costs of the reference will be costs in the case.

Attorneys for plaintiff.—Messrs. *Nanu and Hormusji*.

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23 B. 271 (P.C.) = 7 Sar. P.C.J. 427.

PRIVY COUNCIL.

PRESENT :

Lords Watson, Hobhouse and Davey, and Sir R. Couch.

[On Appeal from the High Court at Bombay.]

KARAMSI MADHOWJI (*Defendant*), *Appellant v.* KARSANDAS NATHA AND OTHERS (*Plaintiffs*), *Appellants.*

[28th June, and 12th July, 1898.]

Hindu law—Will—Construction—Gift conditional on adoption—Condition precedent—Direction to adopt given to the widow of the testator's deceased son, not carried out—Bequest of residuary property—Condition precedent not fulfilled.

The will of a childless testator directed that the widow of his deceased son should adopt a boy, then aged nine years, who was the son of the testator's nephew. To this boy the testator bequeathed his residuary estate to be made [272] over to him at the age of twenty-one years. The widow, having refused to adopt him, died while he was still a minor, without having done so.

During her life the question arose, whether this bequest was to take effect only upon the condition that the adoption should have taken place, or was a legacy validly made in his favour, as a person designated, without the adoption having been carried out.

In 1887, before the death of the widow, a suit for the construction of the will was decided to the effect that the adoption was a condition precedent to the minor's taking the legacy. A review of that judgment was refused when, after coming of age in 1894, he applied for it. His application to be allowed to appeal from that judgment was, however, granted, the circumstances being deemed by the appellate Court to be sufficient cause for the delay, within s. 5 of the Limitation Act (XV of 1877).

The appellate Court subsequently heard the appeal and affirmed the decision of the Division Court. On appeal to the Privy Council,

Held, affirming the decree of the High Court, that the adoption was a condition precedent and that the boy not having been adopted could not take under the will.

[Appl., 9 C.W.N. 309 (319) ; R., 4 C.L.J. 537 = 11 C.W.N. 147 (151).]

APPEAL from a decree (21st February, 1896) of the appellate High Court (1), affirming a decree (1st October, 1887) of the High Court in the original jurisdiction.

With the object of obtaining the true construction of certain of the provisions of the will of Kessowji Jadhowji, a Hindu resident in Bombay, who died on the 9th February, 1886, this suit was brought in 1887 by Karsandas Natha and others, executors. The testator's only son Liladhar had died before his father, leaving a widow Ladkavahu and an only child Kesserbai. The plaintiff Karsandas Natha, now first respondent, was

(1) 20 B. 718.

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nephew of the testator. The widow Ladkavahu was the first defendant, and with her was joined Karamsi Madhowji, then an infant, as co-defendant, through his father Madhowji Katchra, who was another nephew of the testator.

By the will, in the Gujarati language, Ladkavahu was directed to adopt Karamsi, then nine years old. She, however, refused to adopt him, and she died in 1890 without having done so. The will also used words to the effect that so much of the estate as might remain, after all the things directed in the will had been done, should go to Karamsi as his inheritance.

[273] Difference of opinion having arisen as to whether or not the adoption was a condition precedent to Karamsi's becoming entitled to the residuary estate, this suit was instituted in 1887 for the construction of the will.

On this appeal the question was, mainly, as to the true construction of the words used by the testator in reference to the residue,—whether the words referred to what it would consist of, or, having a wider effect, meant that the adoption must precede Karamsi's getting the residue.

The clauses in the will affecting this question appear in their Lordships' judgment.

The suit, *Karsandas Natha and others* v. *Ladkavahu and another* (1), was decided on the 1st October, 1887, in the original jurisdiction by Farran, J. The Court was of opinion that the testator's direction to his daughter-in-law to adopt was to adopt a son to her deceased husband and herself, that being the only lawful adoption to which she was competent; and that Karamsi, unless and until he should have been adopted, was not entitled under the will to the testator's property, his adoption being a condition precedent to the taking under the will, as the Court construed it. *Shamavahoo* v. *Dwarkadas Vasanji* (2) was cited. Karamsi, having come of age in 1894, filed a petition for review, stating that he had been a minor in 1887, and that the decree had not given him an opportunity to show cause against it, with reference to its effect upon his interests on his attaining full age. The judgment on that petition, dated 4th March, 1895, and rejecting it, is reported in *Cursandas Notha* v. *Ladkavahu* (1).

On the 8th March, 1895, Karamsi petitioned for an order calling on the plaintiffs to show cause why, as he had been a minor when the case had been decided by the original Court, and as circumstances had been such as to impede an appeal being preferred on his behalf, he should not be allowed to appeal after all. The High Court were of opinion that cause should be shown; and after hearing the plaintiffs, granted leave to appeal. Their judgment (Sir C. Sargent, C. J., and Bayley, J.) stated the **[274]** grounds on which the special circumstances were considered by them to be sufficient excuse for the lapse of time that had taken place, within s. 5 of the Limitation Act XV of 1877, regard being had to the fact that the interest of the minor to obtain reversal of the original decree had not been identical with those of his guardian—*Kursandas* v. *Ladkavahoo* (1).

The appeal having been heard, the High Court (Parsons and Strachey, JJ.) on the 21st February, 1896, confirmed the decree made by Farran, J, in the original Court on the 1st October, 1887. They said (3) that they

(1) 12 B. 185 and 19 B. 571 and 20 B. 104. (2) 12 B. 202.
(3) 20 B. 719 (720).

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agreed with the learned Judge that Karamsi, as he had not been adopted, was not entitled to the residue of the testator's property.

They quoted cl. 28 of the will, and added :—

"That clearly means that he is first to be adopted,—adoption being one of the things mentioned in the will. The words 'as his inheritance' show that the residue is left to him because he is an heir. Clause 46 provides for the case of his dying after adoption. Nothing being left to him if not adopted, this was the only contingency to be provided for.

"The case of *Bireswar* v. *Ardha Chander* (1) is quite different. There was clear indication there of the testator's intention before making an adoption, to give the property to the boy. Here there was no such intention. On the contrary it was clear that the intention was only to give it after the adoption had taken place. It was to the adopted boy, and not to the *persona designata*, Karamsi, that the bequest was made ;—compare cl. 46 of the present will with cl. 11 of the will in that case, and the distinction pointed out by their Lordships of the Privy Council at p. 107 will at once appear. This case is on all fours with *Shamavahoo* v. *Dwarkadas Vasanji* (2), and the decision of the Judge following that case is correct. We, therefore, confirm the decree with costs."

On this appeal—

Cozens-Hardy, Q. C. and *Branson*, for the appellant, argued that the High Court were in error in holding that the appellant, in order to become entitled to the property bequeathed by the will, must have been adopted. The right construction was that he was entitled to the residue bequeathed to him independently of the adoption. The fact that there was no gift over, in the case of the appellant not being adopted, went far to show that the bequest to him was absolute, and not conditional upon his adoption by [275] Ladkavahu. They referred to *Bireswar Mukerji* v. *Ardha Chander Roy* (1), where the bequest was by name to a boy whom the testator indicated as one whom he was about to adopt, but who was not adopted. As in that case, the appellant was not selected as being the adopted son, but for reasons independent of adoption ;—and, as in that case, the bequest was held good, so here Karamsi should be held entitled. In cl. 28 of the will there was an absolute gift to him. He was a designated person, and it was not of the essence of the gift that he should have been adopted before it could take effect. The words of the will, throughout, were consistent with his taking the bequest; and, on the other hand, if he did not obtain it, there would be an intestacy as to part, a state of things contrary to the testator's intentions. And such a construction would be contrary to the presumption applicable to a will. Reference was made to s. 71 of the Indian Succession Act, 1865, as to the construction of a sentence in a will susceptible of two meanings. That which would give effect was to be preferred to that which would not.

Haldane, Q. C. and *J. D. Mayne*, for the respondents.—The will taken as a whole made it clear that the capacity to take the residue depended on the legatee having the qualification of being the adopted son. Clause 29 made it appear that his adoption was a condition without which the bequest was not to operate. The will, in short, was that there should be an adopted son who should take the testator's property. There was a continuous series of provisions showing that only as adopted son was this legatee in the testator's mind.

(1) 19 I. A. 101 = 19 C. 452.

(2) 12 B. 202.

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Cozens-Hardy, Q. C., replied, adverting to the provision that, in a certain event which had not occurred, the executors were to choose who should be adopted; and arguing that there was no sign, on the part of the testator, that he was actuated by the desire which ordinarily operated in bringing about an adoption, by, or for a Hindu who had no son.

JUDGMENT.

Afterwards, on the 12th July, their Lordships' judgment was delivered by

[276] LORD HOBHOUSE.—The suit in which this appeal is presented was instituted in the year 1887 on the original side of the High Court of Bombay to procure an authoritative construction of the will of Kessowji Jadhowji. He was a wealthy Hindu, who made his will on the 8th February, 1886, and died the next day. The appellant claims to be entitled to his residuary estate.

The testator was the son of Jadu Asar, who had other children. The testator had one child, a son named Liladhar, who married Ladkavahu, and in his turn had one child, a daughter named Kesserbai. Liladhar predeceased the testator. Ladkavahu has died, but Kesserbai is still living. The testator had two nephews; one named Karsandas, who is one of his executors, and is stated to be his nearest reversionary heir, and another whose son is the appellant Karamsi.

The will is written in Gujarati. The version used in this suit is by the translator of the High Court. In the first 27 clauses the testator gives a great number of legacies and directions about his property. The 28th clause is as follows :-—

"28. There is my nephew Madhowji Katchra's son Karamsi Madhowji now (living). He is about nine years of age. It is my wish to adopt him as my son. If I should not be able to do so in my life-time, then my son Liladhar's widow is to take the said Karamsi in adoption. His adoption ceremony (*dattvidhan*) is to be performed. My property which may remain as a residue after all the things mentioned in my will have been done I give to this lad as (his) inheritance. And (I) appoint (him) as my heir. Choru Liladhar's widow Ladkavahu is to get him betrothed (the outlays being made) out of my property. For the same about Rs. 5,000 are to be spent."

By the 29th and 30th clauses he directs that after Karamsi is adopted he shall take the name of Kessowji; and provides for the costs of his marriage and for his residence, which till he is 18 is to be with Ladkavahu. By the 31st clause he directs his executors to make over the property to Karamsi on his attaining 21, if his conduct is good, with alternative provisions if his conduct is bad, in favour of a well-behaved son. The 46th clause is as follows :—

"46. In the twenty-eighth clause above it has been directed (that a son) should be adopted. In accordance therewith after the said Karamsi shall have been adopted should he die without (leaving) any descendants then Choru **[277]** Ladkavahu is duly to adopt out of my father Jadu Asar's descendants any lad who may be found fit. And if the said Ladkavahu should not be living at that time then (any) lad (begotten) of the loins of my father Jadu Asar who may appear to my executors to be fit, is duly to be appointed my heir. And to him my property as mentioned above is duly to be given in inheritance. And his adoption ceremony is to be performed and the outlays on the occasion of his marriage also are duly to be made as written above."

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The difficulty has arisen from the circumstance that Ladkavahu refused to adopt Karamsi. The cause was heard in October, 1887, when Ladkavahu was living, before Mr. Justice Farran, now Chief Justice of Bombay, who decided that until adoption Karamsi was not entitled to the residue. After Karamsi attained majority he obtained leave to appeal; and in February, 1896, the Court of Appeal affirmed the decree below. The present appeal is from that Court. The respondents are the executors, one of whom has an interest to support the existing decree.

The controversy turns on the construction to be given to the sentence "My property which may remain as a residue after all the things mentioned in my will have been done I give to this lad as his inheritance." That sentence admits of being read in two different ways with equal facility. The words "after all things mentioned in my will have been done" may be attached to the preceding word "residue;" or making a pause at "residue," the same words may be thrown forward and attached to "I give." On the former reading the disputed words merely show what is meant by "residue;" on the latter they import a condition precedent to the gift.

Mr. Justice Farran arrived at his conclusion without leaving on record any verbal criticism. The learned Judges of the Court of appeal express themselves thus:—

"Clause 28 of the will is as follows:—'To this boy all the things (*kam*, literally business, work, things to be done) mentioned in my will having been done, I give the residue of my estate as his inheritance and I appoint him my heir.' That clearly means that he is first to be adopted, adoption being one of the things mentioned in the will."

It is not clear whether they mean to say that the words between commas are a clearer translation than the official one, or only to put their own construction on the words as they stand in the official translation. On the expressions used by the [278] learned Judges no question can be raised. But their Lordships not being able to read the original for themselves, must abide by the official translation.

Of course the controversy takes the form of subjecting the will to a minute analysis in order to extract inferences in favour of or adverse to each of the two possible constructions; and that has been done very thoroughly at the Bar. On the appellant's side it is forcibly argued, that the construction adverse to him leads to an intestacy, which it must be presumed that one who is making his will does not intend. It is also urged that, if the testator had attached primary importance to adoption, he would have taken care to place his meaning beyond doubt; that if it were so essential, it was an adoption not to himself but to his dead son, which he might have secured before his own death; that he must have known that after his death Ladkavahu would be a free agent, and might disregard his wishes; and that the words "inheritance" and "heir" are just as compatible with the idea of taking directly by devise as with that of taking in the character of grandson and heir through adoption. On the other hand, it is insisted that the wish for an adopted son is placed first in order; that it is an express condition precedent to the assumption of the testator's name; that it is necessarily implied in the direction that the boy shall reside with Ladkavahu; that the gifts over on failure of Karamsi's issue are only to take place after his adoption, and that there is no gift over unless he is adopted; in short, that the testator assumed as a basis of his dispositions that there would be an adoption, and that the alternative did not occur to him. Thus, it is urged, with the failure of

adoption the whole structure of the will fails; and there ensues an intestacy, not as desired or contemplated by the testator, but because he took for granted the existence of a condition which has not come to pass.

On such a peculiar will it is hardly a profitable task to weigh each verbal criticism in very nice scales, the more particularly as several of the expressions relied on are double-edged and may be used one way or the other with nearly equal force. Their Lordships confine themselves to saying that the meaning of the [279] testator is very obscure, but that the arguments adduced to support the decree are such that they are not justified in disturbing it. They will humbly advise Her Majesty to dismiss the appeal. The costs must follow the result, and the appellant must pay them.

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Appeal dismissed.

Solicitors for the appellant :—Messrs. *Brown, Ringrose and Lightbody.*
Solicitors for the respondent :—Messrs. *Nicholl, Manisty and Co.*

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23 B. 279.

PARSI CHIEF MATRIMONIAL COURT.

Before Mr. Justice Fulton.

KAWASJI EDULJI BISNI (*Plaintiff*) *v.* SIRINBAI (*Defendant*).*
[9th September, 1898.]

Parsis—Marriage—Husband and wife—Suit by husband for restitution of conjugal rights—Defence to such suit—Agreement for separation a good defence—Parsi Marriage and Divorce Act (XV of 1865), s. 36.

Under s. 36 of the Parsi Marriage and Divorce Act (XV of 1865) a contract by which a husband has agreed to allow his wife to live separate is a good defence to a subsequent suit by him for restitution of conjugal rights.

[R., 2 Bom. L. R. 845 (847).]

SUIT by plaintiff (husband) for restitution of conjugal rights.

The suit was filed in July, 1898. The plaint stated that the parties had been married in January, 1875; that in September, 1893, the defendant had left the plaintiff's house and had since lived separately.

The defendant pleaded (*inter alia*) that in January, 1896, the plaintiff had filed a previous suit against her for restitution of conjugal rights to which she had pleaded his cruelty, and she on her part had about the same time filed a suit against him for judicial separation; that both suits were fixed to come on for hearing on 10th July, 1896, but that on the 9th July the parties had come to an agreement, in consequence of which both suits were dismissed.

By this agreement the plaintiff (*inter alia*) agreed to allow the defendant to live separate from him and to make her a monthly [280] allowance during their joint lives. The agreement was in writing and was produced in Court.

The defendant pleaded that she had, in fact, carried out her part of the said agreement, and she contended that by the agreement the present suit was barred and should be dismissed.

Branson, for the plaintiff.

Macpherson, for the defendant.

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The following authorities were referred to:—Parsi Marriage and Divorce Act (XV of 1865), s. 36 ; Act IV of 1869, ss. 32, 33 ; *Gibbs* v. *Harding* (1) ; Brown on Divorce, p. 189 ; *Marshall* v. *Marshall* (2) ; *Clark* v. *Clark* (3) ; *Russell* v. *Russell* (4) ; *Besant* v. *Wood* (5).

JUDGMENT.

FULTON, J.—I think that under s. 36 of the Parsi Marriage and Divorce Act, 1865, a contract, under which the husband has agreed to allow his wife to live separate, may be pleaded by her as a defence to a suit for restitution of conjugal rights.

The material words of the section are as follows :—

" Where a wife shall have...without lawful cause ceased to cohabit with her husband, the party...with whom cohabitation shall have so ceased may sue for the restitution of his.....conjugal rights, and the Court, if satisfied of the truth of the allegations contained in the plaint and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly."

The questions then arise :—

(1) Whether an agreement for separation made by the husband renders it lawful for his wife to live apart from him ? and

(2) Whether the existence of such an agreement is a just ground why relief should not be granted ?

To both questions the answer must be in the affirmative.

Unless the word " lawful " was used by the Legislature in some peculiar and technical sense, it seems clear that, if a husband has contracted to allow his wife to live apart, and she chooses to do so, she has a lawful cause for so doing. Her will **[281]** doubtless is the cause, and the existence of a contract makes it " lawful." It can hardly now be suggested that such a contract is void as immoral or contrary to public policy. Such contracts have long been enforced by injunction by the Courts of equity in England, and are now accepted as defences to claims for restitution of conjugal rights by the Probate Division of the High Court.

The English law on the subject is very clearly explained by Lopes, L. J., in *Russell* v. *Russell* (4) as follows :—

" The effect of the Judicature Acts has been indirect ; but, at the same time, very important. It is, however, confined to separation deeds. These, as is well known, were treated as illegal and void by the Ecclesiastical Courts : see *Westmeath* v. *Westmeath* (6). But when it was settled, as it ultimately was (see *Besant* v. *Wood* (5)), that the Court of Chancery would restrain a suit for restitution of conjugal rights if brought contrary to a covenant not to institute such a suit, and when the Judicature Acts made the Divorce Court a Division of the High Court and abolished injunctions to stay actions, and substituted in all branches of the High Court defences instead of such injunctions it followed that a separation deed containing a covenant not to sue for restitution of conjugal rights became a defence to a suit for such restitution : see *Marshall* v. *Marshall* (2) ; *Clark* v. *Clark* (3). "

In this country between Parsis the contract of separation appears as binding as a similiar contract between Christians in England. It was not

(1) (1870) L.R. 5 Ch. 336.
(2) (1879) 5 Pro. D. 19.
(3) (1885) 10 Pro. D. 188.
(4) (1695) Pro. 315 (332 333).
(5) (1879) 12 Ch D. 605.
(6) (1827) 2 Hagg. Ecc. Supp. 1, 115.

suggested that it was specially inconsistent with the Parsi customs of marriage, and even if it were it would be a question for argument whether the existence of such custom could remove such a contract from the scope of the Contract Act; or could invalidate it as an immoral contract. Considering how fully the Parsis have adopted the Western ideas of marriage, and how readily they have accepted the Act of 1865, it is not likely, I think, that it will ever be contended that such a contract is void. In the present case certainly no such contention was raised.

Mr. Mantri, however, objected to the issue on the ground that it did not arise under the provisions of the Act in a suit for restitution of conjugal rights. That objection, however, can only [282] be sustained if it can be held that the word "lawful" refers not to the law of this country to which Parsis are subject, but to the ecclesiastical law of England to which they are not. That the Parsis of Bombay are not subject to the ecclesiastical law, was settled by the decision of the Privy Council in *Ardeseer* v. *Perozeboye* (1), and though their customs have been modified by Act XV of 1865, they are no more now governed by ecclesiastical law than they were before. The mere fact, then, that in 1865, when this Act was passed, the Divorce Court of England was still administering on this point the old ecclesiastical law, which treated deeds of separation as unlawful, can give no support to the argument that, in using the word "lawful" in s. 36 of the Act, the Legislature meant the criterion of legality to be not the law of this country applicable to Parsis, but the Church law of the people of another religion in England. It is true that the provisions of Act XV of 1865 are in many respects similar to the marriage law administered in England since 1857, and in construing it, the decisions of the Divorce Court and Probate Division may often be useful guides; but it must be always remembered that though the laws are in certain points similiar, they are not the same, and that the decisions under the one can only assist by analogy in the construction of the other. As regards the point now under consideration, it seems to me that the word "lawful" is a plain English word and must be construed in its ordinary sense as having reference to the law to which the parties are subject. If it had been intended, as in Act IV of 1869 applicable to Christians, to exclude a defence of this sort, a section like 33 of that Act would have been necessary.

On the second question my decision necessarily follows my decision on the first. If it is lawful for the wife to stay away, it would not be just to give the husband a decree directing her return. (The rest of the judgment is not material to this report).

Attorney for plaintiff:—Mr. *K. J. Mantri.*

Attorneys for defendants:—Messrs. *Hiralal, Mulla and Mulla.*

(1) (1856) 10 Moo P. C. 375.

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[283] APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

SHIVRUDRAPPA KRISHNAPPA AND OTHERS (*Original Plaintiffs*), *Appellants v.* BALAPPA AND ANOTHER (*Original Defendants*), *Respondents.** [14th April, 1898.]

Landlord and tenant—Agreement to occupy for a term—Permissive occupation—Expiration of term—Suit for possession—Limitation—Limitation Act (XV of 1877), arts. 113, 139 and 144.

Plaintiffs sued to recover possession of a certain house from the defendants, resting their claim on a certain document, dated the 3rd May, 1880, executed by the defendants' father Mallappa to the plaintiffs' father Krishnappa. In this document Mallappa admitted that the house belonged to Krishnappa and promised to vacate it at the end of two years from the date of execution. The document being presented for registration on the 18th May, 1880, Mallappa denied its execution, but after inquiry the District Registrar ordered it to be registered. The lower Court dismissed the suit as barred by limitation (either by art. 113 or art. 144 of the Limitation Act, XV of 1877).

Held, reversing the decree and remanding the case, that the suit was not barred. By the agreement the tenancy or permissive occupation was to end on 3rd May, 1882. Either under art. 139 or 144 the plaintiff had twelve years from that date within which to sue.

SECOND appeal from the decision of R. A. Graham, Assistant Judge, F. P., Sholapur-Bijapur.

Suit to recover possession of a house.

This suit was brought in September, 1893. The plaintiffs rested their claim on a document, dated the 3rd May, 1880, executed to their father Krishnappa by the defendants' father Mallappa, in which Mallappa admitted the house to be Krishnappa's and promised to vacate it at the end of two years. This document was presented for registration on the 18th October, 1880. Mallappa then denied its execution, but after inquiry the District Registrar ordered it to be registered. This document was in the following terms:—

"I, Mallappa, son of Samana, give in writing this deed of agreement in the Fasli year 1289 as follows:—* * There is close to your big house, to the south of it, your other small house. * *. The house was given to me by [284] you. Now you told me that you wanted the house and asked me to vacate and give it over to you. As to that I told you that I could not find another house for my residence so as to vacate and make over to you your house: hence I have begged and obtained from you two years' time from this day during which I am to live in the said house. Wherefore I will live in the said house for two years from this date, and when the two years are over, on the following day I will vacate the said your house and make it over to your possession; I have not any right to the said house * *. 3rd May, 1880."

The first defendant (*inter alia*) pleaded limitation. The second defendant did not appear. The Subordinate Judge allowed the plaintiff's claim. On appeal by the defendants, the Judge reversed the decree, holding that the suit was time-barred. The following is an extract from his judgment:—

"This document (kararpatra) was presented for registration on 18th October, 1880, but defendants' father then denied the execution of it. The District Registrar, after a summary inquiry, ordered that the document

* Second Appeal No. 1143 of 1897.

should be registered, and it was registered in December, 1880. Now, presuming the kararpatra to have been duly executed, the plaintiffs must sue either on it, as evidence of contract, for specific performance of the contract, or on their general title. In the former case, the period of limitation under art. 113 of the Limitation Act would be three years from the date fixed for the performance, *i.e.*, 3rd May, 1882. In the latter case, the twelve years' period would begin to run from the time when plaintiffs' title was denied—in this case, 18th October, 1880. In either case, the suit not having been filed till 1893, is clearly barred."

The plaintiffs preferred a second appeal.

Narayan G. Chandavarkar, for appellants (plaintiffs).—The Assistant Judge was wrong in applying art. 113 of the Limitation Act and in holding that the suit was time-barred. A licensee cannot deny his licensor's title. Under s. 139 of the Limitation Act, the cause of action accrued to the licensor on the expiration of the period of the license. Under the document of 3rd May, 1880, the defendant became a tenant for a fixed term. There was no rent provided for, but he was allowed to remain in possession for two years. Adverse possession could not commence until after the expiration of the two years. The tenancy expired in May, 1882, and the suit being filed in September, 1893, was not time-barred.

Mahadeo V. Bhat, for respondents (defendants).—The first defendant was in actual possession of the house before the date of the agreement. The agreement was an attempt made **[285]** by plaintiff to make the first defendant acknowledge his title. Our adverse possession commenced from the date on which we denied execution of the agreement, that is, from the 18th October, 1880. The suit being brought more than twelve years after that date is barred. No rent was reserved. We were in the position of a licensee. Article 139 would, therefore, not apply.

JUDGMENT.

CANDY, J.—Plaintiffs, the sons of one Krishnappa, sued defendants, the sons of one Mallappa, to recover possession of a house, with regard to which Mallappa was said to have passed a registered agreement, dated 3rd May, 1882, acknowledging Krishnappa's ownership of the house, reciting that he, Mallappa, was occupying the same by permission of Krishnappa, and promising to vacate the same on the expiry of two years from that date, 3rd May, 1880. The plaint was filed in September, 1893. Defendants denied the genuineness of the agreement, and pleaded that the house was their own property and that the claim was barred by limitation. The Subordinate Judge found that the agreement was proved, that plaintiffs were owners of the house, and that the claim was not time-barred. He, therefore, awarded the claim. On appeal the Assistant Judge, F. P., reversed that decision, holding that the claim was time-barred.

It appears that when Krishnappa presented the agreement for registration on 18th October, 1880, Mallappa "denied its execution." An enquiry was held by the District Registrar, who ordered the document to be registered. On these facts the Assistant Judge held that "presuming the kararpatra to have been duly executed, the plaintiffs must either sue on it as evidence of a contract, for specific performance of the contract, or on their general title. In the former case the period of limitation under art. 113 of Limitation Act would be three years from the date fixed for performance, *i.e.*, 3rd May, 1882. In the latter case the twelve years' period of limitation would begin to run from the time when plaintiffs' title was denied—in this case 18th October, 1880."

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We are unable to agree with the view taken by the Assistant Judge. In our opinion, art. 113 of the Limitation Act has no [286] application. Whether the agreement of 3rd May, 1880, be taken by itself, or as part of a compromise effected between Krishnappa and Mallappa regarding the division of certain property including this house, the plaintiffs are entitled to rely solely on this registered document as the basis of their claim to recover possession of the house. By that document, Mallappa admitted that he was in permissive occupation of the house, and he promised to vacate the same on the expiry of two years from that date. In *Gobind Lall Seal* v. *Debendronath Mullick* (1) it was held that a suit for the recovery of immoveable property against a person who had originally been in mere permissive occupation or possession accorded on the ground of charity or relationship is governed by Act XV of 1877, sch. II, art 144. Mr. Justice Pontifex remarked that "a permissive occupation, which has considerable resemblance to a tenancy-at-will, is of extremely frequent occurrence in this country in consequence of the family habits and natures of its people;" and Garth, C.J., said "the case then comes under art. 139 of the Limitation Act, if the relation between the parties is that of landlord and tenant; or under art. 144, if there is no such relation." We do not think that the period of limitation is altered by the fact that in this case Mallappa is said to have executed a written agreement acknowledging his permissive occupation and promising to vacate on the expiry of two years. Krishnappa, whether as landlord or as licensor, was not bound to sue to eject Mallappa, whether as tenant or licensee, within three years of the date on which Mallappa agreed to vacate. If the argument of the Assistant Judge is correct, then art. 139 of the Limitation Act can have no application when the tenant contracts that the tenancy shall determine on a certain date. Where an agreement specifies the term upon which the tenancy is to end, on the expiry of that term the tenancy is determined *ipso facto*. See the cases collected by Mr. Starling in his Notes on the Limitation Act, 3rd Edition, under art. 139, p. 281. Here by the agreement the tenancy or permissive occupation was to end on 3rd May, 1882. Either under art. 139 or under art. 144 plaintiffs had twelve years within which to sue. The Assistant Judge remarked that [287] Mallappa denied Krishnappa's title on 18th October, 1880. But according to the record all that Mallappa did then was to deny execution of the agreement. The pleader for respondents has been unable to point to any evidence showing that Mallappa then denied Krishnappa's title. It is unnecessary, therefore, to determine whether, if Mallappa had then denied Krishnappa's title, or his own permissive occupation, Krishnappa or his sons would have been bound to sue within twelve years from that date. Possibly Krishnappa might then have sued at once to eject Mallappa; or he might have elected to hold to the written agreement. However that might be, we are unable to adopt the view that, taking the agreement of 3rd May, 1880, to be proved, the claim is barred by limitation.

We must, therefore, reverse the decision of the Assistant Judge and remand the appeal for disposal on the merits. If the agreement is proved, then plaintiffs are entitled to succeed so fas as limitation is concerned. If the agreement is not proved, then the basis of their claim fails. Costs to be costs in the cause.

Decree reversed and appeal remanded.

(1) 6 C. 311.

23 B. 287.

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23 B. 287.

Before Mr. Justice Parsons and Mr. Justice Ranade.

DATTARAM (*Original Plaintiff*), *Appellant v.* GANGARAM AND ANOTHER (*Original Defendants*), *Respondents.** [20th April, 1898.]

Guardian—Certificated guardian—Mortgage by such guardian without Court's permission—Validity of such mortgage—Sanction under Civil Procedure Code (Act XIV of 1882), *s.* 305—*Guardians and Wards Act* (*VIII of* 1890), *ss.* 29 *and* 30—*Act XX of* 1864.

Anant was the owner of the property in dispute. He mortgaged it with possession to defendant No. 1 in 1884. Anant died leaving an adopted son Vithal, a minor. Thereupon one Vasudev was appointed by the District Court to be guardian of the person and property of the minor under Act XX of 1864. In September, 1890, Vasudev mortgaged the same property to plaintiff with the sanction of the Subordinate Judge's Court obtained under s. 305 of the Code of Civil Procedure (Act XIV of 1882). In 1895 the plaintiff as second mortgagee brought this suit to redeem the earlier mortgage of 1884.

[288] *Held*, that Vasudev, as certificated guardian, had no power to mortgage the minor's property without the previous permission of the Court which had appointed him to act as guardian, and that the sanction of another Court given under s. 305 of the Code of Civil Procedure (Act XIV of 1882) was not sufficient to legalise the mortgage.

Held, also, that such mortgage would have been absolutely void under Act XX of 1864, but was only voidable under s. 30 of Act VIII of 1890 at the instance of any other person affected thereby.

Held, further, that defendant No. 1, the original mortgagee, was not affected by the plaintiff's mortgage, and that the only person really affected by that mortgage was Vithal, the owner of the equity of redemption, who was a necessary party to the suit.

[R., 17 C.P.L.R. 13 (16); 10 O.C. 321 (326) ; Expl., 7 O.C. 181 (184).]

SECOND appeal from the decision of Rao Bahadur Thakurdas Mathuradas, Assistant Judge of Ratnagiri.

One Anant Narayan Apte was the owner of the land in dispute. He mortgaged them to defendant No. 1 by a mortgage deed dated 13th April, 1884.

Anant died, leaving an adopted son Vithal, a minor.

On the 30th January, 1880, Vithal's natural father Vasudev Krishna was appointed guardian of his person and property under Act XX of 1864 by the District Judge of Ratnagiri.

On the 10th September, 1890, Vasudev mortgaged the minor's property, including the land in dispute, to the plaintiff, with the sanction of the Subordinate Judge of Vengurla granted under s. 305 of the Civil Procedure Code (Act XIV of 1882).

In 1895 the plaintiff as puisne mortgagee filed the present suit to redeem the earlier mortgage of 13th April, 1884.

The Court of first instance dismissed the suit, holding that the plaintiff's mortgage was invalid, as it had not been effected with the previous sanction of the District Court under s. 29 of the Guardians and Wards Act (VIII of 1890).

This decision was upheld, on appeal, by the Assistant Judge.

His reasons were as follows :—

"The mortgagor Vasudev, who is now dead, was not an ordinary guardian, but a guardian appointed by the District Court under the

* Second Appeal No. 1216 of 1897.

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Bombay Minors' Act XX of 1864. That Act was repealed on the 1st July, 1890, but the appointment of Vasudev as the guardian of the ward Vithal was kept alive by s. 2 of the [289] Guardians and Wards Act, 1890. Before passing the mortgage dated 10th September, 1890, he ought to have obtained the sanction of the District Court under s. 29 of the Act. But he did not do so. The mortgage is, therefore, illegal and unauthorized, and confers no right upon the plaintiff: see the cases cited in *Manishankar* v. *Bai Muli* (1).

"It is said that the mortgage was made for the benefit of the ward and with the sanction of the lower Court under s. 305, Civil Procedure Code. Such a sanction, as also such beneficial purpose, assuming that the purpose was beneficial, would not supply the place of the permission of the District Court necessary under the provisions of the Guardians and Wards Act, 1890."

Against this decision plaintiff preferred a second appeal to the High Court.

V. G. Bhandarkar, for appellant.—Section 29 of the Guardians and Wards Act (VIII of 1890) provides, no doubt, that a guardian appointed by the Court cannot mortgage any part of the immoveable property of his ward without the previous permission of the Court. But where the guardian mortgages the property with the sanction of the Court under s. 305 of the Code of Civil Procedure, the mortgage is legal and valid. The mortgage is the act of the Court and not of the guardian. Moreover, s. 30 of Act VIII of 1890 distinctly provides that the transaction is not absolutely void, but voidable only at the instance of any other person affected thereby. The original mortgagee who resists our claim is not affected by our mortgage. To him it is immaterial who pays off his mortgage money. The only person who can be said to be affected by our mortgage is the minor on whose behalf the guardian professed to act, but he is not a party to the suit.

H. C. Coyaji (with *Manekshah Jehangirshah*), for respondents was not called on.

JUDGMENT.

PARSONS, J.—The equity of redemption of the property which is sought to be redeemed in this suit from the original mortgagee, who is the first defendant, was mortgaged to the plaintiff by a judgment-debtor, who had obtained a certificate under s. 305 of the Code of Civil Procedure, authorising him to do so. The judgment-debtor, however, was not the real owner of the property, but was the guardian for the suit of the minor [290] to whom the property belonged, and he had also been appointed the guardian of his property under the Minors Act, XX of 1864. Under s. 29 of the Guardians and Wards Act, 1890, which continued his guardianship and now governs the case, he was prohibited from mortgaging the property of his ward without the previous permission of the Court.

It was first argued that the sanction of the Court under s. 305 of the Code of Civil Procedure was sufficient to legalise the transfer, but this clearly is not right, for the Court mentioned in s. 29 of the Guardians and Wards Act is, according to the definition contained in s. 4 (5), the Court which appointed or declared the guardian in pursuance of an application under this Act, that Court in the present case was the District Court of Ratnagiri, and the guardian had not obtained the permission of that Court

(1) 12 B. 686.

to the mortgage. Then it was argued that the mortgage was the act of the Court, and not of the guardian, but the Court does not under s. 305 execute any mortgage ; all it does is to authorize the judgment-debtor to do what otherwise would be void by reason of the provisions of s. 276, *viz.*, to mortgage property while under attachment. The mortgage when effected is the act of the judgment-debtor alone.

Being thus made without the previous permission of the Court the mortgage would under the provisions of the Act of 1864 have been absolutely void and would confer no title at all upon the plaintiff (see. *Choksi Motilal* v. *Mansang* (1)). This, however, is not so under the Act of 1890. Section 30 of that Act expressly makes such transfers voidable only. The words used are "voidable at the instance of any other person affected thereby." The only person mentioned in the section is the guardian, so that any other person apparently, except him, would have the right to declare the transfer void, provided he was affected by it. We do not think that the original mortgagee in the present case can be in any way affected by the subsequent mortgage of the equity of redemption. He has a right to his money only, and it cannot make any difference to him whether he is paid by A or B. The other person really affected by the mortgage is the owner of the [291] equity of redemption, but he has not been made a party to the suit, and we do not know what view he takes of the mortgage. The Judge of the lower Court rightly says that he is a necessary party to the suit (see s. 85 of the Transfer of Property Act, 1882) and would have joined him and have proceeded with the suit had he not held the mortgage void.

As we hold that the mortgage is not void, we must reverse the decree of the lower appellate Court and remand the case for a decision on the merits after Vithal has been joined as a defendant. Costs to be costs in the cause, to be apportioned by the Court passing the final decree.

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23 B. 291.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BAI MANGAL (*Original Defendant*), *Appellant v.* BAI RUKHMINI (*Original Plaintiff*), *Respondent.* * [20th April, 1898.]

Hindu law—Daughters—Maintenance—Widowed daughters—Their right of maintenance out of their father's estate.

According to Hindu law, it is only the unmarried daughters who have a legal claim for maintenance out of their father's estate. The married daughters must seek their maintenance from the husband's family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs.

[Diss., 16 Ind. Cas. 139=23 M.L.J. 233=12 M.L.T. 230=(1912) M.W.N. 861 ; R., 27 C. 555 (560); 28 C. 278 (288).]

SECOND appeal from the decision of Rao Bahadur V. V. Paranjpe, Additional First Class Subordinate Judge, A. P., at Broach.

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* Second Appeal No. 926 of 1897.

(1) P.J. (1898), p. 5.

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One Sanmukhram died, leaving a widow Bai Rukhmini, and a daughter Bai Mangal by another wife.

Bai Mangal was a widow in indigent circumstances, without any provision from her husband's family. She was, therefore, supported by her father during his life-time.

After Sanmukhram's death, Bai Rukhmini filed a suit to recover possession of the deceased's property from Bai Mangal.

[292] The Court of first instance held that though the plaintiff was her husband's heir, the defendant, as a widowed daughter in indigent circumstances, was entitled to receive maintenance out of her father's property. The Court, therefore, awarded to her for life a portion of her father's property in lieu of maintenance.

This decision was upheld, on appeal, by the First Class Subordinate Judge, A. P., at Broach.

Against this decision a second appeal was preferred to the High Court.

K. M. Javheri (with *M. K. Mehta*), for appellant.

G. K. Parekh, for respondent.

JUDGMENT.

RANADE, J.— In this case the dispute lies between the respondent-plaintiff Bai Rukhmini, who is the widow of the deceased Sanmukhram, and the appellant Bai Mangal, who is the daughter by another wife of the same Sanmukhram. Bai Rukhmini brought the original suit to recover possession of Sanmukhram's property as his sole heir, and this claim was resisted by Bai Mangal on various grounds. Among other defences she urged that, at the time of Rukhmini's marriage, there was an agreement that Rukhmini should claim no interest in the property in case she had no male issue. Bai Mangal also pleaded a caste custom excluding widows from succession, and she further claimed that Sanmukhram had made a will appointing her as his heir and successor.

All the three contentions were disallowed by both the lower Courts, but while recognizing Rukhmini's claim to succeed as heir, they held that Bai Mangal, as widowed daughter in indigent circumstances, who had no provision from her husband's family, had a right to be maintained, and they accordingly awarded to her for her life a part of her father's estate. The appellant Bai Mangal raised before us the same contentions which she had unsuccessfully urged in the Courts below, and these were disposed of by us in the course of the hearing of the appeal. Bai Rukhmini put in cross-objections, which made it necessary that the points of Bai Mangal's indigence, and the inability of her husband's relations to provide for her, should be expressly inquired into, and an issue was sent down to the lower Court, which has recorded a finding in favour of Bai Mangal.

[293] The decision of the respondent's main contention thus turns upon the question of law—whether, and how far, a widowed daughter, who has no provision to fall back upon made for her by her husband's family, can claim maintenance out of her father's estate to which his heir succeeds as owner?

In support of their view that the widowed daughter has such a right to claim maintenance, both the Courts below have chiefly relied upon Mayne's Hindu Law. Mayne (s. 408) lays down that a daughter "is entitled to maintenance until marriage, to and have her marriage expenses

defrayed. After marriage, the maintenance is a charge on the husband's family, but if they are unable to support her, she must be provided for by the family of the father." The only authorities cited by Mr. Mayne for this last proposition are Macnaghten, Vol. II, p. 118, and West and Bühler, pp. 245, 437. On p. 118 of his second volume, Mr. Macnaghten gives the details of a precedent in which the widow and daughters and nephew of a deceased person were allowed to share in certain proportions the estate of their deceased husband, father, and uncle respectively. It is clear that no such simultaneous rule of succession obtains in Hindu law, and at any rate the daughters in this case were not allowed maintenance. The facts of the case have obvious reference to a partition made by brothers after their father's death, when a share equal to a son's share is set apart for the mother, and a quarter share is set apart for the sister by way of provision for the latter's marriage and maintenance till then. This case, therefore, can hardly be relied upon as an authority in the present dispute. As regards the references to West and Bühler, there is a statement on p. 68 where it is mentioned that the widow and her daughters are entitled to maintenance from the united co-parceners or successors to the separate estate. This reference obviously applies to unmarried daughters, for whom provision has to be made till they are married. The authorities cited—*Mankoonwur* v. *Bhugoo* (1); *Ramajee* v. *Thukoo Baee* (2)—support this view. On p. 233, it is further observed that, next after the husband's family, the responsibility of supporting the daughters rests on their father's family. On p. 248, specific reference is **[294]** made to two cases reported in 2 Strange, pp. 83, 90, where the claim of a widowed sister, left destitute by her husband's relations, to be maintained by her brother's widows was allowed. There is a further reference on p. 437 which is obviously meant for unmarried daughters, who must be maintained by their father or brothers till they are disposed of by marriage. The decisions reported in 2 Strange, pp. 83, 90, are thus the only direct authorities which bear upon the present dispute.

The responsibility of the father's family, next after the husband's family, referred to on p. 233 is obviously a moral responsibility, for on failure of the father's family, the same responsibility is thrown on the caste, and, finally, on the king. Against Mr. Strange's two precedents, for which it may be noted no authorities are cited, may be set a later decision of the Madras High Court—*Ilata Shavatri* v. *Ilata Narayanan* (3). Sir Thomas Strange in his first volume, p. 172, no doubt mentions this charge of maintenance of unmarried damsels and indigent widowed daughters and sisters in the same category; but a careful consideration of the original texts leaves no room for doubt that, while the first charge is legally enforceable, the other one is more or less an imperfect obligation. This distinction was emphasized in the leading case on the law of maintenance on this side of India—*Lakshman* v. *Satyabhamabai* (4). Every father of a family has a sort of moral duty to support his dependent male and female relations; but there are certain persons so related in respect of whom the obligation is legal, and in regard to others the texts should be interpreted as being intended for exhortation and recommendation. The support of the widow and of unmarried daughters stands on a very different footing from the support of widowed daughters. The destitute and unprovided for married daughter is allowed preference over her better

(1) (1822) 2 Borr. 157.
(2) (1823) 2 Borr. 485 (497).
(3) 1 M.H.C.R. 372.
(4) 2 B. 494.

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provided sister. This is the only distinction the law recognizes in favour of the destitute widow.

The unmarried daughters are preferred to married, for the simple reason that they have no support to fall back upon till they are disposed of in marriage, either by their father, or by the brothers who succeed to his property by inheritance or partition. In [295] Vyavahar Mayukha (Stokes' Edition, p. 97), we have an express text, which directs that "the maintenance of the daughter of a widow excluded must be provided for by her brothers. If uninitiated, *i.e.*, unmarried, she will take a share. After that (marriage), her husband shall support her." In the case of the daughters of disqualified or excluded heirs, the same rule is laid down in Mitakshara. "Thus daughters must be maintained till they are provided with husbands" (Stokes' Mitakshara, p. 457; see also Vyavahar Mayukha, Stokes' Translation, p. 109; Dattaka Chandrika, p. 662, Stokes' Translation). In Dayabhaga, p. 233, it is expressly mentioned that daughters do not take along with the sons by right of inheritance. The part given to the daughters at partition is meant to be a provision for marriage, and may be less than a quarter—Stokes' Translation, p. 233. In fact, all the text-writers appear to be in agreement on this point—namely, that it is only the unmarried daughters who have a legal claim for maintenance. The married daughters must seek their maintenance from the husband's family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs.

This being the general bent of the law texts and the commentators, we must hold that the appellant has not established her title to receive maintenance from the property of her father. It may be noted that she herself did not seek maintenance, but claimed to be owner. It is also not clear that she is absolutely without any provision. The evidence goes to show that she owns a house and a *yajman vritti*; however on this point we have no finding recorded by the lower Court.

We vary the decree of the lower Court, and awarded the respondent-plaintiff's claim in full. The appellant should pay all the costs of the respondent, and bear her own. Court-fees throughout payable by plaintiff had she sued in the usual form to be calculated and paid by the plaintiff in the first instance.

Decree varied.

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[296] APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

RANGO BALAJI (*Original Plaintiff*), *Appellant v.* MUDIYEPPA AND OTHERS (*Original Defendants*), *Respondents.** [21st April, 1898.]

Evidence—Indian Evidence Act (I *of* 1872), *ss.* 107 *and* 108—*Person not heard of for seven years—Presumption of death—Adoption—Validity of adoption depending on whether natural son alive or dead—Onus of proof—Deed or will conferring estate on a person described as adopted son*—Res judicata—*Former decree in favour of plaintiff, but issue as to adoption found against him—No appeal open to plaintiff against that finding.*

Death is to be presumed after a certain interval (seven years); but there is no presumption as to the time of death. If, therefore, any one has to establish the precise period during these seven years at which a person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the continuance of life. There is no presumption of law that because a person was alive in 1877 therefore he was alive in 1878.

One Shankar died in September, 1878, leaving a widow Bhagubai. The year before his death his only son (Bala), a child of eight years old, had left his home and was never heard of again. A few days before his death, Shankar adopted the plaintiff (his nephew) and executed a deed of adoption, which stated that he had no hope that his son Bala was alive, and that he had, therefore, adopted the plaintiff. The deed further declared the plaintiff to be the owner of all Shankar's property with all the rights of a natural son, but provided that, in the event of the lost son returning, he should have half. In 1892 the plaintiff as Shankar's adopted son brought this suit to recover some of Shankar's property, which was in the hands of the defendants, who claimed it as Shankar's heirs. They (*inter alia*) impeached the plaintiff's adoption.

Held that, in order to recover the property as the adopted son of Shankar, it lay on the plaintiff to prove a valid adoption. It was a condition precedent to prove that, at the date of the adoption, Shankar was without a son. It was, therefore, for the plaintiff to prove that Bala was then dead. There was, at that time, no presumption that Bala was dead, and there being no evidence on the point it was impossible to say when he died, or consequently that the adoption was valid.

Held, however, that plaintiff was entitled to succeed as donee under the deed of adoption (Ex. A). It was clearly Shankar's intention to give the estate to the plaintiff as being his adopted son. But if the adoption was invalid, the gift had no effect. The *onus* here was on the defendants. It was for them to show that Bala was at that date alive and the adoption, therefore, invalid. That burden they had not discharged, and the plaintiff, therefore, was entitled to a decree.

[297] *Per* FARRAN, C.J.—Where a deed of gift or will confers an estate upon a named person, because he fills or by reason of his filling a certain character, he is entitled to recover the estate without affirmatively proving that he fills such character. The *onus* of proving that he does not fill the character, which is the reason of the gift, lies upon those who dispute his claim. The whole question is one of *onus* of proof.

The plaintiff had previously sued one Krishnaji, the father of the defendants, in another suit (No. 304 of 1885) to recover certain other lands. In that suit it had been held that the plaintiff was not the adopted son of Shankar, but that nevertheless he was entitled to recover the lands sued for, on the strength of the above stated deed (Ex. A), and a decree was passed for the plaintiff.

Held that the issue as to adoption in that suit was not *res judicata* in the present suit. In the former suit the plaintiff recovered upon the deed. He could not have appealed from the decree which was in his favour, nor could he under the Civil Procedure Code (Act XIV of 1882) appeal from the finding upon

* Second Appeal No. 1234 of 1897.

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the adoption issue which was against him. Upon that issue there had not been a final decision.

[Appl., 2 Ind. Cas. 977=19 M.L.J. 502=6 M.L.T. 153 (154); R., 32 B. 315=10 Bom. L.R. 380 (384); 33 C. 173 (P.C.)=2 A.L.J. 798=7 Bom. L.R. 892=2 C.L.J. 236=10 C.W.N. 33 =4 L.B.R. 77 (78) (P.C)=15 M.L.J. 317=32 I.A. 177; 11 C.L.J. 580 (585)=6 Ind. Cas. 244.]

SECOND appeal from the decision of R. A. Graham, Assistant Judge, F. P., at Bijapur, reversing the decree of the Subordinate Judge of Bagalkot.

Suit to recover certain land which had been formerly the property of one Shankar Subaji, the uncle of the plaintiff, and (as the plaintiff alleged) his adoptive father.

The defendants Nos. 2, 3 and 4 were in possession of the property. They denied the plaintiffs' adoption, and claimed to be the heirs of Shankar.

Prior to 1873, Shankar, who owned the lands in question, had mortgaged them to the grandfather of defendant No. 1 with possession, on the terms that they were to be restored free from the mortgage lien on the 31st March, 1888. In 1887 defendant No. 1 surrendered them to defendants Nos. 2, 3 and 4, who, as already stated, claimed to be the heirs of Shankar.

Shankar died on the 13th September, 1878. He had had a son Bala who was about eight years of age. This child had left his home about a year before Shankar's death, and was never heard of again. The plaintiff alleged that, in the belief that Bala was dead, Shankar had adopted him, and on the 1st September, 1878, executed an adoption deed (Ex. A), by which he gave plaintiff all his property. The following is the material portion of the deed (Ex. A):—

[293] "I had a natural son by name Bala aged eight years. It is now about a year since he has run away. He was much searched for, but no trace of him could be found. As I have no hope of his being alive, and in order that my obsequies should be performed and my generation should increase, I have adopted you with the consent of your mother Gangabai and according to caste custom and shastras. Therefore you are the owner of all my moveable and immoveable property. You have all the rights of a natural son. * * Should fortunately the natural son Bala return, you and he should divide equally my property—he as elder son and you as younger son."

Shankar left a widow Bhagubai. It was admitted, however, that she had been incontinent and had become a Mahomedan and had forfeited all rights of inheritance to Bala if he (Bala) had survived his father Shankar.

The plaintiff and the defendants were related in an equal degree to Bala.

The plaintiff had previously sued one Krishnaji, the father of the defendants Nos. 2, 3 and 4, in another suit (No. 804 of 1885) to recover certain other lands. In that suit it had been held that the plaintiff was not the adopted son of Shankar, but that, nevertheless, he was entitled to recover the lands sued for on the strength of the above stated deed (Ex. A), and a decree was passed for the plaintiff.

The plaintiff filed this suit in 1892. His claims to Shankar's estate rested either on the fact that he was Shankar's adopted son or upon the terms of the deed (Ex. A).

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The defendants (*inter alia*) denied the adoption and also contended that the question of adoption was *res judicata* by the decision in the former suit (No. 804 of 1885).

The Subordinate Judge held that upon the deed (Ex. A) the plaintiff was entitled to the lands sued for, and gave him a decree.

On appeal by the defendant the Judge held that the question of adoption was not *res judicata* by the decision of suit No. 804 of 1885, inasmuch as the decision in the plaintiff's favour in that suit was based upon the deed (Ex. A). The Judge said :—

"The question as to the plaintiff's adoption being illegal is not *res judicata*, for the decision on that issue was not material for the determination of the case in the view the Subordinate Judge took of the plaintiff's rights. Having **[299]** obtained a decree in his favour, plaintiff had no opportunity to question the correctness of that finding."

The Judge further considered the question as to Bhagubai's title to inherit the property as heir of her son Bala (assuming that he was dead), and sent back the following issue to the Subordinate Judge :—

"(*a*) Has Bala's mother Bhagubai lost her right of inheritance in this case by any and what lawful reason and on what date ?

"(*b*) If so, who would be the next heir to his property after Bala's death in 1889, in case Bhagubai is excluded from inheriting her son's estate, or has forfeited her rights subsequent to this inheritance ?"

On the said issues the Subordinate Judge found as follows :—

"Both sides admit that, as Bhagubai first became incontinent and then became a Mahomedan, she has forfeited her right of inheritance to the estate of her son.

"It appears that in 1889, when Bala was presumed to have died, his heirs (his mother having lost her rights) were plaintiff Rango Balaji, his brother Shriniwas Balaji, the two defendants, and Ramappa Rangappa. They are all equally related to deceased Bala, as will be seen from Ex. No. 71, and they were the only persons alive in 1889."

On receipt of these findings the Judge held that Bhagubai, notwithstanding her incontinence and subsequent conversion to Mahomedanism, was entitled to inherit the property as the mother of Bala, and that the suit was not maintainable in the present form, because there were other heirs of Bala who were equally entitled to the property along with the plaintiff. He, therefore, reversed the decree and dismissed the suit.

The plaintiff preferred a second appeal.

Branson (with *Ganpat V. Mulgaumkar*), appeared for the appellant (plaintiff).—We contend that the plaintiff's adoption was valid—Tagore's Law Lectures, 1888, p. 194. The defendants contend that it was invalid because Bala was then alive. They must prove that fact. There is no presumption, one way or the other, as to the actual date of Bala's death—Taylor on Evidence, p. 219; *Dharup Nath* v. *Gobind Saran* (1). Sections 107 and 108 of the Indian Evidence Act deal with the question whether a man is alive or dead, but they do not create any presumption as to the date of **[300]** death. There is doubt that Bala is now dead. The question is when did he die. Everything ought to be presumed in favour of our adoption. Under the deed (Ex. A) in case of Bala's return the plaintiff is to take half the property. Under any circumstances there is a gift to the plaintiff of one-half of the property. Bala has never come forward to dispute the deed. Shankar could dispose of his property as he chose.

(1) 8 A. 614.

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The plaintiff is legally entitled to the property of Shankar under the terms of the deed, which may be looked upon as either a deed of adoption or a will.

We also contend that the decision in suit No. 804 of 1885 brought by the plaintiff against the father of the defendants is *res judicata* as regards the effect of the deed. The Court held in that suit that the deed could be acted on as a deed of title or a deed of settlement.

Scott (with *Mahadeo V. Bhat*), appeared for the respondents (defendants Nos. 2 to 4).—The plaintiff's adoption could only be valid if it be proved that at the date of the adoption the missing son Bala was dead. The plaintiff must prove affirmatively this fact. The *onus* of proof lay on the plaintiff, and he having failed to discharge it, the suit must fail—*Dhondo* v. *Ganesh* (1). The plaintiff can only claim by virtue of his adoption, because adoption is the essence of the deed.

The finding in the former suit makes the question of the plaintiff's adoption *res judicata*. In that suit it was held that the adoption was invalid and that the plaintiff was entitled to recover the property only as trustee for Bala.

It was argued that the deed, if not a deed of adoption, was at any rate a deed of gift. Even if it be a deed of gift, Bala and his heirs would be entitled to contest it, the property mentioned therein being ancestral.

Branson, in reply.—There is no doubt about the fact of plaintiff's adoption. It is for those who impeach the adoption to prove that Bala was alive at its date. It is not necessary for the plaintiff to prove that Bala was dead.

JUDGMENT.

[301] FARRAN, C.J.—Shankar Subaji was the owner of the lands in suit. In 1873, he mortgaged them to Mudiappa, the grandfather of defendant No. 1, with possession upon the terms that they were to be restored freed from the mortgage lien on the 31st March, 1888. In 1887, defendant No. 1 surrendered the lands to the defendants Nos. 2—4, who claim to be the heirs of Shankar Subaji. The plaintiff alleging that he is the adopted son of Shankar Subaji brought the present suit for possession of the lands with mesne profits. The fact that Shankar Subaji went through the form of adopting the plaintiff is not disputed, nor that he executed the adoption deed (Ex. A) in the plaintiff's favour. The deed, which is registered, is dated the 1st September, 1878. Shankar died on the 13th of the same month. The material portion of the deed runs as follows (His Lordship read the above passage from the deed, and continued :—)

The circumstances were as recited in the deed. Bala never returned, nor was he ever heard of again.

The question to be determined is, whether the plaintiff acquired any right to the property of Shankar either as his adopted son or under the terms of the deed (Ex. A). The only further fact necessary to be stated is that Shankar left a widow Bhagubai. As to her, it was admitted, upon remand before the Subordinate Judge, that as Bhagubai first became incontinent, and then became a Mahomedan, she had forfeited her right of inheritance to the estate of her son Bala.

In 1889 the heirs of Bala, in the absence of Bhagubai, were the plaintiff Rango Balaji, his brother Shrinivas Balaji, the defendants Konher Krishna and Janardhan Krishna, and one Ramappa Rangappa.

(1) 11 B. 433.

These were all related in an equal degree to Bala. The Assistant Judge has found that Bhagubai had not in 1889 by reason of her apostacy and incontinence lost her right to inherit to her son Bala—*Akora Suth* v. *Boreani* (1); *Kojiyadu* v. *Lakshmi* (2); *Advyapa* v. *Rudrava* (3). No argument has been addressed to us upon this branch of the case. Upon the finding upon it the plaintiff cannot have any claim to the estate of [302] Shankar except as an adopted son or under the terms of the deed (Ex. A).

Before considering the plaintiff's claim based upon the above grounds it is necessary to refer to the question of *res judicata* which has been argued before us, but which by the Assistant Judge was decided against the defendants. In 1885, the plaintiff sued (in suit No. 804 of 1885) to recover two fields not now in suit from Krishnaji Chawdo, the father of the defendants Konher and Janardhan Krishnaji. In that suit it was held that though the plaintiff was not an adopted son of Shankar under the deed (Ex. A), effect could be given to that deed as a deed of title or a deed of settlement, and the possession of the lands was decreed to the plaintiff (Ex. 76). The reason for the finding was that as the deed passed in plaintiff's favour by Shankar could only be impeached by the natural son Bala, and as the deed provided that both Bala and the plaintiff should take Shankar's property equally, plaintiff became a trustee for Bala, and as trustee he could eject Krishnaji. I agree with the Assistant Judge that the issue as to adoption found against the plaintiff in that suit does not render the question of the adoption *res judicata* in this suit. The plaintiff succeeded in the former suit upon the deed and recovered possession of the two fields in suit. He could not have appealed from the decree which was in his favour, nor could he under the Code appeal from the finding upon the adoption issue which was against him. Upon that issue there cannot be said to have been a *final* decision. The decree in his favour was made in spite of the finding—see *Thakur Magundoo* v. *Thakur Mahadeo Singh* (4). Mr. Scott contends that the finding in the former suit, that the plaintiff recovered possession as trustee for Bala, makes that question at all events *res judicata*. I think that this is not so. Bala was not a party to that suit, nor was Krishnaji sued as his heir. The finding of the Court as to the capacity in which the plaintiff recovered possession would not have been *res judicata* either for or against Bala, nor can it be used either for or against the defendants claiming to be heirs of Bala.

[303] The main question is whether the plaintiff is the adopted son of Shankar. The answer to that question depends upon whether Bala was alive or dead at the date of the adoption. For the determination of it, in the absence of specific proof, recourse must, I think, be had to the Evidence Act—*Mazhar Ali* v. *Budh Singh* (5); *Dharup Nath* v. *Gobind Saran*(6); *Dhondo* v. *Ganesh* (7). Having regard to the provisions contained in ss. 107 and 108 of that Act the presumption is that Bala is now dead, but there is, I think, no presumption as to when he died. There is no presumption that he lived for seven years—*Dharup Nath* v. *Gobind Saran* (*supra*). The question is fully discussed in *In re Phene's Trusts* (8). See *Hiekman* v. *Upsall* (9). If it is necessary to establish the exact date of his death he, upon whom the *onus* of establishing that date is cast, must

(1) 2 B.L.R.A.C.J. 199. (2) 5 M. 149. (3) 4 B. 104.
(4) 18 C. 647. (5) 7 A. 297. (6) 8 A. 614.
(7) 11 B. 433. (8) L.R. 5 Ch. 139. (9) 20 Eq. 136.

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establish it or otherwise he must fail. Now here the plaintiff is seeking to recover the property in suit as against the natural heirs of Shankar. He must, therefore, I am inclined to think, prove affirmatively that Bala was dead at the date of his adoption. He must show that Shankar was then sonless. This, in the opinion of the Assistant Judge, he has not done. It follows, I think, that he fails affirmatively to prove the adoption. It is quite impossible for this Court to determine whether the adoption was valid or not. The plaintiff cannot prove that it was valid; the defendant cannot prove that it was invalid. Under the particular circumstances of this case, I do not think that there is any presumption to be raised for or against the adoption. It is a question of *onus* of proof.

The next question arises upon the terms of the deed, Ex. A. It is whether, in the events which have happened, the plaintiff takes the property of Shankar Subaji under the deed. This is a question of construction. The intention of Shankar must be gathered from the terms of the deed, and from the surrounding circumstances if there is room for doubt—*Fanindra Deb Raikat* v. *Rajeswar Dass* (1). Here, apart from the character in which the gift was made to the plaintiff, it appears clearly that it was the intention **[304]** of the testator (the deed is, I think, in effect a will) that the plaintiff should take the whole estate in the event of Bala not returning. That cannot, I think, be doubted. Bala never has returned. The circumstances under which the testator desired that the plaintiff should become the owner of all his moveable and immoveable property have continued unaltered. It appears to me, therefore, that it lies upon the defendants to show that the testator was mistaken in his belief that his son Bala was dead and that he had adopted the plaintiff when he executed Ex. A. The defendants say that the words of gift contained in the document—for they are, I think, words of gift—are inoperative because the testator had not validly adopted the plaintiff and only supposed that he had done so, but admittedly they cannot prove anything of the sort. In all probability the child Bala was dead when the document was executed. In the Privy Council case above referred to, it was established that the adoption was invalid, but here nothing is established. So far as we know, the circumstances under which the old man executed the deed were exactly as he supposed them to be. I think that the plaintiff can claim the property under the terms of the deed executed in his favour.

To prevent misapprehension I should add that my judgment on this point is based upon the proposition that where a deed of gift or will confers an estate upon a named person because he fills, or by reason of his filling, a certain character, he is entitled to recover the estate without affirmatively proving that he fills such character. The *onus* of proving that he does not fill the character which is the reason of the gift, lies, in my opinion, upon those who dispute his claim. The whole question is, in my opinion one of *onus* of proof. I have not found any direct authority sanctioning the above view. It is, I think, supported by the judgments in *In re Corbishley's Trusts* (2). It may be that, if the defendants could show that the plaintiff was not the adopted son of Shankar, they ought to succeed.

The defendants, however, contend that as the property was ancestral, Shankar had no power to deal with it to the detriment of his son Bala. It is somewhat difficult to see how this objection **[305]** is open to them.

(1) 12 I.A. 72 (89).

(2) (1880) 14 Ch. D. 846.

They profess to make it as the heirs or some of the heirs of Bala, but they are, for the reasons already assigned, unable to prove that they are the heirs of Bala or that Shankar was not his heir. In this respect the case somewhat closely resembles that of *In re Green's Settlement* (1). If they cannot prove that they are the heirs of Bala, the objection can only be made by them as reversioners after the death of Bhagubai entitled to the estate of Shankar or as persons in possession without title. In the former capacity they clearly cannot take the exception. In so far as they are concerned, Shankar could dispose of his property as he chose. I also think that as trespassers it is not competent for them to say that Shankar's conveyance is invalid. If Bala had survived and objected to it, doubtless he could have avoided it, but until avoided the settlement of the property by Shankar upon the plaintiff appears to me to confer title upon the latter.

I have, it will be observed, rested my decision to some extent upon English precedents. I have done so, not because they are binding as authorities, but because they appear to me to be founded on reason.

The plaintiff appears to me in all human probability to be the person legally entitled to the property of Shankar under what may be fairly termed his will. There is no rule of law, that I am aware of, which compels me to decide this appeal contrary to the probabilities of the case, or to defeat the clearly expressed wishes of Shankar Subaji. I would, therefore, reverse the decree of the Assistant Judge and restore that of the Subordinate Judge with costs throughout on the respondents.

CANDY, J.—It is clear that plaintiff can only recover as the validly adopted son of Shankar, or as donee from Shankar by the deed A. With regard to the adoption it is a condition precedent that Shankar should have been without issue at the time of the adoption—Mayne, s. 97. The *onus* is on plaintiff, who before he can succeed must establish his title. It is for him to show when Bala died. It may be presumed that Bala is dead. But there is no presumption that Bala was dead in 1878. **[306]** Therefore, in the absence of any evidence on the point, it is impossible to say when Bala died, and so it is impossible for plaintiff to prove that his adoption was valid.

Next, as to plaintiff's title as donee. The Assistant Judge, F. P., found as a fact that Shankar intended to give the estate to plaintiff as his adopted son capable of inheriting by virtue of his adoption. This is a finding of fact and binding on us—*Dyami Naik* v. *Lingappa* (2). The question then arises whether the adoption was invalid. If it was, then the deed of gift had no effect on the property—*Fanindra Deb Raikat* v. *Rajeswar Das* (3). Here the *onus* is on defendants. They must show that Bala was alive at the time of the adoption. Sections 107, 108 of the Evidence Act relate to the question whether a man *is* alive or dead. On this point there is in the present case no doubt. Bala has never been heard of since his disappearance in 1877 : therefore the burden of proving that he is alive is shifted to the person who affirms it. That burden admittedly is not discharged. But the question here is whether Bala is proved to have been alive in 1878. Mr. Field in his notes to ss. 107, 108 of the Evidence Act quotes Taylor, s. 157, showing that though death is to be presumed after a certain interval, there is no presumption as to the time of death, and, therefore, if any one has to establish the precise period during these seven years at which the person died, he must do so by

(1) (1865) 1 Eq. 288. (2) P. J. (1889), p. 37. (3) 11 C. 463.

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evidence, and can neither rely on the one hand upon the presumption of death, nor on the other upon the presumption of the continuance of life.

This is really what was ruled in *In re Phene's Trusts* (1), which laid down that, if a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption, but of evidence, and the *onus* of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that [307] a person alive and in health on a certain day was alive a short time afterwards.

In my opinion, ss. 107, 108 of the Evidence Act have made no difference in this statement of the law. In the present case if it were possible to draw an inference of fact, I should say that the little boy Bala, aged eight years, who ran away from home in 1877 must in all probability have died before September, 1878. There is no presumption in law that because he was alive in 1877, therefore he was alive in 1878. In this view of the case, defendants cannot, in my opinion, successfully contest plaintiff's claim under the document A; and plaintiff, therefore, is entitled to have the decree of the Assistant Judge reversed and that of the Subordinate Judge restored.

Decree reversed.

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23 B. 307.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

FAKIRGAUDA (*Original Plaintiff*), *Appellant v.* GANGI (*Original Defendant*), *Respondent.** [22nd April, 1898.]

Husband and wife—Suit for possession of wife—Wife herself defendant—Limitation—Limitation Act (XV of 1877), sch. II, art. 35—Restitution of conjugal rights—Demand and refusal—Continuing cause of action—Limitation Act (XV of 1877), s. 23.

Where a husband sued to recover possession of his wife, making the wife herself the defendant to the suit.

Held, it was in substance a suit for the restitution of conjugal rights, and art. 35 of the Limitation Act (XV of 1877) applied.

The demand and refusal, which form the starting point for limitation under art. 35, are a demand by the husband and refusal by the wife (or *vice versa*) being of full age.

A positive refusal on the part of the wife to return to her husband is not essential to the husband's cause of action.

Quære—Whether in case of a refusal by a wife of full age to a demand made by her husband, that she should return to him, a suit by him for her recovery is barred under art. 35 of sch. II of the Limitation Act (XV of 1877), or falls within the purview of s. 23 as based on a continuing cause of action?

[Appl., 25 B. 644 (653)=3 Bom. L.R. 371; R., 28 C. 37 (45).]

[308] SECOND appeal from the decision of L. Crump, District Judge of Dharwar (confirming the decree of Rao Bahadur Gangadhar V. Limaye, First Class Subordinate Judge).

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* Second Appeal No. 950 of 1897.

(1) (1869) L.R. 5 Ch. 139.

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Suit by a husband to recover possession of his wife. The defendant was the wife herself. The parties were Lingayats and resided in Dharwar.

The defendant contended that she and the plaintiff belonged to different sects of the Lingayat caste, and that there could be no lawful marriage between them.

The Subordinate Judge found that the defendant was not the lawfully married wife of the plaintiff, the parties belonging to the different sects of the Lingayat caste, and there being no evidence of any custom sanctioning such marriages. He also held that the claim was time-barred under arts. 34 and 35, sch. II of the Limitation Act (XV of 1877).

The plaintiff appealed, but the Judge (T. Hamilton) summarily dismissed the appeal under s. 551 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff preferred a second appeal, and the High Court reversed the decree and remanded the case. See I. L. R., 22 Bom., 277.

On the remand the Judge found that the suit was barred by limitation, and he confirmed the decree of the Subordinate Judge.

The plaintiff preferred a second appeal.

Dhondu P. Kirloskar appeared for the appellant (plaintiff).—The suit is not barred. The Judge applied art. 34, sch. II of the Limitation Act. We submit that neither art. 34 nor art. 35 are applicable. This is not a suit for the restitution of conjugal rights; it is a suit for the institution of such rights. Article 34 applies to a suit for the recovery of a wife who is in the possession of a third person.

If the Limitation Act applies to such a case as this, s. 23 of the Act applies, the case being one of continuing wrong—*Hemchand* v. *Shiv* (1); *Bai Sari* v. *Sankla Hirachand* (2); *Binda* v. *Kaunsilia* (3).

[309] The defendant relied on the defence of limitation. The burden, therefore, lay on her to prove that there was no demand and refusal within two years of the institution of the suit.

Sadashiv R. Bakhle appeared for the respondent (defendant).—Both the lower Courts have held that there was no demand and refusal. Therefore, the suit was rather premature than time-barred. In our written statement there is an allegation that there was repudiation on our part immediately after the marriage.

Next we contend that the suit is governed either by art. 34 or art. 35 of the Limitation Act, and it was incumbent upon the plaintiff to prove demand and refusal within two years of the suit. For the purpose of the Limitation Act no distinction can be drawn between a suit for restitution of conjugal rights and one for institution of such rights. As to the general right of a Hindu to claim back his wife, we submit that the right can only be exercised after demand and refusal. Having regard to art. 35 we contend that the suit is premature, there having been no demand and refusal and consequently there was no cause of action. The plaintiff may make a fresh demand and institute a fresh suit.

JUDGMENT.

PER CURIAM.—We are unable to agree with the District Judge in this case that the suit is barred by limitation. It is a suit by the plaintiff, who alleges that he is the husband of the defendant, in which he seeks to recover possession of his wife, the defendant herself. It is a peculiar mode of stating the relief to which, if his allegations are true, the plaintiff

(1) P. J. (1883), p. 124. (2) 16 B. 714. (3) 13 A. 126.

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would be entitled. The woman could not well be ordered to give possession of herself to the plaintiff. That is the appropriate remedy when the defendant is a third party who has the wife under his control. The appropriate form of decree in this case would be one which after making a proper declaration directs the defendant to go to the plaintiff's house—*Furzund Hossein* v. *Jaun Bibee*(1).

The suit is, however, we think, in substance a suit for the restitution of conjugal rights, and art. 35 of the schedule to **[310]** the Limitation Act is the article which is appropriate to it. The District Judge has held that the suit is barred, because the defendant and some of her witnesses have deposed to a demand and refusal six or seven years ago, but the demand and refusal to which they refer took place when the defendant was a minor of the age of fifteen or sixteen years. The demand and refusal, which form the starting point for limitation under art. 35, are a demand by the husband and refusal by the wife (or *vice versa*) being of full age. A refusal by the wife when a minor does not cause the statute to commence to run. That being so, the demand and refusal deposed to on behalf of the defendant must be eliminated from consideration for the purposes of limitation. The defendant appears to have attained majority about two years before the suit. She was about 21 when she gave her evidence in November, 1894. The suit was first filed on the 9th August, 1893. It is, therefore, clearly not time-barred.

Before us it is contended that the suit is premature, as no demand and refusal have been proved. No cause of action, therefore, it is said, has accrued to the plaintiff. The English Courts in suits of this kind require that there shall be a demand by the husband upon the wife to return to cohabitation before a petition is presented for restitution of conjugal rights. That is under a rule of Court (Rule 175) : see Browne and Powles on Divorce, p. 135. There is no such rule of Court here, but the Limitation Act appears to recognize the necessity of a husband asking his wife to join him, or to return to his house before he can file a suit to compel her to do so. Assuming that to be the law, there is evidence here, which apparently the District Judge does not disbelieve, that the plaintiff called on the defendant to return to him two years before the witness, (Ex. 31), gave his evidence, which would be about a year before suit. A positive refusal on the part of the wife cannot be essential to the husband's cause of action. She might always return evasive answers to his demands or silently ignore them. Here there is no doubt as to the position taken up by the defendant. She has always alleged, and still alleges, that the plaintiff's marriage with her is invalid and that she is not his wife, and she refuses, therefore, to live with him. We cannot doubt that this state of **[311]** affairs discloses a cause of action—*Dadaji* v. *Rukmabai* (2); *Binda* v. *Kaunsilia* (3); *Bai Sari* v. *Sankla Hirachand* (4).

We do not wish to express an opinion as to whether, if the defendant had been of full age when the demand and refusal deposed to by the defendant's witnesses took place, a suit by the plaintiff would have been absolutely barred, nor as to whether s. 23 of the Limitation Act applies to such a case as this. The question apart from the authorities, appears to us to be one of doubt and difficulty.

Decree reversed and appeal remanded for re-trial. Costs, costs in the cause.

Decree reversed and case remanded.

(1) 4 C. 588. (2) 10 B. 301. (3) 13 A. 126. (4) 16 B. 714.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

RAJARAM (*Original Plaintiff*), *Appellant v.* BANAJI MAIRAL (*Original Defendant*), *Respondent.** [20th June, 1898.]

Limitation Act (XV of 1877), art. 179, cl. 4—Step-in-aid of execution—Application for return of a copy of a decree.

An application to the Court by a decree-holder asking for the return of the copy of a decree filed with a former darkhast is not a step-in-aid of execution within the meaning of art. 179 (4) of the Limitation Act (XV of 1877).

[Expl., 11 C.L.J. 243 (249) = 5 Ind. Cas. 660.]

SECOND appeal from the decision of C. H. Jopp, District Judge of Poona.

Plaintiff and defendant were owners of two adjoining houses. On the 20th June, 1892, the plaintiff obtained a decree directing the defendant to remove certain work which he had done upon the plaintiff's wall, and restraining him from doing any new work thereon, or causing any obstruction to the plaintiff in repairing the wall.

On the 20th January, 1894, the plaintiff presented his first darkhast for execution of the decree. Notice under s. 248 **[312]** of the Civil Procedure Code was issued and made returnable on the 8th March, 1894. The plaintiff, however, failed to attend, and his darkhast was dismissed on the 3rd April, 1894.

On the 10th April, 1894, plaintiff applied to the Court for a return of the copy of the decree which had been filed with his darkhast.

On the 23rd February, 1897, plaintiff filed a second darkhast for execution. He contended that his application of the 10th April, 1894, for a return of the copy of the decree was a step-in-aid of execution and prevented the bar of limitation.

This contention was overruled by the Court of first instance, and the darkhast was rejected as barred by limitation.

This order was upheld, on appeal, by the District Judge.

Plaintiff thereupon preferred a second appeal to the High Court.

M. V. Bhat, for appellant.

N. G. Chandavarkar, for respondent.

The following authorities were cited in argument:—*Kunhi Mannan* v. *Seshagiri Bhakthan* (1); *Chowdhry Paroosh Ram* v. *Kali Puddo* (2); *Rajkumar Banerji* v. *Rajlakhi Dabi* (3); *Gopilandhu* v. *Domburu* (4); *Aghore Kali Debi* v. *Prosunno Coomar* (5); *Chundra Nath* v. *Gurroo Prosunno* (6); *Krishnayyar* v. *Venkayyar* (7).

JUDGMENT.

PARSONS, J.—The point is whether the action of the decree-holder asking the Court for the return of the copy of the decree filed with a former darkhast is applying to the Court to take some step-in-aid of execution of decree within the terms of art. 179 (4) of the Limitation Act. In my opinion it is not. The words of the enactment seem clear. They

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* Second Appeal No. 72 of 1898.

(1) 5 M. 141. (2) 17 C. 53. (3) 12 C. 441. (4) 11 M. 336.
(5) 22 C. 827. (6) 22 C. 375. (7) 6 M. 81.

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require an application to be made to the Court for it to take some step-in-aid of execution of the decree. The return by it of a copy of a document cannot, in my opinion, be held to be a step in execution taken by the Court. If the copy were a necessary adjunct to an application for the execution of his decree, it would be, at the [313] most, an act which would enable the applicant to make that application in the future. He is not, however, required by law, when he presents his application to execute the decree, to file along with it a copy of the decree. This is provided by rule only. No doubt when he presents his application he is bound to present it in the manner required by the rules of the Court, but it seems to me that he would not be entitled to treat an application to the Court to obtain something which would enable him merely to comply with the rules as an application to the Court itself to take a step-in-aid of execution. For instance, to take a somewhat analogous case, assuming that the Court supplied the paper on which, under the rules, applications were to be made, I do not think that an application for the paper on which the application for execution was to be written would be entitled to be called an application to the Court to take a step-in-aid of execution. This is the principle of of the decision in *Gopilandhu* v. *Domburu* (1) and in *Aghore Kali Debi* v. *Prosunno Coomar* (2) and is, in my opinion, a perfectly correct one. The decree is confirmed with costs.

RANADE, J.—The appellant in this case obtained a decree on 21st June, 1889, in the First Class Subordinate Judge's Court, Poona, which was finally confirmed in second appeal on 20th June, 1892. The decree directed certain works to be removed, and the respondent was restrained from doing any new work in the wall or obstruct appellant in repairing his wall on respondent's side. The first darkhast for the execution of this decree was given on 20th January, 1894. Notice under s. 248 was issued and made returnable on 8th March, 1894, when respondent obtained a postponement till 3rd April, 1894. On that day, appellant failed to attend, and the darkhast was dismissed for his default. On the 10th April, 1894, appellant applied for a return of the copies of the decrees filed with his first darkhast, and he gave his present darkhast on 23rd February, 1897, filing the copies of the decrees returned to him. In this darkhast the appellant stated, that though more than three years had elapsed since the presentation of the first darkhast, yet the second darkhast was within time by reason of the notice under [314] s. 248, and the application made by respondent on the 8th March, 1894, as also by the order of 3rd April, 1894. In both the lower Courts, as also before us, the appellant did not rest his case on either the proceedings of the 8th March or 3rd April, 1894, but it was contended that the application of 10th April, 1894, for a return of the copies of the decrees prevented the bar of limitation. Both the Courts below overruled this contention, and held that the darkhast was time-barred. We have how to consider how far the application of 10th April, 1894, can be considered as a step-in-aid of execution within the meaning of cl. 4 of art. 179 of the Limitation Act.

The point has never been formally raised and decided in this Court. The Madras High Court has, however, ruled in *Gopilandhu* v. *Domburu* (1) that an application by a decree-holder for a copy of the decree with intent to apply for execution is not a step-in-aid of execution within the meaning of art. 179, cl. 4. Two decisions of the Calcutta High Court to the same effect are reported in *Gunga Pershad* v. *Debi Sundari* (3), as also in

(1) 11 M. 336. (2) 22 C. 827. (3) 11 C. 227.

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Rajkumar Banerji v. *Rajlakhi Dabi* (1). The appellant's pleader, however, urged that the Madras ruling did not apply because the ground on which it was based was that, under the provisions of the Code, it is not absolutely necessary to file copies of the decrees with a darkhast. He contended that the rules framed by this Court required the production of such copies, and that, therefore, the ruling is inoperative here. We do not think that there is any difference in the rules framed by this Court and those to which the Madras High Court refers in its judgment, and the ruling, therefore, is one which applies to the present case. If applications for copies of decrees were held to be steps in aid of execution, the starting points laid down in the first three clauses of art. 179 would be enlarged, and an element of uncertainty introduced which would defeat the purpose of the law. As regards the Calcutta decision in *Gunga Pershad* v. *Debi Sundari* (2) it was argued that the decision would have been otherwise if the lady who applied for the copy had got her name entered as heir in the record in the place of the deceased judgment-creditor. This circumstance, [315] though it is referred to in the judgment of the Court, does not appear to us to be the sole or even the chief ground for the conclusion arrived at. Those reasons are more fully set out in the judgment in *Rajkumar Banerji* v. *Rajlakhi Dabi* (1). "An application for the return of a document in the record room is by itself an indifferent act," and "no copy of the decree is required by law to be filed in execution." These reasons appear to us to be good and sufficient reasons for holding that the lower Courts were right in rejecting the darkhast in the present case.

The other cases cited by the appellant's pleader have no bearing on the merits of his present contention. The ruling in *Chundra Nath* v. *Gurroo Prosunno* (3) that an application for a transfer of decree to another Court is a step in aid of execution, as also the ruling in *Krishnayyar* v. *Venkayyar* (4) which held that an application to the second Court to return the decree back to the first Court when complete execution has not been obtained, was a step in aid of execution, have obviously no bearing in the present case. So also the decision in *Kunhi Mannan* v. *Seshagiri Bhakthan* (5) which held that an application for a certificate that a certain copy of a revenue register is necessary, stands on the same footing. The applications in all these cases had one common feature. They were applications made in furtherance of an application to put a decree in execution. In the present case the first darkhast had been dismissed on 3rd April, 1894. The application on 10th April was not an application in aid of any darkhast then pending, nor was it an application which was required by law as a necessary preliminary step. It was mainly on this account that the appellant in his present darkhast laid no stress on this application of 10th April, but chiefly relied on the proceedings of 8th March and 3rd April, 1894. The Courts below have very properly disallowed his contention based on the application for a return of the copies made after the darkhast was disposed of, and we accordingly confirm the order of the lower Court and reject the appeal.

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(1) 12 C. 441. (2) 11 C. 227. (3) 22 C. 375.
(4) 6 M. 81. (5) 5 M. 141.

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JUNE 28.

APPEL-
LATE
CRIMINAL.

23 B. 316.

23 B. 316.

[316] APPELLATE CRIMINAL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* GANGIA AND OTHERS.* [28th June, 1898.]

Criminal procedure—Judge's charge—Misdirection—Confessions—Retracted confessions—Admissibility of such confessions without corroborative evidence—Evidence.

The accused were tried for murder. The Sessions Judge in his charge to the jury discussed the evidence generally, describing it as very poor evidence which, standing alone, amounted to nothing. He also told the jury that, as regards retracted confessions, "the law is that you are to look for corroboration in independent evidence. If that supplies such corroboration that you can confidently say, 'the confessions must be absolutely true,' you can act upon them, otherwise not."

Held, that the charge was defective. The Sessions Judge ought to have summed up the evidence to the jury, calling their attention to the material parts of it, and leaving them to form their own opinion on it, instead of treating it generally.

Held, also, that the Judge had misdirected the jury, as there is no rule of law that a retracted confession cannot be treated as evidence unless it is corroborated in material particulars by independent reliable evidence.

APPEAL by the Local Government from an order of acquittal passed by F. C. O. Beaman, Sessions Judge of Belgaum.

The accused, who were eight in number, were tried on a charge of murder under s. 302 of the Indian Penal Code (Act XLV of 1860).

In his charge to the jury the Sessions Judge said as follows :—

"The whole case turns on the confessions which have all been retracted. For if you eliminate the confessions, what remains? This much only.

"*A*. General evidence of ill-will against the complainant. But this is common to the whole country side and in no sense particular to the accused or any of them.

"*B*. Very poor evidence of witness to conspiracy.

"*C*. Very poor evidence of one witness as to seeing some of the accused going together on the night of the murder.

"*D*. Production of a gun in presence of the panch by one of the accused.

"That evidence standing alone amounts practically to nothing.

[317] Thus it turns out that the case rests solely on retracted confessions. I cannot even direct you to independent corroboration of the kind there ought to be before you found a verdict on a retracted confession. The law is that you are to look for corroboration in the independent evidence. If that supplies such corroboration that you can confidently say, 'the confessions must be substantially true,' you can act upon them, otherwise not . . . . It is very unsafe to act upon an uncorroborated retracted confession."

The jury by a unanimous verdict acquitted all the accused.

The Sessions Judge accepted this verdict and directed the accused to be acquitted and discharged.

Against this order of acquittal, the Local Government appealed to the High Court.

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* Criminal Appeal No. 122 of 1898.

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Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

Dattatrya K. Idgungi, for the accused.

JUDGMENT.

PARSONS, J.— The charge of the Sessions Judge to the jury in this case has been attacked on many grounds, but it is sufficient for us to notice two of them only. First, that the Sessions Judge did not sum up the evidence to the jury calling their attention to the material facts of it and leaving them to form their own opinion upon it, but treated it generally and called it "very poor evidence," which, "standing alone, amounted to nothing." With reference to this, we would draw the attention of the Sessions Judge to the judgment of Sargent, J., in *Reg* v. *Fattechand* (1). Secondly, that he misdirected the jury by telling them that in the case of retracted confessions "the law is that you are to took for corroboration in the independent evidence. If that supplies such corroboration that you can confidently say 'the confessions must be absolutely true,' you can act upon them, otherwise not." We think this is a clear misdirection. This Court has always consistently held that there is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars—*Queen-Empress* v. *Gharya* (2). The Madras High Court in a recent case, *Queen-Empress* v. *Raman* (3), has arrived at the same conclusion. In [318] that case the Chief Justice and Shepherd, J., say: "We are of opinion that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence." We would also refer the Sessions Judge to the Criminal Rulings of this Court, 12 of 1896 (*Imp.* v. *Genu*) and 3 of 1898 (*Imp.* v. *Balaya*), especially the latter one, where the subject of confessions is dealt with, and the case of *Queen-Empress* v. *Maiku Lal* (4).

We reverse the acquittals of the accused and direct them to be retried.

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23 B. 318.

APPELLATE CIVIL.

Before the Honourable Mr. Parsons, (Acting) Chief Justice, and Mr. Justice Ranade.

SATU AND ANOTHER (*Original Defendants*), *Appellants v.* HANMANTRAO GOPALRAV NIMBALKAR (*Original Plaintiff*), *Respondents.** [6th July, 1898.]

Civil Procedure Code (Act XIV of 1882), *s.* 120—*Refusal of a plaintiff to attend as a witness.*

A plaintiff who was represented by a pleader was summoned at the instance of a defendant to attend the Court and to give evidence on his behalf on the day fixed for final hearing. The plaintiff refused to attend, on the ground that he was a person of rank and was exempted from personal appearance in the Courts of a Native State. The first Court, considering the personal appearance of the

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* Appeals Nos. 37 and 39 of 1897 from order.

(1) 5 B.H.C.R. Cr.C. 85.
(2) 19 B. 728.
(3) 21 M. 83.
(4) 20 A. 133.

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plaintiff necessary, issued an order under s. 120 (1) of the Civil Procedure Code (Act XIV of 1882) that he should attend, and, on his failure to do so, passed [319] a decree against him. On appeal, the Judge reversed the decree and remanded the case for trial.

Held, confirming the order of remand, that the order and decree of the first Court were alike illegal, as the plaintiff having appeared by a pleader, the Court had no power to issue an order under s. 120, unless the pleader had refused or was unable to answer a material question.

APPEAL against an order passed by F. C. O. Beaman, District Judge of Belgaum.

One Hanmantrao Gopalrav Nimbalkar, a resident of Kolhapur, brought a suit in the Court of the Subordinate Judge of Chikodi to recover rent due under a kabulayat. The defendants denied their liability.

After the issues had been framed, the plaintiff was served with a summons as witness for the defence to appear and give evidence, but he refused to comply with it, on the ground that he was a person of rank and exempt from personal appearance in the Courts of the Maharaja of Kolhapur. The Subordinate Judge being of opinion that the questions which the defendants proposed to ask the plaintiff were of such a nature that the latter should appear before him to answer them in person, issued a notice under s. 120 of the Civil Procedure Code (Act XIV of 1882) requiring the plaintiff to appear in person on a certain day and informing him that the suit would be dismissed if he failed to appear. The notice was duly served, but the plaintiff did not attend, the reason assigned being that he was a person of rank who enjoyed the privilege of exemption from personal attendance in the Kolhapur Courts. Upon this, the Subordinate Judge dismissed the suit, observing that though the plaintiff was exempted from appearance from the Kolhapur Courts, he did not enjoy the same privilege with respect to the British Courts.

The plaintiff appealed and contended that s. 120 did not apply, inasmuch as his pleader did not refuse, nor was he unable to answer any material questions relating to the suit. The Judge reversed the decree and remanded the case for re-trial. The following is an extract from his judgment :—

"The learned Judge below was in error in dismissing the suit under s. 120, Civil Procedure Code. Neither does s. 157 apply. The first of those sections [320] provides for the appearance of a party not to give evidence, but to put the Court in possession of information necessary to the framing of issues or other points in the conduct of the suit. The second of those sections provides for the case of a party who is in the eye of the law altogether absent. Here the plaintiff was represented by a pleader. The plaintiff was summoned, like any other witness, to give evidence."

The defendants appealed against the order of remand.

Balaji A. Bhagavat and *Mahadeo V. Bhat*, for the appellants (defendants).

Vasudev G. Bhandarkar, for the respondent (plaintiff).

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(1) Section 120, Civil Procedure Code (Act XIV of 1882) :—

"If the pleader of any party who appears by a pleader refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

"If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pass a decree against him, or make such order in relation to the suit as it thinks fit."

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JUDGMENT.

PARSONS, C.J. (Acting).—As the plaintiff appeared by a pleader, the Court had no power to issue an order under s. 120 of the Civil Procedure Code, unless his pleader refused or was unable to answer a material question. No such refusal or inability is noted on the record. What appears therefrom is that issues were settled on the 5th March and that the plaintiff was summoned at the instance of the defendant to attend the Court and give evidence on his behalf on the 23rd September, the day fixed for final hearing, and that he failed to attend, and that the Court thereupon issued an order under s. 120 that he should attend, and on his failure to attend passed a decree against him. We think that the District Judge was right in holding that under these circumstances the order and the decree were alike illegal, and we dismiss these appeals with costs in each on the appellant.

Appeal dismissed.

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23 B. 321.

[321] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

LAKHMAN BALAJI (*Original Defendant*), *Applicant v.* RAMCHANDRA PARASHRAM (*Original Palintiff*), *Opponent.** [11th July, 1898.]

Dekkhan Agriculturists' Relief Act (XVII of 1879), *ss.* 3 (*z*), 53 *and* 73(1)—*Agriculturist —Plaintiff proved or admitted to be an agriculturist—Appeal—Special Judge—Jurisdiction.*

The plaintiff alleging that she was an agriculturist sued for redemption under Chap. II of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Subordinate Judge raised an issue as to her status, and on that issue found that she was not an agriculturist. He, however, proceeded with the trial of the case and on the merits dismissed her claim. She thereupon applied to the Special Judge, who took up the case in revision, reversed the decree of the lower Court, and passed a decree in the plaintiff's favour, holding that she was an agriculturist.

Held, that the Special Judge had no jurisdiction. The Subordinate Judge had found that the plaintiff was not an agriculturist. Having done so it must be deemed that he went on with the trial only in his ordinary jurisdiction, and

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* Application No. 48 of 1898 under extraordinary jurisdiction.

(1) Sections 3 (*z*), 53 and 73 of the Dekkhan Agriculturists' Relief Act:—

3. The provisions of this chapter (II) shall apply to—

(*z*) Suits for the redemption of mortgaged property when the plaintiff, or, where there are several plaintiffs, any one of the plaintiffs, is an agriculturist.

53. The District Judge may for the purpose of satisfying himself of the legality or propriety of any decree or order passed by a Subordinate Judge in any suit or other matter under Chap. II, Chap. IV or Chap. VI of this Act, and as to the regularity of proceedings therein, call for and examine the record of such suit or matter, and pass such decree or order thereon as he thinks fit;

and any assistant Judge or Subordinate Judge appointed by the Local Government under s. 52 may similarly, in any district for which he is appointed, call for and examine the record of any such suit or matter, and, if he see cause therefor, may refer the same, with his remarks thereon, to the District Judge, and the District Judge may pass such decree or order on the case as he thinks fit:

Provided that no decree or order shall be reversed or altered for any error or defect or otherwise, unless a failure of justice appears to have taken place.

73. The decision of any Court of first instance that any person is or is not an agriculturist, shall for the purposes of this Act, be final.

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the decree passed was one not under Chap. II of the Dekkhan Agriculturists' Relief Act, but under the general provisions of the Civil Procedure Code (Act XIV of 1882). By s. 53 the Special Judge has jurisdiction only over decisions and orders passed by a Subordinate Judge under Chap. II.

[322] *Per* PARSONS, J.—It is only when the plaintiff is admitted and proved (not merely when he claims) to be an agriculturist that the Court has jurisdiction to try a suit under Chap. II of the Act. The question of status ought to be raised and decided as a preliminary issue.

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Khan Bahadur Navroji Dorabji, Special Judge, under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The plaintiff sued to redeem and recover possession of certain land, alleging that she was an agriculturist, and thus entitled to the benefit of Chap. II of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The defendants denied the mortgage and contended (*inter alia*) that the plaintiff was not an agriculturist, and that the suit was barred by limitation.

The Subordinate Judge found that the plaintiff was not an agriculturist, and having done so he held, on the merits, that the plaintiff was not the owner of the equity of redemption and that the suit was barred. He, therefore, dismissed the suit.

The plaintiff applied for revision to the Special Judge, who reversed the decree and ordered that plaintiff should redeem and recover possession of the property on payment of ninety-nine rupees to the defendants within six months. In his judgment he stated that the plaintiff "must certainly be taken to be an agriculturist."

Against this order defendant No. 3 applied to the High Court in its extraordinary jurisdiction to set aside the decree of the Special Judge, contending that he had no jurisdiction in the case and that the plaintiff having been held by the first Court not to be an agriculturist, the provisions of Chap. II of the Dekkhan Agriculturists' Relief Act were not applicable. A rule *nisi* was granted and now came on for hearing.

Mahadeo B. Chaubal, appeared for the applicant (defendant No. 3) in support of the rule:—The question is whether the Special Judge had jurisdiction in the matter. We contend that he had not. For the Subordinate Judge had found that the [323] plaintiff was not an agriculturist. Having done so, it must be taken that he decided the suit in his ordinary jurisdiction and not in the special jurisdiction vested in him under Chap. II of the Dekkhan Agriculturists' Relief Act. If he had held that the plaintiff was an agriculturist, and had decided the suit under Chap. II, then, no doubt, the Special Judge would have had jurisdiction to entertain the application for revision. Under the circumstances the plaintiff's remedy lay in appeal to the District Judge.

Balaji A. Bhagavat, for the opponent (plaintiff) showed cause.—The Special Judge had jurisdiction to entertain our application for revision. In the plaint, the plaintiff clearly stated that she was an agriculturist. The Special Judge was justified in stating that the plaintiff was an agriculturist; she held land and maintained herself by agriculture. The decision of the first Court under the original Act (XVII of 1879) as to status was final, but under the amending Act (VI of 1895) the finding can be upset in appeal. As to the powers of the Special Judge see s. 53.

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JUDGMENT.

PARSONS, J.—In this case the plaintiff brought a suit for redemption under the provisions of Chap. II of the Dekkhan Agriculturists' Relief Act, alleging that she was an agriculturist entitled to the benefits of that Act. The defendant in his written statement disputed her status and, an issue being framed on the point, the Subordinate Judge decided that the plaintiff was not an agriculturist and could not avail herself of the Dekkhan Agriculturists' Relief Act. The Subordinate Judge, however, did not dispose of the case as he should have on this issue only, but he decided the other issues raised, and finding that plaintiff was not the owner of the equity of redemption and that her suit was time-barred, rejected the claim. The Special Judge took up the case on revision under s. 53 of the Act, and passed a decree in favour of the plaintiff.

It is contended that the Special Judge had no jurisdiction, since the decree passed by the Subordinate Judge was not passed in a suit under Chap. II of the Act. I think the contention is a good one. Section 3 (*z*) of the Act has the words "when the plaintiff is an agriculturist." It is thus, not when the **[324]** plaintiff claims to be an agriculturist, but when he is an agriculturist, that is to say, when he is admitted or proved to be an agriculturist, that the Court is given jurisdiction to entertain and try a suit under Chap. II of the Act. Directly the Court finds that he is not an agriculturist, (and this point, if at issue, ought to be raised and decided as a preliminary one), the Court has no jurisdiction to proceed under that chapter. If, as in the present case, the Court, after finding that the plaintiff is not an agriculturist, goes on with the trial of the suit, it must be deemed to do so only under its ordinary jurisdiction, and the decree passed would not be one passed under Chap. II of the Act, and, therefore, final, but would be appealable under the general provisions of the Civil Procedure Code. The Special Judge is, by s. 53, given jurisdiction only over decrees or orders passed by a Subordinate Judge in a suit or matter under Chap. II.

If what I have above said is correct, it clearly cannot be said that a decree is passed in a suit under Chap. II when the Subordinate Judge has found in that suit that the plaintiff is not an agriculturist and is not entitled to bring a suit under that chapter. I think in these cases that the suit is governed, not by the description that the plaintiff gives of his status, but by his actual status as determined by the Court in which his suit is filed, and that the jurisdiction of the Special Judge to hear an application for revision of the decree or order passed in the suit must depend upon the same determination.

We make the rule absolute with costs. The application to the Special Judge is ordered to be returned to the applicant.

RANADE, J.—The question of jurisdiction raised by the applicant in this case is one of some importance. It is not disputed that before the repeal of s. 73 of Act XVII of 1879 by s. 3 of Act VI of 1895, the decision of the question of status by a Court of first instance was final. The consequences of this finality are discussed in *Malhar* v. *Chinto* (1), *Mahalingapa* v. *Nemchand* (2) and *Gyanmal* v. *Ramchandra* (3). In the present case, the decision was that the respondent, original plaintiff, was **[325]** not an agriculturist. This decision being final, the case was taken out of the description of suits falling under Chap. II of Act XVII of 1879,

(1) P.J. (1887), p. 38. (2) P. J. (1887), p. 77. (3) P.J. (1896), p. 342.

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and the Special Judge had no jurisdiction to exercise his revisional powers in respect of it.

It was, however, contended that, by reason of the repeal of s. 73, the finality of such decisions on the point of status of the Court of first instance was removed, and the Special Judge could exercise his revisional powers in all cases where he was satisfied that the decision of the question of status was incorrect, and that the mortgagor seeking redemption was an agriculturist. It is not, however, easy to see how the repeal of s. 73 could confer a new jurisdiction on the Special Judge which he did not possess before. His jurisdiction in the matter of such suits is regulated by the provisions of s. 3, cl. (*b*), sub-cl. (*z*), which the amending Act has left untouched. That clause gives him jurisdiction in cases when the mortgagor seeking redemption is an agriculturist, and the claim is valued at a certain figure and the property is situated within certain districts. These limitations must be strictly observed. The only effect of the repeal of s. 73 is that, in cases where he has jurisdiction, he is not bound by the decision of the Court of first instance when it finds that the person seeking redemption is an agriculturist. If the Special Judge finds that this decision is not correct, he may revise it, and if he finds that the plaintiff is not an agriculturist, he must refer the applicant before him to the District Court. In the same manner, if the District Judge finds in an appeal before him that a certain person seeking redemption was an agriculturist, though held to be otherwise by the Court of first instance, he can, since the date of the repeal of s. 73, reverse the decision of the Court below, and then return the appeal to be filed as an application before the Special Judge if the other limitations hold good in the particular case. This is the only change effected by the repeal. In the present case the decision of the Court of first instance that the respondent-plaintiff was not an agriculturist excluded the case from the description of suits falling under Chap. II, over which alone the Special Judge has jurisdiction. The only remedy open to the respondent-plaintiff was by way of appeal to the District Court.

[326] The decision in *Shidhu* v. *Bali* (1), followed in *Usmanbhai* v. *Imratabai* (2), no doubt recognizes the very large powers possessed by the Special Judge under the Dekkhan Agriculturists' Relief Act to interfere with decisions on questions of fact as well as of law, but this wide power cannot be held to cover cases where he acts without jurisdiction as in the case before us. The decision in *Kondaji* v. *Anau*(3) certainly went much further, but the ruling is expressly based on a *bona fide* mistake of facts on the part of the first Court in applying Chap. II to a case which did not fall under it. The ruling has no application in the present case, as there is no allegation here of any such mistake. The same remark holds true of the ruling in *Bhagvant* v. *Rango* (4), where this Court held that when the first Court had disposed of the case as falling under Chap. II, the Special Judge's jurisdiction was not ousted by reason of his finding that the mortgage was for a larger sum than the limitation laid down in s. 3. The circumstances of the present case do not quite resemble those of the ruling in *Janardhan* v. *Ananta*(5), where the effects of the repeal of s. 73 are discussed in respect of the jurisdiction of District Judges, but the principle laid down there holds equally good in respect of the Special Judge. Just as the District Judge has no power to hear an appeal in a case falling within Chap. II,

(1) 15 B. 180. (2) P. J. (1893), p. 148. (3) 7 B. 448.
(4) P.J. (1884), p. 30. (5) P. J. (1896), p. 396.

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but is bound to return the appeal to be filed as an application before the Special Judge, the Special Judge in this case had no power to dispose of the application before him in the present case, but was bound to refer the applicant to his remedy by way of appeal.

We must, therefore, make the rule absolute, and set aside the decision of the Special Judge, and direct the respondent to seek his remedy in the District Court.

Rule made absolute.

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23 B. 327.

[327] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

PAYAPA AKKAPA PATEL (*Original Plaintiff*), *Appellant v.* APPANNA AND OTHERS (*Original Defendants*), *Respondents.**

[11th July, 1898.]

Hindu law—Adoption—Adoption by widow of a predeceased son—Consent of mother-in law—Adoption must be by widow of the last full owner—Exceptions to this rule.

By Hindu law as settled by judicial decisions, it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and a person in whom the estate does not vest, cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights.

To this rule there are four exceptions :—

1. In the case of co-widows. Though, on the death of the husband without male issue, the estate vests in all his widows, it has been held that the elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows of their vested rights. The consent of such younger widows has not been held to be essential.

2. In the case of a mother who succeeds as heir to an unmarried son, legitimate or adopted, who dies after his father. In such a case the right of the widow to take a son in adoption to her husband has been conceded to her, though such a son cannot properly be described as being the heir of the last full owner.

3. When an adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent.

4. Where there has been ratification by conduct or acquiescence.

Per PARSONS, J.—The mere fact that the adopting widow is not the widow of the last male holder would not make an adoption by her spiritually invalid, while any difficulty as to the inheritance and the estate is cured by the assent to the adoption given by the person in whom that inheritance or estate is vested.

One Bhimappa died in 1878, leaving a widow Umava and a daughter-in-law Sarasvati him surviving. His only son Darigavda, the husband of Sarasvati, had predeceased him. On Bhimappa's death his estate vested in his widow Umava. In 1879 Sarasvati withUmava's consent adopted a son Shentapa (defendant No. 3). The plaintiff in this suit sued to recover certain land which formed part of Bhimappa's estate, alleging that it had been given to him by Umava. The first defendant alleged and proved that he had bought the land from the third defendant (Shentapa,) who was the adopted son of Sarasvati.

Held, (dismissing the suit), that the adoption was valid, and that the first defendant was entitled to the land.

[**F.**, 38 B. 724 = 16 Bom. L.R. 663 = 27 Ind. Cas. 51 ; **Diss.**, 33 M. 228 = 4 Ind. Cas. 386 = 7 M.L.T. 236 (240) ; **Expl.**, 25 B. 306 (311) ; **Doubted**, 32 B. 499 (502) = 10 Bom. L.R. 692 ; **R.**, 27 M.L.J. 306 = 16 M.L.T. 413 = 24 Ind. Cas. 999.]

[328] THE plaintiff sued to recover possession of certain land from the first defendant, who had ousted him in 1891. The plaintiff alleged

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* Second Appeal No. 931 of 1897.

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that the land had been given to him by Umava, the widow of one Bhimappa, the former owner of the land.

Umava had succeeded to the land on the death of her husband (Bhimappa) in 1878. She was then sixty years of age. Their only son Darigavda had predeceased Bhimappa and left a widow Sarasvati, who at Bhimappa's death was twenty years old.

For the defence it was alleged that Sarasvati, with the consent of Umava, had adopted a son named Shentapa (defendant No. 3) to her husband (Darigavda), and that he had sold the land to the first defendant, who was in possession.

The Subordinate Judge found that Sarasvati did as a matter of fact adopt the third defendant with the assent of her mother-in-law Umava, in whom Bhimappa's estate had vested on Bhimappa's death, and that such adoption was valid, and that the title of the first defendant as purchaser from the third defendant as such adopted son was established. He, therefore, dismissed the plaintiff's claim.

On appeal the Judge confirmed the decree.

The plaintiff appealed to the High Court. The only question raised in appeal was as to the validity of an adoption by a daughter-in-law in the lifetime of her mother-in-law, the estate having vested in the latter as heir and not in the daughter-in-law, by reason of her husband having predeceased his father.

Dhondu P. Kirloskar, for the appellant (plaintiff).—The only question is, whether the adoption of Shentapa (defendant No. 3) is valid. We contend that it is invalid. Umava was the widow of the last male holder, and, therefore, she alone was entitled to adopt. Her consent to the adoption by her daughter-in-law was not sufficient to make the adoption valid.

Manekshah J. Taleyarkhan, for the respondents (defendants).—It is not necessary that the widow who adopts should be the widow of the last male holder. It has been held that when a son dies unmarried, or without leaving a widow, his mother can adopt. The test of a valid adoption, in a case like the present, is [329] whether the consent of the person in whom the estate has vested has been obtained. Here the mother-in-law, in whom the estate had vested, consented to the adoption by her daughter-in-law, and she having consented, the adoption was valid. It was not necessary to obtain the consent of the reversioners in whom the property had not vested.

The following cases were cited during arguments :—*Shri Dharnidhar* v. *Chinto* (1) ; *Vasudeo* v. *Ramchandra* (2) ; *Rupchand* v. *Rakhmabai* (3) ; *Babu* v. *Ratnoji* (4) ; *Amava* v. *Mahadyauda* (5) ; *Pudma Coomari Debi* v. *The Court of Wards* (6) ; *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakhmi Narsayya* (7); *Gavdappa* v. *Girimallappa* (8) ; *Krishnarav* v. *Shankarrav* (9) ; *Bhoobun Moyee* v. *Ram Kishore* (10) ; *Waman Dhondo* v. *Ramchandra* (11).

JUDGMENT.

RANADE, J.—Both the lower Courts have found that Sarasvati, the widow of the predeceased son of Bhimappa, did, as a matter of fact, adopt respondent No. 3 as her son with full assent of her mother-in-law, Bhimappa's widow Umava, and that the adoption so made with

(1) 20 B. 250. (2) 22 B. 551. (3) 8 B.H.C.R. A.C.J. 114.
(4) 21 B. 319. (5) 22 B. 416. (6) 8 I.A. 229.
(7) 4 I.A. 1. (8) 19 B. 531. (9) 17 B. 164.
(10) 10 M.I.A. 279. (11) P.J. (1897), p. 193.

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the assent of the person in whom the estate vested on Bhimappa's death was a valid adoption. In the appeal before us the sole contention raised related to the validity of such an adoption by a daughter-in-law in the lifetime of her mother-in-law when the estate was vested in the latter as heir, and not in the daughter-in-law by reason of her husband having predeceased his father.

There can be no doubt that, as a general rule of strict Hindu law as settled by judicial decisions, it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and that a person in whom the estate does not vest cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights. This position was first laid down in *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore* (1), and has been **[330]** repeatedly affirmed by their Lordships in *Pudma Coomari Debi* v. *The Court of Wards* (2), and again in *Thayammal* v. *Venkatarama* (3), and *Tarachurn* v. *Suresh Chunder* (4). Effect was given to this view by the Madras High Court in *Annammah* v. *Mabbu Bali Reddy* (5), by the Calcutta High Court in *Tarachurn* v. *Suresh Chunder* (4) and by this Court in *Keshav* v. *Govind* (6); *Chandra* v. *Gojarabai* (7). In most of these cases the estate had vested in the daughter-in-law by reason of her husband having survived his father—*Mussumat Bhoobum Moyee Debia* v. *Ram Kishore*, *Thayammal* v. *Venkatarama*, *Tarachurn* v. *Suresh Chunder*, *Krishnarav* v. *Shankarrav* (8) and *Keshav* v. *Govind*, and it was held that the mother-in-law could not by exercising her power of adoption defeat her daughter-in-law's rights. The same principle governs cases when the son dies before his father, and it is the daughter-in-law who seeks by adoption to divest the mother-in-law of her rights—*Shri Dharnidhar* v. *Chinto* (9). The same rule applies to the case of collateral relations—*Rupchand* v. *Rakhmabai* (10); *Annammah* v. *Mabbu Bali Reddy* (5); *Chandra* v. *Gojarabai* (7).

Although this is the general rule, four distinct classes of exceptions or qualifications to this rule have been recognized. The first exception has reference to case of co-widows. Though on the death of the husband without male issue, the estate vests in all his widows, it has been held that the elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows of their vested rights. The consent of such younger widows has not been held to be essential—*Rakhmabai* v. *Radhabai* (11); *Ramji* v. *Ghaman* (12); *Amava* v. *Mahadgauda* (13). In such cases the widows are apparently considered to be not distinct but united in their concern to respect the wishes and promote the interest of the husband, and the act of the same widow is held to bind the others.

[331] The second exception to the rule that it is only the widow of the last full owner who can adopt a son to him on his death without issue, has been recognized in the case of a mother who succeeds as heir to an unmarried son, legitimate or adopted, who dies after his father. In such a case the right of the widow to take a son in adoption to her husband has been conceded to her, though such a son cannot properly be described as being the heir of the last full owner. This exception was approved by the

(1) 10 M.I.A. 279. (2) 8 I.A. 229. (3) 14 I.A. 67.
(4) 17 C. 122 = 16 I.A. 166. (5) 8 M.H.C.R. 108. (6) 9 B. 94.
(7) 14 B. 463. (8) 17 B. 164. (9) 20 B. 250.
(10) 8 B.H.C.R. A.C.J. 114. (11) 5 B.H.C.R. A.C.J. 181. (12) 6 B. 498.
(13) 22 B. 416.

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Privy Council in *Rajah Velanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya* (1), where the principle of such recognition is laid down, namely, that the act of adoption is derogatory of no other rights than those of the adopting mother. The judgment expressly states that this circumstance distinguished such a case from the general rule as laid down in *Mussumat Bhoobum Moyee* v. *Ram Kishore* (2) and that the decision in the latter case expressly recognized this distinction. This view was given effect to in *Ramji* v. *Ghamau* (3) and *Gavdappa* v. *Girimallappa* (4), *Sangapa* v. *Vyasapa* (5), in which last case the ruling in *Krishnarav* v. *Shankarrav* (6) was distinguished on the ground that the deceased's son last full owner had been married and had left a widow whose rights were defeated by the adoption, which of course brought the case under the general rule.

The third modification of the general rule is the one with which we are more immediately concerned here, though it is in reality only a further development of the principle on which the second exception is based. It is to the effect that when the adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent. The validity of the principle of the general law is not affected by a qualification which recognizes that a person may waive his right in favour of the adoption. In the *Ramnad case* (7) their Lordships in their judgment observed that in the case of an adoption by a predeceased son's widow, the consent of the father-in-law, or, in his absence, of "all the brothers, who in default of **[332]** the adoption would take the husband's share, would be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener *against their will.* This same consideration influenced their Lordships in deciding *Sri Raghunadha* v. *Sri Brozo Kishore* (8) that the consent of kinsmen was limited to those kinsmen who are by their union interested in the family property. This view was given effect to by this Court in *Ramji* v. *Ghamau* (3) *Dinkar* v. *Ganesh* (9). When such consent was proved to have been given by the party in whom the eatate vested, the adoption was upheld, though it had the effect of divesting the party giving such consent of his rights—*Rupchand* v. *Rakhmabai* (10) *Babu* v. *Ratnoji* (11); *Venkoji* v. *Datto* (12). When the consent of the parties in whom the estate vested was not proved, the adoption was held invalid—*Vasudeo* v. *Ramchandra* (13). It is true in this last case Mr. Justice Candy differed from Mr. Justice Parsons and was of opinion that the decision in *Babu* v. *Ratnoji* was not correct. Mr. Justice Candy was of opinion that *under no circumstances* can an adoption, not made by the widow of the last full owner, be valid so as to divest the heir in whom the estate has vested of his or her rights. As has been shown above, the proposition as thus stated is too broadly put, and that it needs the qualification of "against their will" or "without their consent" to make it complete. The general rule is subject to certain recognized qualifications and among others to the qualification that the consent of the person in whom the estate has vested, not given at a later stage, but given at the time and with full knowledge, cures the defects, if any, in the formal adoption. Nothing is more common in this country than to find that

(1) 4 I.A. 1. (2) 10 M.I.A. 279. (3) 6 B. 498.
(4) 19 B. 331. (5) P.J. (1896), p. 528. (6) 17 B. 164.
(7) 12 M.I.A. 397. (8) 3 I.A. 154. (9) 6 B. 505.
(10) 8 B.H.C.R.A.C.J. 114. (11) 21 B. 319. (12) R.A. 129 of 1893.
(13) 22 B. 551.

parents, when they grow old, and have the misfortune of losing an only son in their old age, leaving a young widow behind, think it their duty to console that widow for the loss she has suffered by permitting her to adopt a son in preference to adopting a son themselves. In the present case, Bhimappa was admittedly very old when he died in 1878. His widow Umava was herself sixty years old, while Sarasvati was only twenty [333] at the time. Umava not only approved Sarasvati's adoption, but she actually joined with her in executing the varaspatra in 1879, and later on she herself executed a malkipatra in 1882 in favour of the adopted son of Sarasvati. Both deeds are registered and both recite that the adoption was made with the consent of Umava and by the orders of Bhimappa. There was no such consent proved in any of the cases relied upon by Mr. Justice Candy in the case in which he expressed a doubt on this point. This contemporaneous express consent validates the action of Sarasvati in adopting respondent No. 3.

The fourth exception is clearly allied to the one discussed above and is based on the principle of ratification by conduct or acquiescence—*Sadashiv* v. *Hari*(1); *Rajendro Nath* v. *Jogendro Nath* (2); *Ravji* v. *Lakshmibai* (3); *Sukhbasi Lal* v. *Guman Singh* (4). It is not necessary to discuss this point further here, as in this case the adoption is not questioned by Umava. She never disputed the third respondent's status during his life, and in her deposition before the Mamlatdar she gave her consent to have her lands transferred to this respondent's name.

These are some of the qualifications of the general rule. The present case falls under the third exception, and I feel satisfied that the claim has been properly disposed of in the Courts below. I would, therefore, confirm the decree of the lower Court, and dismiss the appeal with costs.

PARSONS, J.—My learned colleague has dealt so ably and exhaustively with the point of Hindu law at issue in this second appeal, that I feel anything I can say beyond expressing concurrence with him will be mere surplusage. The validity of an adoption made under circumstances very similar to the present was affirmed by the Chief Justice and myself in *Babu* v. *Ratnoji* (5). The correctness of this decision was doubted by Candy, J., in the case of *Vasudeo* v. *Ramchandra* (6), but it became unnecessary for the appeal Court to pronounce upon it, as the appeal was decided on other grounds : see *Vasudeo* v. *Ramchandra* (7). In the meantime [334] however, the opinion of Candy, J., had been considered by this Court in *Amava* v. *Mahadgauda* (8) and pronounced to be in accordance with the decision in *Annammah* v. *Mabbu Bali Reddy* (9); and a dictum in *Shri Dharnidhar* v. *Chinto* (10), but not deriving support from the case of *Krishnarav* v. *Shankarrav* (11). My learned colleague has now shown that the opinion rests on a proposition that has been too broadly expressed in the cases quoted. The mere fact that the adopting widow is not the widow of the last male holder would not make an adoption by her spiritually invalid, while any difficulty as to the inheritance and the estate is cured by the assent to the adoption given by the person in whom that inheritance or estate is vested. This seems to me to be a very proper and sensible conclusion to come to and I am glad that my learned colleague pronounces it to be in full accord with the principles of Hindu law.

Decree confirmed.

(1) 11 B.H.C.R. 190. (2) 14 M.I.A. 67. (3) 11 B. 381. (4) 2 A. 366.
(5) 21 B. 319. (6) P.J. (1896), p. 299. (7) 22 B. 551. (8) 22 B. 416.
(9) 8 M.H.C.R. 109. (10) 20 B. 250. (11) 17 B. 164.

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Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

BAI JASODA (*Original Plaintiff*), *Applicant v.* BAMANSHA MANCHERJI (*Original Defendant*), *Opponent.** [25th July, 1898.]

Small Cause Court Act, Provincial, (IX of 1887), s. 25—Civil Procedure Code (Act XIV of 1882), s. 203—Decree not according to law—Substantial failure of justice—Interference under extraordinary jurisdiction.

The plaintiff, a Hindu widow, sued for Rs. 74-4-0, being the balance due on an account. She called six witnesses to prove her claim. The defendant did not appear to defend the suit. The Judge, however, dismissed the suit, the only judgment recorded by him being as follows:—"Claim not proved. Claim rejected with costs." The plaintiff thereupon applied to the High Court under its extraordinary jurisdiction, and the above decree was set aside, and a decree passed for the plaintiff with costs.

Held, that the decree being founded on a judgment not in accordance with s. 203 of the Civil Procedure Code (Act XIV of 1882), was not according to law, and, therefore, the High Court under s. 25 of the Provincial Small Cause Courts Act (IX of 1887) had jurisdiction to pass such order in the matter as it thought fit.

[335] *Per* FARRAN, C.J.—In a case where there is nothing, to excite suspicion, and where the plaintiff has given such proof of her claim as the law requires, the plaintiff is entitled, and this Court is entitled, to have some indication from the Judge of the point upon which he dismises the suit, to show that he is not acting from mere caprice or in ignorance of the rules of law which regulate the proof requisite to establish a plaintiff's claim.

Per FULTON, J.—The ground on which I would base our decision is that the error under s. 203 brings the case within our jurisdiction, and that the case being thus before us we are entitled, on being convinced that a failure of justice has occurred, to pass an order which will rectify the mistake.

[F., 5 C.L.J. 413 (415); R., 6 C.L.J. 527 (530); 18 Ind. Cas. 216=109 P.L.R. 1913=119 P.W.R. 1913; 8 S.L.R. 164; Cons. & Expl., 27 B. 563 (574).]

APPLICATION to the High Court, under s. 25 of the Provincial Small Cause Courts (Act IX of 1887), to set aside the decree of Rao Bahadur Krishnamukhram A. Mehta, Judge of the Court of Small Causes at Broach.

The claim was to recover Rs. 74-4-0, being the balance due on an account (khata) begun in Samvat 1944 and adjusted at intervals by stamped khatas purporting to be signed by the defendant.

The plaintiff called six witnesses, who gave evidence as to the genuineness of the signature on the various khatas.

The defendant did not appear to defend the suit.

The Judge nevertheless dismissed the suit with costs. The only judgment recorded by him was as follows:—"Claim not proved. Claim rejected with costs."

The plaintiff thereupon applied to the High Court in its extraordinary jurisdiction to set aside the decree, and obtained a rule *nisi*.

Krishnalal M. Jhaveri, for the applicant in support of the rule.—The decision of the Judge cannot be supported. The khata sued on, which was the last of a series of khatas passed by the defendant to the plaintiff's deceased husband, was amply proved by the evidence. In the absence of the defendant the plaintiff could not possibly do anything more to prove

* Application No. 42 of 1898 under extraordinary jurisdiction.

her claim. The decision is clearly wrong—*Poona City Municipality* v. *Ramji Raghunath* (1).

Hormusji C. Koyaji, for the opponent (defendant) to show cause.—The Judge recorded all the evidence which the plaintiff [336] had produced, and passed a decision on the merits. It may be that the decision is wrong, but the Judge has committed no error of law which would enable this Court to interfere under s. 25 of the Provincial Small Cause Courts Act. Further, the Judge has not acted beyond his jurisdiction nor has he committed any material irregularity. This Court has, therefore, no jurisdiction to interfere with his decision.

JUDGMENT.

FARRAN, C.J.—In this case there has, in my opinion, been a substantial failure of justice, and as the decree is not according to law, I think that we should interfere to assist the plaintiff under the provisions of s. 25 of the Provincial Small Cause Courts Act.

The only judgment which the Small Cause Court Judge has recorded is "Claim not proved. Claim rejected with costs." I am not prepared to say, having regard to s. 203 of the Civil Procedure Code (Act XIV of 1882 that in all cases where a judgment is recorded in that form this Court should interfere. In many cases the point for determination which forms the basis for dismissing the suit, is obvious upon the face of the proceedings, and it would be a mere technical omission on the part of the Small Cause Court Judge not to state it specifically. The omission to do so could injure no one. But in a case where there is nothing to excite suspicion, and where the plaintiff has given such proof of her claim as the law requires, in my opinion, the plaintiff is entitled, and this Court is entitled, to have some indication from the Judge of the point upon which he dismisses the suit, to show that he is not acting from mere caprice or in ignorance of the rules of law which regulate the proof requisite to establish a plaintiff's claim. To that extent I think that the judgment in *Muhammad Bakar* v. *Bahal Singh* (2) may be safely followed.

The present was a suit on a khata against a Parsi—an abkari contractor and presumably educated—who did not appear or offer any defence to the claim, though the summons was duly served upon him. The plaintiff was a Hindu widow. The monetary transactions between the defendant and the plaintiff began during the lifetime of the plaintiff's husband. The account opened [337] with an advance to the defendant of Rs. 95-5-9 which was acknowledged by the defendant in his own handwriting, his signature being written over a receipt stamp. The signature appears upon Ex. A passed in Samvat 1944 and is proved by the witness Jamanadas Mancharam. It is not suggested by the learned pleader, who appeared before us for the defendant, nor is he instructed to say that this or any other of the defendant's signatures which have been put in, is a forgery. The account was continued for several years, and ends with an adjustment contained in Ex. E, dated in Samvat 1950, showing the sum of Rs. 74-4-0 as due from the defendant to the plaintiff. The signature of the defendant written across a receipt stamp is affixed to this adjustment and is proved by the witness Bhagtidas Pitambar. The claim of the plaintiff would apparently have been time-barred, had it rested upon Ex. A and Ex. E alone. She has, however, produced a series of intermediate adjustments, Exs. B, C and D, purporting to bear the defendant's signatures across a receipt stamp. Being unable to prove these by

(1) 21 B. 250.

(2) 13 A. 277.

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witnesses who saw them signed by the defendant (her husband, who conducted the business, being dead, or by witnesses who knew defendant's signature, she proved and put in other signatures of the defendant, Exs. B, C and D, in addition to those on Ex. A and Ex. E. The Exs. G, H and I appear to be signed in the same handwriting as are Exs. A, B, C, D and E. We asked our translator as to whether they are written by the same hand and he was satisfied that they were.

The chain of proof was thus complete. I entirely fail to see why judgment was not given for the plaintiff. The pleader for the defendant could not suggest any plausible reason why that was not done. He argued that we had no jurisdiction to interfere in such a case as this, but I cannot agree with that contention. The judgment is not in accordance with the law laid down in s. 203 of the Code, and there has, I am convinced, been a substantial failure of justice.

I was at first disposed to grant a remand, but am led by a perusal of the judgment of my learned colleague to the conclusion that we ought not to remand the case, but to pass a decree for the plaintiff.

[338] FULTON, J.—The section of the Provincial Small Cause Courts Act (IX of 1887) under which this case has been called for, runs as follows:—

"The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit."

The powers conferred by that section are, as pointed out by the Allahabad High Court in *Muhammad Baker* v. *Bahal Singh* (1), purely discretionary, but apparently, before the Court can make any order reversing or modifying the decree of a Court of Small Causes, it must be satisfied that that decree is not according to law. This seems to be the criterion of its jurisdiction under the section.

What may be the exact meaning of the phrase "according to law" and whether by any ingenuity of reasoning it can, in an extreme case, be held sufficiently elastic to include a clearly erroneous decision of facts, it is unnecessary now to determine. In the present case it is manifest that in the judgment recorded by the Judge of the Small Cause Court the provisions of cl. (1) of s. 203, Civil Procedure Code, have not been followed.

The claim was to recover Rs. 74-4-0, being the balance due on an account begun in Samvat 1944 and adjusted at intervals by stamped khatas purporting to be signed by the defendant. The defendant did not appear, and the Court had to determine whether the claim was within time and whether the money had been advanced as alleged. The real question to be decided was as to the genuineness of the signatures on the various khatas which were put in to prove the original loan and to bring the case within time. What the learned Judge thought in regard to these signatures, we have no means of knowing. After recording the evidence he simply noted as his judgment "Claim not proved. Claim rejected with costs." But whether he held that none of the signatures was proved, or whether he merely doubted the genuineness of some of them, it is impossible to say, as they severally depended on different bits of evidence. Such a judgment cannot be said to contain the points for determination and the decision thereupon. Consequently it is not such a judgment as is required

(1) 13 A. 277.

by s. 203, and the decree founded thereon is not according to [339] law. What degree of irregularity may be sufficient to justify the interference of this Court, cannot perhaps with safety be laid down. But I think we shall not be going too far if we hold that a decree founded on a judgment not containing the decision on the points required by s. 203 is not according to law. This seems almost a necessary corrollary of the judgment of Mr. Justice Candy and myself in Second Appeal No. 885 of 1892, where, following the decision in *Bhagvan* v. *Kesur Kuverji* (1), we reversed the decree of the District Judge and remanded the case to him "to pass a decree according to law, as his judgment contains no particulars as provided by s. 574." This section, it is true, requires reasons for the decision of the appellate Court to be recorded. But it may well be, as in the present case, that the want of information in regard to the points for determination and the decision thereon is as inconsistent with the correct appreciation on the part of this Court of the grounds on which the decision is based as a judgment containing no reasons for the decision. Here we can only conjecture what those grounds may have been. The Judge may have disbelieved the evidence of the witnesses who spoke to the execution of Exs. A and F; or he may have thought, having regard to the danger there often is of accepting mere similarity of handwriting as sufficient proof that a particular signature is genuine, that here the similarity of writing was not so marked as to make it incumbent on him to hold that Exs. B, C and D were proved; or he may possibly through inadvertence have fallen into some error of law as to the kind of proof requisite to establish any of the facts on which it was necessary for the plaintiff to rely. On all these points we have no information, and as in this particular case it is possible that the brief form of the judgment may conceal an error in law, which would have been apparent if the provisions of s. 203 had been complied with, I think that the failure to comply with those provisions was a substantial error in law, and not merely a technical irregularity not affecting the merits of the case. I, therefore, consider that under the section above referred to, this Court has jurisdiction to pass such order with respect to the decree as it thinks fit.

[340] What that order should be, must depend entirely on the circumstances of the case. No rule, in my opinion, can be laid down for general guidance without trenching on the functions of the Legislature by adding words to the section which are not to be found there. On this point I entirely concur in the remarks of the Chief Justice and Mr. Justice Parsons in *Poona City Municipality* v. *Ramji Raghunath* (2). In the case of *Muhammad Bakar* v. *Bahal Singh* (3) the learned Judges of the Allahabad High Court, in considering the discretionary powers of the High Court under s. 25, said: "We think we should not interfere under s. 25 of the Act unless it clearly appeared to us that some substantial injustice to a party to the litigation had directly resulted from a material misapplication or misapprehension of law or material error in procedure in the Court of Small Causes," but for my part I should hesitate to adopt such a limitation of the powers of the Court. The present case illustrates the danger of attempting to add to the law by laying down a rule outside the words of the Act; for if we were to follow the practice suggested in the above-mentioned judgment, we should, in my opinion, be unable to give any relief to the plaintiff, albeit we consider that she has suffered substantial injustice, because I should have a difficulty in holding that the

(1) 17 B. 428. (2) 21 B. 250. (3) 13 A. 277.

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substantial injustice (*i. e.*, the omission to pass a decree for the plaintiff instead of against her) was the effect of the material irregularity. That irregularity, I think, affected the merits of the case, inasmuch as there was an omission to record the Judge's decision on the various points which the plaintiff was entitled to know and which, if recorded, might have enabled her by application for review or under s. 25 to obtain a fresh decision ; but at the same time I should not in this case have been prepared to interfere, unless I also thought that the ultimate decision was wrong in fact as well as in form. In one sense, of course, it may be contended that the omission to record the findings which the law prescribes is unjust to the plaintiff, inasmuch as it deprives her of means of redress which might otherwise be at her command, but that does not seem to me the real ground for interference in the present case. The real ground appears to be that we think the decree [341] ought to have been for the plaintiff instead of for the defendant, and I am not prepared to say that I think this error in the decree was the effect of the erroneous form of the judgment. It may well be, and I can see no reason for presuming the contrary, that the learned Judge, who has had long experience and must be well versed in all the sections of the Evidence Act, would have arrived at exactly the same result even though he had strictly followed the requirements of s. 203. The ground on which I would base our decision is that the error under s. 203 brings the case within our jurisdiction, and that the case being thus before us we are entitled, on feeling convinced that a failure of justice has occurred, to pass an order which will rectify the mistake. The reason why I think the decision is wrong, is that the similarity of handwriting and the evidence recorded leaves no doubt in my mind that all the khatas are genuine having regard to the fact that the pleader for the defendant, who appeared before us, was not instructed to say that they were forgeries, and that the defendant himself, who is an abkari contractor and as a man of business must be aware of the expediency of making a clear statement of his defence, has never made such statement or offered to give evidence. The case having been fully heard *ex parte* owing to the absence of the defendant in the Small Cause Court, and no reason having been suggested why he should be granted a new trial, I should be disposed to order that the decree of the Court of Small Causes be converted into one for the plaintiff for the amount claimed with costs, including the costs of the present application.

Rule made absolute. Decree for Plaintiff.

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[342] APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice and Mr. Justice Fulton.

SHRI BEHARILALJI BHAGWATPRASADJI (*Original Defendant No.* 5), *Appellant v.* BAI RAJBAI AND ANOTHER (*Original Plaintiff and Defendant No.* 1), *Respondents.** [28th July, 1898.]

Hindu law – Widow—Maintenance—Right of maintenance charged on property left by testator—Sale of such property in fraud of widow's right of maintenance—Right of widow as against purchaser—Transfer of Property Act (IV of 1882), *s.* 39—*Executor power of sale of—Probate and Administration Act (V of* 1881), *s.* 90, *as amended by Act VI of* 1889, *s.* 14.

A testator, by his will, gave his widow's maintenance out of the income of his immoveable estate, subject to a limited power of sale or mortgage conferred upon his executrix for a special purpose. It was found by the lower Courts that a large part of the property was sold by the executrix with the object of defeating the claim of the plaintiff, who was one of the testator's widows, and that the purchaser was aware of the fraud.

Held, that the plaintiff was entitled to recover her maintenance out of the property in the hands of the purchaser. The purchaser having been aware of the fraud, the plaintiff's right to maintenance against the property in his hands remained unaffected whether under s. 39 of the Transfer of Property Act (IV of 1882) or the law previously in force and irrespective of the possibility of her claim being satisfied from other property.

Section 90 of the Probate and Administration Act (V of 1881) as amended by Act VI of 1889, s. 14, gives an executor merely the ordinary powers of sale that an owner would have in so far as they are not limited by the will, and as such, those powers are subject to the usual rules of equity.

[**Rel.**, 36 P.R. 1907 = 11 P.L.R. 1908 = 118 P.W.R. 1907 ; **D.**, 37 C. 362 (366) = 6 Ind. Cas. 893.]

SECOND appeal from the decision of Rao Bahadur Chandulal Mathuradas, First Class Subordinate Judge of Ahmedabad with appellate powers.

This was a suit by a widow to recover a house, arrears of maintenance, etc., bequeathed to her by her husband Motibhai Dhoribhai. The first defendant (Hetba) was the mother of the testator and the executrix of his will. Defendant No. 2 was the plaintiff's co-widow and defendants Nos. 3 and 4 were the sisters of the testator. The fifth defendant (appellant) was the purchaser of the whole or nearly the whole of the testator's property (including the house in question) from defendants Nos. 1, 2, 3 and 4.

The testator Motibhai Dhoribhai, of Nadiad, died on the 20th June, 1882, leaving him surviving his mother Hetba (defendant No. 1, **[343]** two widows, *viz.*, Kasanba, and Rajbai (plaintiff), and two sisters Hira and Harkha. By his will, dated the 19th May, 1882, he appointed his mother Hetba (defendant No. 1) "to carry on the *vahivat* of his properties," and he (*inter alia*) gave a legacy of Rs. 601 to his younger widow, Rajbai (plaintiff), to be paid out of his moveable property. He also directed that, if she could not live jointly with the others, she was to be given a house No. 2 for her residence and Rs. 50 every twelve months for her expenses. He further gave his mother Hetba (defendant No. 1) authority for certain purposes to mortgage or sell the property, and after her death the management was to be given to his sister Hira. The following is the material portion of the will :—

"There are at present living my mother named Hetba, and I have two wives, of whom Kasanba is elder and Rajbai is younger, and two

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sisters * Hira and * Harkha. * I authorize my mother Hetba to carry on the *vahivat* of my properties. * *

"My properties are to be dealt with in the following way. Out of my moveable property Rs. 500 are to be paid to the elder of my wives * and the younger should be paid Rs. 601. Both my said wives are after my decease to be obedient to my mother. * But if any one of my two wives or both of them cannot take her or their food jointly, the younger wife is to be given house No. 2 for her residence and Rs. 50 (Babasai currency) are to be paid to her every twelve months for expenses, and the elder one is to be given the western one of the two houses, No. 10, for her residence and Rs. 50 for expenses every twelve months. * *

"As to the whole of the immoveable and moveable property that may remain after excluding the properties dealt with above, my mother Hetba has the right of carrying on the *vahivat* thereof * as long as she may be alive. And she has authority to effect a mortgage or sale in order to make gifts for charitable and religious purposes for the benefit of her soul and to the mandir at Vatdal. * * After my decease and the decease of my mother as to whatever of my above-mentioned property may be remaining, after excluding therefrom the property which my mother may have dealt with, the *vahivat* thereof is to be carried on, and the same is to be taken possession of, by my sister Hira. * * *

"On the decease of my wives, after my and my mother's death, as to whatever property belonging to them there may be, the same also is to be enjoyed by the person (or persons) who may be enjoying my property at the time, and the person or persons who may be enjoying the property is or are to make outlays in respect of the obsequial ceremonies in any manner he likes, and the person who may be enjoying the property is to go on paying every year to the wives the maintenance allowance which I have fixd above, or keep them and maintain them together as far as possible. * * *"

[344] On the 25th November, 1895, the plaintiff Rajbai brought this suit to recover the house bequeathed to her as above stated and Rs. 84-6-0 arrears of maintenance and the legacy of Rs. 601. She alleged that as she could not agree with her co-widow Kasanba (defendant No. 2) she had begun to live separately in 1893 and had demanded separate residence and maintenance, which were refused. She also alleged that Hetba (defendant No. 1) had fraudulently sold the house bequeathed to her (the plaintiff) to the fifth defendant (appellant) in order to defeat her (the plaintiff's) claim.

The first defendant Hetba, ploaded that the plaintiff's claim to the legacy of Rs. 601 was barred by limitation, and she further stated that the whole of the testator's property had been sold to the fifth defendant.

Defendants Nos. 2, 3 and 4 pleaded to the same effect.

Defendant No. 5 answered that he had purchased only a part of the testator's property for which he had paid Rs. 8,750 and that this purchase money together with the remainder of the testator's prorerty still in the hands of the other defendants were sufficient to satisfy the plaintiff's claim.

The Subordinate Judge held that the plaintiff's claim to the legacy of Rs. 601 was barred by limitation, but he directed that she should be given possession of the house bequeathed to her for residence. As to the arrears of maintenance he ordered that they should be recovered from the first defendant (Hetba) alone.

On appeal by the plaintiff the Judge varied the decree by directing that the plaintiff should recover the maintenance awarded to her from

the testator's property, whether in the hands of the first or the fifth defendant. He was of opinion that the property had been fraudulently sold to the fifth defendant in order to defeat the plaintiff's claim to maintenance. In his judgment, after referring to the provisions of the will, he continued :--

"These provisions clearly indicate that whoever enjoys or is in possession of the property should allow maintenance to his widows, including the plaintiff. In other words, their maintenance is made a charge on his property. Defendant No. 5 has purchased a large part of this property; and though, in the absence of any evidence on the point, it is not possible to say that he has purchased it without any consideration whatever, still it cannot be reasonably doubted that he was the religious preceptor of the deceased Motibhai, and is [345] that of his mother and sisters. The law on the subject is that laid down by s. 39 of the Transfer of Property Act (IV of 1832). Where a third person has a right to receive maintenance from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee if he has notice of such intention (s. 39). This section is consistent with the observations of Mr. Justice West in the well-known case of *Lakshman* v. *Satyabhamabai* (1). A purchaser taking from a vendor with reason to suppose that the transaction was one originating not in an honest desire to pay off debts or satisfy claims for which the estate was justly liable, and which it could not otherwise well meet, but in a desire to shuffle off a moral and legal liability would, as sharing in the proposed fraud, be prevented from gaining by it (see Mayne's Hindu Law, p. 432, 3rd Ed.). It is admitted by the defendant Beharilal that he is in possession of the whole of the property sold and that he knew of the will (No. 66). In fact, it is referred to in his document of sale (Ex. 49), and if he knew of the will, he ought to have known that the property which he was purchasing was encumbered with the plaintiff's right of maintenance. The purchase was for the comparatively large sum of Rs. 8,750 and the defendant has paid Rs. 2,850 to Motibhai's uncle's son Dwarkadas with a view to buy off what might appear to be his reversionary claim (Ex. 73). He bad also promised to pay Rs. 50 annually to the testator's sister Harkhaba as directed by the will (Ex. 48). Motibhai was a man of means, and he seems to have left bebind him no debts strictly so called. Defendant No. 1 did not sell the property in order to satisfy any claim against the estate. Why did she require such a large amount as that of Rs. 8,750 and what did she do with it? She was under no necessity of selling the property, and she had no authority to sell it. Intention is to be gathered from the acts of the parties. Defendant No. 1 has acted most recklessly and defendant No. 5 most cleverly. If the latter had taken the property as a religious gift, he would have taken it burdened with the charges for maintenance. He wants to get rid of that liability by giving it the name of sale. Why was not plaintiff made a party to the sale when all the rest were joined as parties to it? The object was to defeat her rights as well as the rights of the other reversionary heirs. The intention was to take the property unencumbered, and thus to defeat the plaintiff's right of maintenance. It was the intention of the first four defendants to defeat the right, and the last defendant could not have been ignorant of it. The first four defendants were practising the fraud upon her claim, and the

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fifth defendant had notice of it. If she cannot get her maintenance from the property in the hands of defendant No. 5, I doubt that she can get the house from him. This case ought to be governed by s. 39 of the Transfer of Property Act; and the case cited by the fifth respondent's pleader cannot apply. The result is that the plaintiff's claim for maintenance is a charge on her husband's property whether it be in the hands of defendant No. 1 or defendant No. 5."

Defendant No. 5 preferred a second appeal.

[346] *Gokuldas K. Parekh*, for the appellant (defendant No. 5).—We did not buy the whole of the property left by the testator. The plaintiff should look primarily to the other property for her maintenance. Section 39 of the Transfer of Property Act is not applicable. That Act came into force in this Presidency in 1893 while the right of the executrix to sell accrued long before. Section 90 of the Probate and Administration Act (V of 1881) empowers an executor to sell—*Lakshman* v. *Satyabhamabai* (1).

Daftary, for respondent No. 1 (plaintiff).—The will gives the executrix a power of sale only under certain circumstances. Almost the whole of the property left by the testator has been sold to the appellant. The appellant who purchased the property knew of the fraud practised upon the plaintiff. Under these circumstances he cannot be exonerated from liability for the plaintiff's maintenance—Mayne's Hindu Law, ss. 427 and 430; *Savitribai* v. *Luxmibai* (2); *Kalu* v. *Kashibai* (3).

K. M. Javheri, for respondent No. 2 (defendant No. 2).

JUDGMENT.

FARRAN, C. J.—We are of opinion that the testator by his will gave his widows a right to receive maintenance from the profits of his immoveable estate subject to the limited power of sale or mortgage conferred upon his executrix "in order to make gifts for charitable and religious purposes for the benefit of her soul to the mandir at Vadtal as mentioned above (*i.e.*, for *pundan*) and on other auspicious or inauspicious occasions" if he has not specifically (subject as aforesaid) charged his estate with the payment of such maintenance. We draw this conclusion as well from the general purport of the will as from the express declaration of the testator that he "who may be enjoying the property is to go on paying every year to the wives the maintenance allowance which I have fixed above and to maintain them together as far as possible." This declaration, though it immediately follows a direction to the person who may enjoy the property after the death of the testator's wives and mother as to the performance of their several obsequial ceremonies, appears to be a general direction as to the maintenance of his wives, and not a direction confined to the person who is to enjoy the property after the mother's death. The testator's widows are, **[347]** we think, under the terms of the will, in a position exactly analogous to, if not more favourable than, that of a widow entitled under the general Hindu law to maintenance out of family property in the hands of one of the surviving members of such family.

It was argued by Mr. Gokuldas for the appellant that the Transfer of Property Act relied on by the First Class Subordinate Judge, A. P., was inapplicable to the present case notwithstanding that the conveyance to the fifth defendant took place after it had come into force. He contended that the right of the executor to sell the property which had

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accrued on the death of the testator in 1882, could not be reduced by the provisions of s. 39 of the Transfer of Property (Act IV of 1882) having regard to the provisions of s. 2. Probably this argument is correct, but the point is not material, as it does not appear that s. 39 has made any change in the law as explained in Mr. Justice West's judgment in *Lakshman* v. *Satyabhamabai* (1). That judgment had evidently been carefully considered by the Subordinate Judge, and we think that its principles were correctly applied. The Subordinate Judge found that the fifth defendant was aware of the fraud on the plaintiff that was practised by the first four defendants in order to defeat her claim to maintenance, and in these circumstances her right to maintenance remained unaffected against the property in his hands whether under s. 39 of the Transfer of Property Act or the law previously in force, and irrespective of the possibility of her claim being satisfied from other property. At p. 520 Mr. Justice West said: "I find a difficulty in accepting the doctrine that it depends on how the widow's claim may or can be met, whether she can have recourse to property already sold to provide her with maintenance. . . . What was honestly purchased is free from her claim for ever: what was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first." The law thus laid down was not seriously attacked, and we think we ought to follow it.

As regards s. 90 of the Probate and Administration Act, 1881, as amended by Act VI of 1889, which, it was contended, gave the executor full power to dispose of the property, we think [348] that the will in this case impliedly imposes a restriction upon the power of the executrix to dispose of the immoveable property of the testator, and that the section relied on does not assist the defendant. It was not indeed until the reply that the pleader for the appellant was driven to rely upon it. The general purport of the will evidently evinces a desire upon the part of the testator to keep the property intact, and the limited power of sale already referred to is, we think, a clear indication of the testator's desire to restrict his executrix to a power of sale for the special purpose which he has specified. Besides, it is not clear that the section precludes the application of the equitable principle on which the decision in *Lakshman* v. *Satyabhamabai* is based and which has been embodied in s. 39 of the Transfer of Property Act. It cannot seriously be argued that s. 90 of the Probate Act in any way supersedes s. 39 of the Transfer of Property Act, as there is nothing in the section itself to indicate any such intention. It seems to give the executor merely the ordinary powers of sale that an owner would have in so far as they are not limited by the will, and as such those powers would be subject to the usual rules of equity. We confirm the decree with costs.

Decree confirmed.

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Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Strachey.

TRIMBAK GANGADHAR RANADE (*Original Plaintiff*), *Appellant* *v.* BHAGWANDAS MULCHAND AND OTHERS (*Original Defendants*), *Respondents.** [15th April, 1898.]

Mortgage—Power of sale—Suit to set aside sale under power of sale—Promise by mortgagee to postpone sale—Evidence of such promise admissible—Evidence Act (I of 1872), s. 92, proviso 4—Contract Act (IX of 1872), s. 63—Transfer of Property Act (IV of 1882), s. 69—Town of Bombay, limits of.

The plaintiff mortgaged certain property to the first defendant on 28th December, 1895. By the mortgage-deed the mortgage-debt was made re-payable on 28th December, 1896. On the 12th May, 1897, the first defendant sold it by auction under the power of sale contained in the mortgage-deed, **[349]** and the second defendant was the purchaser. The plaintiff now sued to set aside the sale and to be allowed to redeem, alleging that on the day before the sale the first defendant had orally promised and agreed to postpone the sale for four days and that the second defendant had notice of this fact before he purchased the property.

Held, that evidence of such oral agreement was admissible. It was not an agreement to modify any of the terms of the mortgage; it was merely an agreement to forbear, for a period of four days, from the exercise of the power of sale given by the mortgage. It, therefore, did not fall within proviso 4 of s. 92 of the Evidence Act (I of 1872).

Held, also, that the said promise or agreement, if made by the mortgagee, was not an extension of time for the performance of the plaintiff's (mortgagor's) promise to him, which was to pay the mortgage-debt on the 28th December, 1896, but was an agreement to refrain from exercising, for a stated period, the right of sale arising from non-performance, and, therefore, s. 63 of the Contract Act (IX of 1872) did not apply.

Land situate in the district of Mahim within the island of Bombay, and within the local limits of the original jurisdiction of the High Court, is situate within the town of Bombay, in the sense in which that expression is used in s. 69 of the Transfer of Property Act (IV of 1882).

[R., 12 Bom.L.R. 669=11 Cr.L.J. 544=7 Ind. Cas. 935; 19 Ind. Cas. 931=4 P.R. 1914=243 P.L.R. 1913=145 P.W.R. 1913=207 P.W.R. 1913; 24 Ind. Cas. 391; 27 Ind. Cas. 269.]

SUIT by a mortgagor for a declaration that a sale by a mortgagee was void, and to be allowed to redeem the mortgage.

The plaintiff was the owner of certain property situate at Lower Mahim in the island of Bombay, which he mortgaged on the 28th December, 1895, to the first defendant (Bhagwandas) for Rs. 8,000 to be repayable in one year.

On the 8th January, 1897, the first defendant's solicitors gave notice to the plaintiff that, unless the mortgage-debt was paid off within three months, the property would be sold under the power of sale contained in the mortgage-deed.

On the 28th April, 1897, the sale was advertised for the 12th May, 1897. On that day accordingly it took place and the mortgaged property was sold to the second defendant (The Standard Mills Company) for Rs. 9,350.

The plaintiff alleged that on the evening of the 11th May, *i.e.*, the day before the sale, he had an interview at Ghat Cooper with the first defendant, at which, the latter agreed to give him four days' time within

* Suit No. 307 of 1897. Appeal No. 968.

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which to pay off the mortgage-debt, and promised that the sale fixed for the next day should be postponed; that he (the [350] first defendant) told the plaintiff to meet him the following morning at his (the defendant's) solicitor's office, in order that the necessary steps might be taken for the postponement; that he met the first defendant accordingly as arranged, but that the defendant left the office, telling him to await his return; that the plaintiff accordingly waited for several hours in the office, but the defendant did not return; that finding that the defendant did not return, he (the plaintiff) went to his own solicitors and caused a letter to be written to the defendants' solicitors stating the agreement to give four days' time and warning them not to permit the sale to take place. This letter he also caused to be read at the auction, which nevertheless took place in the evening of that day.

The plaintiff further alleged that, but for the first defendant's conduct in causing him (the plaintiff) to wait for several hours at the solicitors' office on the 12th May, he would have been able to procure the money required to pay off the debt and thus have prevented the sale.

The money was subsequently procured by the plaintiff and was tendered to the solicitors of the first defendant, but the tender was refused and the conveyance of the property to the second defendant was completed.

Kirkpatrick (with *Macpherson*) for plaintiff.

Robertson (with *Davar*) for defendant No. 1.

Anderson (with *Lang*, Advocate General) for defendant No. 2.

The following authorities were cited:—Transfer of Property Act (IV of 1882), s. 69; Fisher on Mortgage, p. 460; Coote on Mortgage, pp. 475, 476; *Orme* v. *Wright* (1); *Selwyn* v. *Garfit* (2); *Jenkins* v. *Jones* (3); *Parkinson* v. *Hanbury* (4); General Clauses Act, X of 1897, s. 3, cl. 41.

FULTON, J.—(Having found upon the evidence that the first defendant had promised the plaintiff to postpone the sale for four days, and had told him to wait at the solicitors' office as alleged by the plaintiff, His Lordship continued:—)

[351] So far I have found the above facts in the plaintiff's favour, but when I come to the question whether by these occurrences the plaintiff was prevented from paying off the money in time to stop the sale I am obliged to find against him. He has not proved that his negotiations to raise money were in such an advanced condition that he could by any possibility have paid the money on the 12th. He says he could have done so if he had not been kept waiting at the solicitors' office, but his statement is contrary to all probability. He evidently did not think so himself. If he had thought so, there would have been no object in his begging for time. No witness has been called to say that he was ready, or would have been ready had he been asked to advance the money on the 12th May. It is true a tender of Rs. 8,500 was made on Monday the 17th. But it is contended by the defence that this was merely a sham tender, the money being lent for the purpose with the assurance that it would not be accepted. It is impossible to see how it could have been accepted by Bhagwandas' solicitors after he had by the auction bound himself to sell to the second defendant. But, of course, it cannot be said with certainty that the facts were all known to the man who advanced the money, and it is possible that the tender was made seriously in the hope

(1) (1838) 3 Jur. 19. (2) (1888) 38 Ch. D. 273. (3) (1860) 2 Giff. 99.
(4) (1860) 1 Dr. and Sm. 143.

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that in some way or the other it would be accepted. Assuming, however, that the tender was made with the hope of its being accepted, and that by the 17th the plaintiff was really in a position to pay off the mortgage, there is nothing to show that he was in that position, or that he might have been but for this detention at the solicitors' office on the 12th.

I do not think it is proved that the property was sold at an under-value. The evidence is contradictory and leaves the point doubtful, but I do not think the question really affects the determination of the suit. Had anything turned on the point, it would have been necessary to appoint an independent commissioner to value the property.

On these facts I have to consider the law to be applied. It was contended that, under proviso 4, s. 92, of the Evidence Act (I of 1872) an oral agreement could not be proved. Possibly this is the case. But the so-called agreement made at Ghat **[352]** Cooper was a purely gratuitous promise which could not be relied on as a contract. If the plaintiff had shown that he was in a position to pay the money on the 12th, and was precluded from doing so by his reliance on the mortgagee's promise, the case would have been different. To such a state of circumstances I do not think s. 92 would have applied, and if, knowing of such circumstances, the purchaser had bought, I apprehend that he would have been treated as a trustee for the mortgagor, who by a breach of faith of which he was aware, had been prevented from redeeming his property whilst there was still time. In such circumstances I doubt whether the purchaser could have relied on s. 69 of the Transfer of Property Act, 1882, or on any other section. But as matters stand, I cannot see that there was any equity against the purchaser. The mortgagee was exercising his legal right of sale, which subsisted so long as the property was not redeemed. The mortgagor has not shown that by any reasonable possibility he could have redeemed before the hour fixed for the sale. The breach of promise on the part of the mortgagee may have been a serious disappointment to the mortgagor, but I do not think that his position was really altered for the worse by this fact. The purchaser who was anxious to buy, and is not shown to have acted in collusion with the mortgagee, could not have refrained from bidding without running the risk of losing the property altogether. I think, then, he is entitled to stand on his legal rights, and no ground has been shown for setting aside the sale.

It was also contended that a sale during plague time was unfair and inequitable. But I think the mortgagee was entitled to enforce his rights. There is no analogy between a case, like this, of a sale during the continuance of a calamity of uncertain duration and (as in *Orme* v. *Wright*) a sale purposely fixed for an election day when it was certain that few people would bid. It is a misfortune for the mortgagor if property was unduly depreciated at that time, but that is a risk which seems inseparable from his position. The sale was not specially hurried on. The mortgagee had for months been asking for payment and he was consequently entitled to sell, which he did, after the usual advertisement of the intended sale.

[353] The only other point to which I need advert is a curious one urged on behalf of the plaintiff, *viz.*, that property at Mahim is not property within the town of Bombay. (Transfer of Property Act (IV of 1882), s. 69.) It must be conceded that, in ordinary language, land at Mahim though within the island would not be described as within the town of Bombay. But to construe the section correctly, the history of the island must be borne in mind. In this island previously to the introduction of the Act

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the mortgagee was entitled to exercise the powers of sale conferred by a mortgage in English form, and it may safely be said that it was not the intention of the Legislature while preserving the power in one part of the island to withdraw it in another. It is true that the Court must be very careful not improperly to depart from the words of the law, but to a case like the present, where the intention of the Legislature is clear, I think I must apply the principle contained in *Salmon* v. *Duncombe* (1) and treat the word "town" in its application to Bombay as referring to the whole island. To construe it otherwise would make the section in its reference to Bombay wholly unreasonable. In s. 2 of Act XIII of 1856 for regulating the Police in the Towns of Calcutta, Madras and Bombay, the word town is defined to mean all places within the local limits of the jurisdiction of Her Majesty's Supreme Court. A similar definition is given in Act XIV of the same year. In Act IV of 1857 it is provided that the words "Town of Bombay" shall include all places within the islands of Bombay and Colaba. In the Bombay municipal legislation commencing with Bombay Act II of 1865 "City" is the word used. In the General Clauses Act X of 1897 "Presidency town" is clearly defined. No definition of the words "Town of Bombay" applicable to all Acts of the Government of India has been pointed out as in force when the Transfer of Property Act was enacted. But as we find that in some Acts the phrase was expressly defined as relating to the whole island, it seems not unreasonable to suppose that the term was not considered inappropriate and was employed in other Acts in the sense which in some it was expressly declared to bear. For legislative purpose the expression appears to have acquired a technical meaning. On **[354]** the issues I find as follows:—(His Lordship stated his findings). I reject the claim and direct that the plaintiff should pay the costs of the second defendant. Having regard to my finding on the first issue I think that the first defendant should pay his own costs.

The plaintiff appealed.

Kirkpatrick and *Raikes*, for appellant.—They referred to the Contract Act (IX of 1872), s. 63; *Davis* v. *Cundasami* (2); *Albert* v. *Grosvenor Investment Co.*(3); *Williams* v. *Stern* (4); *Selwyn* v. *Garfit* (5); Conveyancing Act (1881), s. 21; Fisher on Mortgage (5th Ed.), p. 459, para. 961; *Bailey* v. *Barnes* (6).

Russell and *Davar*, for respondent No. 1 (defendant No. 1).—They cited *Mumford* v. *Peal* (7); *Tucker* v. *Laing* (8); Evidence Act (I of 1872), s. 92; Contract Act (IX of 1872), s. 25.

Anderson (with *Lang*, Advocate-General, and *Scott*), for respondent No. 2 (defendant No. 2).

JUDGMENT.

The judgment of the Court was delivered by

STRACHEY, J.—(His Lordship, after examining the evidence, differed from Fulton, J., and found that no agreement to postpone the sale was proved, and continued:—)

The first defendant in the witness-box has given a complete denial to the plaintiff's allegations. The evidence adduced by the plaintiff is not of a quality which removes the doubts which the improbabilities of

(1) (1886) 11 Ap. Ca. 627.
(2) 19 M. 398.
(3) (1867) L. R. 3 Q. B. 123.
(4) (1879) 5 Q. B. D. 409.
(5) (1888) 38 Ch. D. 273.
(6) (1894) 1 Ch. 25.
(7) 2 A. 857 (863).
(8) (1856) 2 K. and J. 745.

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his story have produced in our minds. We have, therefore, come to the conclusion that he has failed to prove any promise or agreement on the part of the first defendant to grant four days' time for payment of the mortgage-debt or to postpone the sale. It was contended on behalf of the first defendant that no oral agreement of the kind alleged by the plaintiff could be proved, having regard to the fourth proviso to s. 92 of the Evidence Act. It appears to us, however, that [355] such an agreement would not be an agreement to rescind or modify a contract, grant or disposition of property within the meaning of the proviso. It would be an agreement by the mortgagee, not to modify any of the terms of the mortgage of the 28th December, 1895, but to forbear for a period of four days from the exercise of the power of sale which it created. We see no reason why such an oral agreement could not be validly made and proved.

Assuming the Division Court to be right in its finding that the first defendant on the 11th May, 1897, promised to give the plaintiff four days' time, the question arises, what is the legal effect of such a promise? It would be, as we have said, a promise by a mortgagee having a power of sale to forbear from the exercise of the power for four days. Now there was admittedly no consideration for the promise, no benefit to the mortgagee or detriment to the mortgagor: the arrangement was exclusively for the mortgagor's advantage. The learned counsel for the plaintiff sought to meet this difficulty by relying on s. 63 of the Indian Contract Act, which provides that every promisee may extend the time for performance of the promise made to him, and on the decision in *Davis* v. *Cundasami* (1), where it was held that an agreement extending the time for the performance of a contract falling under s. 63 of the Contract Act does not require consideration to support it. Without expressing any opinion upon that proposition, it appears to us that s. 63 of the Contract Act does not apply to the case before us. It occurs in a group of sections headed "Contracts which need not be performed," and it enables a promisor, where the time for performance of his promise has been extended by the promisee, to plead such extension in answer to a demand for performance at the time originally fixed by the contract. The extended time is substituted in the contract for the original time. Now, in the contract of mortgage, the time for performance of the mortgagor's promise was the due date, the 28th December 1896. No extension or alteration of the time was ever made by the mortgagee. Under the deed the power of sale was not to be exercised unless default should be made in [356] payment of the principal debt on the due date, and until three months after notice in writing requiring such payment had been served on the mortgagor. No payment was made on the due date. The necessary notice in writing was given on the 8th January, 1897. In April the three months expired, and the power of sale thereupon became exerciseable under the deed and under s. 69 of the Transfer of Property Act, IV of 1882. On the 28th April the mortgagee advertised the property to be sold on the 12th May. That was the state of things existing on the 11th May, when the mortgagee's agreement to give four days' time is alleged to have been made. Up to that date it is not suggested that there was any extension of time. Now, assume that on the 11th May the mortgagee promised to give the mortgagor four days' time, and meanwhile to postpone the sale. Such a promise no doubt involved a forbearance of the exercise

(1) 19 M. 398.

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of the power of sale, and a consequent extension for the same period of the mortgagor's right to redeem, which may always be exercised up to the moment of sale. But it was not an extension of the time for the performance of the mortgagor's promise to pay the mortgage-debt as fixed in the deed, in the sense in which the expression 'time for performance of the promise' is used in s. 63 of the Contract Act. The time for performance in that sense never ceased to be the 28th December, 1896. After that date the mortgagor was still bound to pay the debt and could have redeemed on payment, although the time for performance had passed. To say that a promise by the mortgagee on the 11th May to postpone the sale would extend the time for performance of the mortgagor's promise under the contract, is as incorrect as to say that on the 10th May there were still two days within which the mortgagor's promise might be performed. The time for performance of the contract must not be confounded with the time within which, notwithstanding default in performance, the mortgagor in default might still redeem. It follows that the mortgagee's agreement of the 11th May, if made, was not an extension of the time for performance of the mortgagor's promise to him, but an agreement to refrain from exercising for a stated period the right of sale arising from non-performance. That being so, s. 63 of the Contract Act does not apply. **[357]** The facts in *Davis* v. *Cundasami* were totally different. A case much more nearly resembling the present is *Williams* v. *Stern* (1). It appears to us that if, contrary to the conclusion at which we have arrived at on the question of fact, the first defendant agreed on the 11th May to give the plaintiff four days' time and to postpone the sale, the agreement was not binding on him, because there was no consideration to support it. It was contended on behalf of the plaintiff that, apart from the question of agreement, the first defendant was in some way estopped: that he misled the plaintiff into the belief that the sale would not be held on the 12th May, and that the plaintiff, if not so misled, might have been able to raise the amount of the debt and pay it in time to prevent the sale. As in the case of *Williams* v. *Stern*, the first defendant's promise, if made, was not a misstatement of existing facts which operated to the plaintiff's disadvantage: it was merely the expression of an intention, a "mere naked promise" not enforceable in law. We agree with the Division Court that there is no evidence to show that the plaintiff was prevented by any act of the first defendant from paying the mortgage-debt in time to stop the sale. He says that he was prevented because, in consequence of the first defendant's promise, he remained at Messrs. Wadia and Ghandy's office more or less from 10 A.M. until 3 P.M. on th 12th May. The auction took place soon after 5 45 P.M. Upon his own showing, the plaintiff clearly did not believe that he could raise the money in four or five hours, or he would not have asked for four days. He made a tender of the mortgage money for the first time on the 17th May. In our opinion, there is no ground for the contention that, but for the first defendant's conduct on the 11th and 12th May, the plaintiff would have been in a position to pay off the debt before the sale took place on the 12th.

In this view of the case, the power of sale was not improperly or irregularly exercised within the meaning of the deed and of s. 69 of the Transfer of Property Act, 1882, and it is unnecessary to inquire whether, upon the contrary view, the title of the purchaser, the second defendant,

(1) (1879) 5 Q. B. D. 409.

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would have been impeachable on the ground of express notice. Upon another point we [358] need only say that we agree with the Division Court that the mortgaged property, being situate at Mahim within the island of Bombay and within the local limits of this Court's original civil jurisdiction, is situate within the town of Bombay, in the sense in which that expression is used in s. 69. The decree of the Division Court must be confirmed, but as we differ from the learned Judge's finding on the first issue, the plaintiff must pay the costs in that Court of the first as well as of the second defendant. The plaintiff must also pay the costs of this appeal.

Attorneys for plaintiff.—Messrs. *Payne, Gilbert and Sayani.*

Attorneys for defendants.—Messrs. *Wadia and Ghandy*, and Messrs. *Ardesir, Hormūsji and Dinsha.*

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Before Mr. Justice Strachey; and, on appeal, before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

GREAT INDIAN PENINSULA RAILWAY COMPANY (*Original Defendants*), *Appellants v.* THE MUNICIPAL CORPORATION OF BOMBAY AND H. A. ACWORTH, MUNICIPAL COMMISSIONER (*Original Plaintiffs*), *Respondents.** [11th November, 1898.]

Water-works—Municipality of Bombay—Right to enter on land of Railway Company to lay pipes, &c.—Bombay Municipal Act (Bom. Act III of 1888), *ss.* 222, 265—*Railway Act IX of* 1890, *s.* 1—*Accommodation works.*

Under the Bombay Municipal Act (Bom. Act III of 1888) the Corporation of Bombay has the right, for the purpose of supplying the city with water, to enter upon land belonging to other owners, to make connections between the the mains, and to lay the pipes forming the connections through or under such lands without the owners' permission, though not without giving them reasonable notice in writing.

Held, also, that s. 12 of the Railways Act (IX of 1890) does not exclude the above right of the Corporation of Bombay to enter on land belonging to the G. I. P. Railway Company for the said purposes.

SUIT by the Municipal Corporation of Bombay to obtain a declaration that certain land mentioned in the plaint was vested in them, and that, even if it was not, they were entitled to enter upon it for the purpose of executing certain works necessary to supply water to the City of Bombay, and for injunction, &c.

[359] The plaint alleged that by virtue of Act XIII of 1863 and subsequent Acts of the Legislature the land in question with other lands was vested in the plaintiffs for the purpose of carrying the water of the Vehar Lake into the town of Bombay and there distributing the same; that in January, 1894, the plaintiffs desired to make a connection in the Vehar 32" main for the purpose of carrying Vehar water into the Arthur Road 27" main. They also proposed to make a connection between the Tansa 48" main and the Vehar 32" main. The two places at which these works respectively were to be executed were marked X and Y, respectively, in a plan annexed to the plaint.

* Suit No. 378 of 1894; Appeal No. 984.

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The following are the material paragraphs of the plaint:—

"4. The plaintiffs by their workmen on the 29th day of January, 1894, entered on the land through which the said Vehar 32" main runs at the spot marked with the letter Y on the said plan and began to excavate the soil over the said Vehar main for the purpose of making the connection second above mentioned, but the defendants claimed to be entitled to refuse to allow the plaintiff's men to work at the said spot without their permission, and the defendants claim the land through which the said Vehar main runs at the said place as their own, and refuse to allow the plaintiffs to make the connection aforesaid, or to enter upon the said land at the place aforesaid, except upon conditions which the plaintiffs are not bound to agree to.

"5. The plaintiffs say that the land at the places marked X and Y on the said plan is vested in the plaintiffs and is not the property of the defendants as they allege, and in the alternative the plaintiffs say that, if they are wrong in this contention and the said land is the property of the defendants, yet nevertheless the plaintiffs are entitled to enter on the said land in the way and in the manner and for the purposes that they entered on the same on the 29th day of January, 1894, and that the defendants are not entitled to prevent them so entering."

The prayers of the plaint were as follows:—

"1. That it may be declared that so much of the land shown in the plan deposited in the office of the Secretary to Government of Bombay mentioned in the 2nd paragraph of this plaint as occupied by the Vehar pipe as corresponds with the places marked X and Y on the plan Ex. A hereto annexed is vested in the plaintiffs.

"2. That it may be declared that the plaintiffs are entitled to enter upon the land at the said places marked X and Y as aforesaid for the purposes mentioned in the 3rd paragraph of this plaint even if the land is the property of the defendants, without the permission of the defendants.

"3. That the defendants may be restrained by the order and injunction of this Honourable Court from preventing the plaintiffs, their servants and agents entering [360] upon the said land at the places marked X and Y as aforesaid for the purposes mentioned in paragraph 3 of this plaint or for any other purpose for which the plaintiffs may lawfully enter thereon."

The defendants by their written statement did not admit that the land in question was vested in the plaintiffs, and submitted that, even if it was, the plaintiffs, having regard to s. 12 of the Railways Act (IX of 1890), were not justified in entering upon the defendants' land and attempting to do the said work without the permission of the defendants. They further contended as follows:—

"2. The defendants say that in the months of September, 1893, and January, 1894, the plaintiffs' servants, without the permission of the defendants, entered upon the defendants' land for the purpose, as alleged by the said servants, of laying down therein 2 pipes to connect the 32" Vehar main with the Tansa main; portions of both these pipes were intended to be placed upon land of the defendants. The defendants will rely upon a plan furnished by the plaintiffs' engineer to them showing the proposed connections and upon the correspondence, copies whereof are hereto annexed and marked collectively No. 1.

"3. The defendants say that, irrespective of the provisions of s. 12 of the Railway Act, 1890, the plaintiffs were not justified by any of the provisions of the Municipal Act, 1888, in doing what they attempted to

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do, and that the defendants were justified in preventing the plaintiffs' said servants from making the said connections,

"4. The defendants do not admit that the land at the places marked X and Y on the plan annexed to the plaint, and marked A, is vested in the plaintiffs, but the defendants say that it is the property of the defendants, having been acquired by them in the year 1869. The defendants submit that in no event were the plaintiffs entitled to enter on the said land in the way or in the manner or for the purpose that they entered on the same on the 29th January, 1894."

The case was tried by Strachey, J., in December 1897.

Inverarity and *Lowndes* appeared for the plaintiffs.

Lang (Advocate-General) and *Russell*, for the defendants.

The following issues were raised:—

1. Whether all the lands and other immoveable property, necessary for the purpose of carrying the water of the Vehar Lake by pipes into Bombay is vested in the plaintiffs?

2. Whether the land, the subject-matter of this suit, is vested in the plaintiffs?

3. Whether the land described in the plaint is not the property of the defendants?

[361] 4. Whether the plaintiffs are entitled to enter or justified in entering upon the land in question in the way and in manner and for the purposes alleged in the plaint?

5. Whether the defendants are not justified in preventing the plaintiffs' servants from entering upon the said land for the purposes mentioned?

6. Whether, having regard to the provisions of the Railway Act IX of 1890, the defendants were not justified in preventing the plaintiffs and their servants from entering into the land?

7. General issue.

The following is the material portion of the judgment delivered by the lower Court:—

STRACHEY, J. (after examining the evidence as to title continued:—) The state of the title to the property in dispute is, therefore, this. The Vehar main, including the parts of it shown on Ex. I, where the plaintiffs proposed to make the connections, is vested in the plaintiffs. The soil above the main is vested in the defendants. The space of 22 inches between the western skin of the main and the railway fence is vested in the defendants. The land west of the railway fence as far as 266 feet north of the Arthur Road is vested in the plaintiffs. The result is that everything done in this case by the plaintiffs west of the fence was done upon their own property, but that in crossing without the permission of the defendants the space of 22 inches between the fence and the main they committed a trespass, unless they can show express statutory authority justifying their action.

In considering the right of the plaintiffs to enter, for purposes connected with the water-works, upon land vested in other persons, and to make the proposed connections upon such land, it is not necessary to refer to any enactment earlier than the City of Bombay Municipal Act, III of 1888. The subject is dealt with by Chap. X of that Act. The first section of Chap. X, s. 261, gives the Municipal Commissioner for the purpose of providing the city with a proper and sufficient water-supply, and when authorized by the Corporation in that behalf, power to construct and maintain water-works either within or without the city, and do any other necessary acts, necessary, that is, for the purposes specified, to

purchase or take on lease any water-work, and to enter into an arrangement with any person for a supply [362] of water. Section 262 provides that the Commissioner shall manage all water-works belonging to the Corporation, maintain them in good repair and efficient condition, "and shall cause all such alterations and extensions to be from time to time made in the said water-works, as shall be necessary or expedient for improving the said works." That section does not require the authority of the Corporation for necessary or expedient alterations or extensions of existing water-works, as distinguished from the construction of water-works provided for by s. 261. The making of the proposed connections between the Vehar and Tansa and Arthur Road mains would be an alteration or extension of municipal water-works, and would, it is not denied, be necessary or expedient for improving them within the meaning of the section. It has been argued with reference to the interpretation clause, s. 3 (*t*), including within the term water-work a duct, main-pipe, and any "thing for supplying or used for supplying water," that the laying down of any new pipe, such as those required for the proposed connections, would be "constructing water-works" within the meaning of s. 261, and would require a resolution of the Corporation, which admittedly has not been passed. In my opinion, however, s. 261 refers only to any future water-works which the Commissioner may construct or acquire, and not to additions to water-works, like the Vehar water-works, already existing and vested in the Corporation when the Act came into force. The distinction between extensions of an existing system of water-works by additions or improvements within the area previously supplied and previously within the jurisdiction of the Corporation, and a "construction" of new water-works, is not only plainly recognized by ss. 261 and 262, but illustrated by the most recent decisions in England upon the analogous provisions of the Public Health Act, 1875—*Cleveland Water Company* v. *Redcar Local Board* (1); *Huddersfield Corporation* v. *Ravensthorpe Urban District Council* (2). Section 263 deals with the right of access to municipal water-works. It provides that the "Commissioner . . . may, for the purpose of inspecting or repairing or executing any work in, upon, or in connection with, any municipal water-work, at all reasonable times, [363] (*a*) enter upon and pass through any land, within or without the city, adjacent to or in the vicinity of such water-work, in whomsoever such land may vest, (*b*) convey into and through any such land all necessary materials, tools, and implements." That would include a right to enter upon the land in dispute vested in the defendants for the purpose of making the proposed connections. It is not alleged that the times at which the plaintiffs proposed to make the connections were not reasonable. So far, although the Act clearly recognizes the right of the plaintiffs to extend and alter their mains, and gives them a right of access with all necessary implements for the purpose of making connections, it says nothing about the right to lay the pipes forming the connections upon land vested in other persons. That, however, is the effect of s. 265 read with an earlier section of the Act. Section 265 provides that "the Commissioner shall have the same powers and be subject to the same restrictions for carrying, renewing, and repairing water-mains, pipes and ducts within or without the city as he has, and is subject to, under the provisions hereinbefore contained for carrying, renewing and repairing drains within the city." The preceding

(1) (1895) 1 Ch. 168.

(2) (1897) 2 Ch. 121.

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provisions of the Act relating to drains are contained in Ch. IX. The only provisions relating to drains which, it has been suggested, are made applicable by s. 265 to water-works are ss. 220, 221 and 222. Section 220 merely provides that all municipal drains shall be under the control of the Commissioner. Section 221 provides that "the Commissioner shall maintain and keep in repair all municipal drains, and, when authorized by the Corporation in this behalf, shall construct such new drains as shall from time to time be necessary for effectually draining the city." If, as regards repair, that section is made applicable by s. 265 to water-works, it adds nothing to s. 262. If, as regards constructions of new works, s. 221 is made applicable by s. 265 to water-works, it adds nothing to s. 261. As s. 265 makes applicable to water-works only the powers and restrictions given to and imposed on the Commissioner for carrying, renewing and repairing drains, and does not refer to the construction of new drains, it does not, in my opinion, make the latter part of s. [364] 221 applicable to water-works. If by reason of s. 265, the latter part of s. 221 applied to the construction of new water-works, that would not, for the reasons which I have already given in reference to s. 261, affect the proposed connections, which are not the construction of new, but the alteration and extension of existing water-works. That disposes of Mr. Russell's argument based on the words common to ss. 221 and 261, "when authorized by the Corporation in this behalf." The only other section in Chap. IX which has been referred to is s. 222. That section is clearly made applicable by s. 265 to water-works. It provides that "the Commissioner may carry any municipal drain through, across or under any street . . . and, after giving reasonable notice in writing to the owner or occupier, into, through, or under any land whatsoever within the city." Reading this as applying to water-works, it supplements ss. 262 and 263 by adding to those provisions for alterations and extensions of water-works, and for access to them for inspection, repair, or the execution of any work, a further power to carry pipes into, through, or under any land whatsoever, which would, of course, include the land in dispute vested in the defendants, after giving reasonable notice in writing to the owner or occupier. In the present case the reasonable notice in writing was given by a letter from the Water Engineer to the Chief Engineer, dated the 26th October, 1893, (Ex. M.), and enclosing a tracing (Ex. I) which showed the proposed connections.

Unless, therefore, the defendants can point to some enactment excluding or modifying the operation of these just cited, the plaintiffs have, under their Act, the right to enter upon the land in dispute, even where vested in the defendants, to make connections between their mains, and to lay the pipes forming the connections through or under the defendants' land, and to do all this without the defendants' permission, though not without giving them reasonable notice in writing. The defendants, however, do point to an enactment which, they contend, excludes or modifies the operation of Act III of 1888 so far as the railway property is concerned. They rely on s. 12 of the Indian Railways Act, IX of 1890, which provides that "if an [365] owner or occupier of any land affected by a railway considers the works made under the last foregoing section to be insufficient for the commodious use of the land, or if the local Government or a local authority desires to construct a public road or other work across, under or over a railway, he or it, as the case may be, may at any time require the Railway Administration to make at his or its expense such further accommodation works as he or it thinks necessary and are

agreed to by the Railway Administration, or as, in case of difference of opinion, may be authorized by the Governor-General in Council." Mr. Russell contended that the proposed connections were "further accommodation works" within the meaning of this section, and that the plaintiffs, who are a 'local authority' as defined by s. 3 of the General Clauses Acts, 1887 and 1897, cannot themselves make the connections, but can only require the defendants to make them at the plaintiffs' expense. The word "Railway" is defined by s. 3 of Act IX of 1890 as including "all land within the fences or other boundary marks indicating the limits of the land appurtenant to a railway;" and, therefore, if, contrary to the conclusion which I have already stated, the land in dispute outside the railway fence is vested in the defendants, Mr. Russell's argument will not apply to it. Mr. Russell supported his contention by referring to ss. 7 and 8, under the latter of which, he said, the defendants might, subject to certain conditions, and for the purpose of exercising the powers conferred on them by the Act, alter the position of the Vehar main itself or of any pipe vested in the plaintiffs. It appears from the evidence of Mr. Campion, and from the letters of the Chief Engineer and the Agent, which have been put in, that the defendants contend for an extremely wide application of s. 12. Mr. Campion, for instance, says that, althouth the defendants "would not object to any thing reasonable," they claim a right under the section to prevent the plaintiffs not only from making connections, but from coming within the railway fence for any purpose whatever without their permission, including such purposes as patrolling the line of the Vehar main for inspection and control, and entering the sluice-house, which is admittedly municipal property. It is difficult to see how the **[366]** right of access to municipal water-works for purposes of inspection and the like conferred by the express terms of s. 263 of Act III of 1888, can be overridden by a section in Act IX of 1890 relating exclusively to the making of accommodation works.

It appears to me that there are two answers to Mr. Russell's contention. In the first place, I agree with Mr. Inverarity's argument that, assuming the proposed connections to be "further accommodation works" within the meaning of s. 12, that section is purely enabling and permissive, and not prohibitive. It gives a particular right to a local authority as against a Railway Administration, but does not thereby impliedly abolish any independent right vested in the local authority by any other enactment. What it does is, in effect, to give the plaintiffs, as regards railway land, an additional and not a substituted right, so that they might, at their option, either themselves make the connections under ss. 262, 263, 265 and 222 of Act III of 1888, or require the defendants to make them under s. 12 of Act IX of 1890. The provisions of s. 12 would only be obligatory upon a local authority desiring further accommodation works and not having any independent power, such as the powers created by Act III of 1888, for the purpose. That this view is correct, follows, I think, from the wording of s. 12, which in terms only confers a power on the local authority and does not purport to take away any other power or duty existing *aliunde*. There is nothing inconsistent with it in s. 8. It is reasonable enough that a local authority should be empowered, subject to certain conditions and for the purposes of its own Act, to lay pipes under railway as well as under other land, and that nevertheless the Railway Administration should be authorized, for the purpose of exercising the powers conferred upon it by Act IX of 1890, to alter the position of any such pipe, subject to the local authority's superintendence.

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In the second place, the proposed connections are not, in my opinion, "further accommodation works" within the meaning of s. 12 of the Indian Railways Act. They are a public work for which, under the section, a local authority might require accommodation works to be made. In the case of a local [367] authority desiring to construct a public road or other work across, under, or over a railway, the accommodation works required must obviously be works other than the public work to be constructed; there must be, first, a public work whose construction is desired by the local authority, and, secondly, works required to be made for its commodious use. A local authority desiring to make only a public road cannot require the Railway Administration to make the road as an accommodation work. What the local authority may require the Railway Administration to make, is not the road or other public work, but accommodation works for its commodious use. The public work itself must be made by the local authority under some other statutory power. In the present case, what is the public work which the local authority "desires to construct" under the railway? The connections, by means of pipes, between the Vehar and the Arthur Road and Tansa mains. What, then, are the accommodation works required for the commodious use of the public work? None. No work other than the connections themselves is contemplated. It follows that no accommodation work is in question here, and that s. 12 does not apply. Again, it is not "accommodation works" simply, but "further accommodation works" that the section provides for. The "further accommodation works" must mean the same thing throughout the section; must have the same meaning whether the requisition to the railway Administration is made by the owner or occupier mentioned in the opening words of the section or by the Local Government or a local authority. The word 'further,' in itself, and also in connection with the opening words, obviously has reference to s. 11, to which s. 12 is a rider, and in which the term "accommodation works" is virtually defined. Sections 11 and 12 of the Indian Railways Act are modifications of ss. 68 and 71 of the Railways Clauses Consolidation Act, 1845 (8 and 9 Vic., c. 20), though s. 71 refers only to owners and occupiers, and not to local authorities desiring to construct public works. It has been held that the "further" works contemplated by s. 71 do not mean any kind of works which would at any time be convenient for the landowners, but works additional to accommodation works already [368] made by the Railway Company under s. 68, and of the same kind as those which might be required under that section—*Rhondda and Swansea Railway Co.* v. *Talbot* (1). In the present case, no accommodation works have been previously made by the Railway Company for the plaintiffs, and s. 11 mentions no accommodation works resembling the connections which the plaintiffs propose to make. The connections are not water-courses or other passages of the kind described in s. 11 (*b*), as Mr. Russell suggested. They are not, in my opinion, "further accommodation works" or accommodation works at all. Section 12 of the Indian Railways Act, 1890, therefore, does not exclude the right of the plaintiffs to enter on the defendants' land and to make the proposed connections which is given to them by Act III of 1888.

This decides the suit substantially in favour of the plaintiffs. I find on the first and fourth issues in the affirmative, and on the fifth and sixth in the negative. On the second and third I find that the Vehar main and

(1) (1897) 2 Ch. 131.

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the land west of the railway fence are vested in the plaintiffs, and the land between the main and the railway fence to the west in the defendants. The plaintiffs will have a decree for declaration and injunction in accordance with these findings, with costs.

The defendants appealed, contending that the lower Court was wrong in holding that the Corporation were entitled to enter upon their land without their permission.

The appeal was heard by Kershaw, C. J., and Fulton, J.

Long (Advocate-General) and *Macpherson*, for the appellants.

Scott and *Lowndes*, for the respondents.

JUDGMENT.

KERSHAW, C. J.—The Court is of opinion that Mr. Justice Strachey's judgment is right and should be upheld. I need only shortly allude to what are the admitted facts of the case. They have been clearly stated by the Advocate-General in his opening speech. It appears that a main of the Bombay waterworks, through a portion of its course, lies along a narrow strip of land which may be accurately described as part of this railway. The plaintiffs think it necessary, that there should be a **[369]** connection between one portion of this water-main and another portion of their water-mains in the city, and in order to carry this out, they desire to enter upon the land of the defendant Railway Company and to exercise what they consider to be the powers conferred upon them by the Municipal Act. An action in the nature of a friendly action was filed, it having been agreed to be taken for granted that the Corporation have entered upon the land and are prepared to carry out the proposed works. The action was instituted in the High Court and came before Mr. Justice Strachey, who decided that the Bombay Corporation were right. This Court is of opinion that Mr. Justice Strachey decided properly, and the reasons which lead us to that decision may be shortly stated.

By the combined operation of s. 265 and s. 222 of the Municipal Act, it may be said that, practically, the Corporation have the same rights with regard to carrying out their water-works as they have with regard to the carrying out of their drainage system. By s. 265 it is provided: "The Commissioner shall have the same powers and be subject to the same restrictions for carrying, renewing and repairing water main pipes or ducts within or without the city, as he has, and is subject to, under the provisions hereinbefore contained for carrying, renewing and repairing drains within the city." Turning back to Chap. IX it is seen that the Commissioner is associated with drainage and drainage works by s. 221, which says: "The Commissioner shall maintain and keep in repair all municipal drains and when authorized by the Corporation in this behalf shall construct such new drains as shall from time to time be necessary for effectually draining the city." By s. 222 it is laid down that "the Commissioner may carry any municipal drain through, across or under any street or place laid out as or intended for a street, or under any cellar or vault which may be under any street, and after giving reasonable notice in writing to the owner or occupier, into, through or under any land whatsoever within the city, or, for the purpose of outfall or distribution of sewage, without the city." Sub-section 3 of this section lays down: "In the exercise of any powers under this section, as little damage as can be shall be done, and compensation **[370]** shall be paid by the Commissioner to any person who sustains damage by the exercise of such power."

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For the Railway Company it is said that the new pipe proposed to be laid through the twenty-two inches or thereabouts of this land is really a new drain within the meaning of s. 221, and that, therefore, the Municipal Commissioner requires the sanction or authorization of the Corporation before he can lawfully and legally enter upon the work duties. The Court does not think it is necessary to decide that question. It is surrounded by a great many difficulties, and the real question which arises in this appeal may be decided without entering upon that question at all. It seems to us that what the Commissioner did as a matter of fact is well described by Mr. Justice Strachey when he says the Commissioner's action amounts to an alteration or extension of an existing water-main, which may be effected under one of the sections without the authority of the Corporation being given to him. By s. 262 it is laid down: "The Commissioner shall manage all water-works belonging to the Corporation, and maintain the same in good repair and efficient condition, and shall cause all such alterations and extensions to be from time to time made in the said water-works as shall be necessary or expedient for improving the said works." Clearly the alteration and extension proposed is with a view to improving the said works, and no doubt it will have that effect when it is completed. Therefore, if the proposed work may be described as an alteration or extension of the existing work, it is an operation which can be carried out by the Commissioner without obtaining the authority of the Corporation at all.

It has been alleged by the defendants that there is no power in the Corporation to lay the new pipe on private land. We are of opinion that under s. 265 as read with s. 222 there is power to lay such a pipe under any land whatever in the city, and, therefore, there is no trespass by the Corporation, seeing that they have followed out strictly the lines of the Act which gives them the power.

Lastly, is is contended that even if the Corporation formerly had this power it is now controlled and taken away by s. 12 [371] of the Railways Act. It seems to us that, in order to take away a power of this kind which is so eminently serviceable and useful for a large Corporation like that of Bombay, it should be either taken away in express terms, which would leave no doubt about the matter, or the inference should be so strong as really to amount to taking away, in express terms, the power given by the Municipal Act. If we can see that both powers may be exercised together or separately, so that there is some reason why the two powers may co-exist side by side, it will go far to show that such inference cannot be drawn. We can understand why in the one case it would be for the advantage of both the Railway Company and the Corporation that the Railway Company should have the right to do the work. We can also see that there may be circumstances in which it would be for the advantage of both that the Corporation should do it. Supposing that a street has to be carried under a railway, it would be for the advantage of all that the Railway Company should do it, but when, on the other hand, we come to a work like water works it should be done by the Corporation, who have the whole scheme of the supply of water to the city in hand. I see nothing in s. 12 which by express words takes away the power given by the Municipal Act, or in any way repeals it. I see no irresistible inference to be drawn from s. 12, which takes away such power, and we are of opinion that Mr. Justice Strachey was right when he said the two powers might well co-exist side by side, and that there is no abrogation by s. 12 of the Railways Act of the powers previously given to the Corporation.

I do not think it necessary to enter into a discussion with regard to what are further accommodation works, because the case scarcely turns upon that point. It seems to me that the Court can decide the appeal on the broad grounds of the reasons given. The order of this Court is that Mr. Justice Strachey's decision be confirmed with costs.

Decree confirmed.

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Attorneys for the plaintiffs :—Messrs. *Crawford, Brown and Co.*
Attorneys for the defendants :—Messrs. *Little and Co.*

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23 B. 372.

[372] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

SAKHARAM AND OTHERS (*Original Defendants*), *Appellants v.* DEVJI AND OTHERS (*Original Plaintiffs*), *Respondents.* * [8th August, 1898.]

Hindu law—Joint family—Manager—Debt contracted by a manager for family purposes—Decree against the managing member alone—Sale in execution of such decree—Effect of such sale.

Where a debt is incurred by a Hindu as manager of the family for family purposes, the other members of the family, though not parties to the suit, will be bound by the decree passed against him in respect of the debt; and if in execution of the decree any joint property is sold, the interest of the whole family in such property will pass by the sale.

[**F.**, 29 C. 583 (586) = 6 C.W.N. 370 ; 6 C.L.J. 362 (368); 9 C.W.N. 879 (882) ; **Rel.**, 12 Bom.L.R. 811 (817) = 7 Ind. Cas. 990 ; **R.**, 7 Ind. Cas. 341 = 20 M.L.J. 852 (853) = 8 M.L.T. 204.]

SECOND appeal from the decision of C. H. Jopp, District Judge, Ahmednagar.

Suit for redemption. The plaintiffs were three brothers living together as members of a Joint Hindu family. Devji Antoba (plaintiff No. 1) was the manager.

The land in question was family property. In 1867, Devji as manager of the family mortgaged it with possession to Kakaji for family purposes.

In 1873, Kakaji sued Devji alone and obtained a money decree against him in respect of another debt, in execution of which his right, title and interest in the mortgaged lands was put up to sale in 1876, and was purchased by Kakaji himself.

Kakaji remained in possession of the lands till his death in 1885, when it passed into the possession of his brothers, defendants Nos. 2 and 3, and of his nephew, defendant No. 4.

In 1896, plaintiffs filed the present suit to redeem the lands from the mortgage of 1867.

Defendant No. 1, the widow of Kakaji, did not defend the suit, nor did defendant No. 3.

Kakaji's brother and nephew (defendants Nos. 2 and 4) contended that the whole interest of the family in the land had passed to Kakaji by the sale in execution, and that the plaintiffs had no right to redeem.

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* Second Appeal No. 89 of 1898.

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[373] The Subordinate Judge held that the mortgage-debt had been satisfied out of the rents and profits of the mortgaged lands, and that the effect of the Court sale was to pass Devji's interest in the land to the purchaser Kakaji. But he held that the shares of Devji's two brothers (plaintiffs Nos. 2 and 3) were not affected by the execution sale, and as the mortgage-debt had been already satisfied, he awarded them possession of their two-thirds share jointly with defendants Nos. 2 and 4.

In appeal, the District Judge held that plaintiffs Nos. 2 and 3 as owners of two-thirds of the equity of redemption were entitled to redeem the whole of the property, even though the mortgagee (Kakaji) had acquired a share in the equity of redemption; and as the mortgage-debt had been satisfied, he passed a decree awarding possession of the whole of the lands in dispute to plaintiffs Nos. 2 and 3. His reasons were as follows:—

"I do not decide whether the plaintiffs' family remained joint at the date of the decree and of the auction-sale, whether Devji (plaintiff No. 1) was then manager, or whether the debt was one for family purposes, and binding on all the members of the joint family. Even if these points are decided in favour of defendants, Kakaji would still have acquired the share of Devji only in the lands by his auction-purchase. If Kakaji had wished to make the shares of all the members of the joint family liable for the debt, he should in the suit of 1873 have joined all the members of the family as parties to the suit, or at any rate he should have sued Devji as representative of the family. It must, therefore, be concluded that Devji was not so sued, and as Kakaji chose to sue Devji alone and not as the representative of the family, the execution of his decree took place against Devji only, the decree could not be, and was not, enforced against the other members of the family, and Devji's interest alone passed to Kakaji under the auction-sale—Mayne's Hindu Law, para. 324; *Deendyal* v. *Jugdeep* (1); *Maruti* v. *Lilachand* (2); *Kisansing* v. *Moreshwar* (3); *Bhana* v. *Chindhu* (4) does not apply, for the debt in that case was contracted by the father as well as by the other members of the family. I find that Kakaji purchased Devji plaintiff No. 1's interest only at the auction sale."

Against this decision defendants preferred a second appeal to the High Court.

N. G. Chandavarkar, for appellants.

M. B. Chaubal, for respondents.

JUDGMENT.

[374] RANADE, J.—The District Judge has refused to enquire "whether the plaintiffs' family remained joint at the date of the decree and of the auction-sale, whether Devji was then the manager, or whether the debt was one for family purposes, and binding on all the members of the joint family," because he thinks that, as the suit on the bond was brought against no other member of the family than Devji, and he even was not sued as the representative or manager of the family, the decree could not be enforced against the other members of the family, and that Devji's interest alone passed to Kakaji under the auction-sale. No doubt Mayne in his work on Hindu Law, s. 324, does lay down this proposition: "If the managing member of the family executes a document which would bind the other members, the proper course is to sue them all. If the creditor chooses, he may only sue the person who executed the document.

(1) 4 I. A. 247. (2) 6 B. 564. (3) 7 B. 91. (4) 21 B. 616.

But if he adopts this course, his execution will only take effect upon the share of the execution debtor. He cannot enforce it against the other members (not being the sons of the debtor) merely by proving that the transaction was entered into for the benefit of the family." Numerous cases decided by this Court, however, show that the statement is not now quite accurate, and that there seems to be no difference between the case of sons and that of other members of the family. In *Hari* v. *Jairam* (1) the plaintiffs were brothers one of whom alone had been sued, yet the contention of the others, that they were not bound by the Court-sale as they were not parties to the suit, was held to be untenable on the authority of the Privy Council decision in *Daulat Ram* v. *Mehr Chand* (2). In *Vishnu* v. *Venkatrav* (3) it was decided, also, on the authority of *Daulat Ram's* case, that if the debt was incurred by Sankraji and Harji as the managers of the family, and for a family purpose, the interest of Venkatrav, their brother, might pass, although he was not a party to the suit. In *Vasudev* v. *Krishna* (4) the interests of a brother again were at stake, and it was held that the decision depended upon whether the decree obtained by the plaintiff against Thana Naik was for a debt incurred by Thana Naik as manager of the family for the **[375]** purposes of the family. To the same effect is the decision of the Calcutta High Court in *Sheo Pershad Singh* v. *Saheb Lal* (5), in which the head-note runs thus: " the sale having been under a decree in respect of a joint debt of the family, the whole interest of the family in the properties in dispute passed at the sale, although L and S only out of the members of the family were sued." We, therefore, frame these issues—

(1) Whether the debt for which the decree was passed was contracted by Devji as the manager of the family and for a family purpose?

(2) Whether the interest of the plaintiffs Nos. 2 and 3 were attached and sold in execution of the decree? and

(3) If so, whether it is open to the defendant in the present suit to contend that he is still possessed of their interests?

(This last issue, we may remark, is framed at the request of the pleader for the respondent in relation to point 3 in appeal No. 109 of 1897).

We ask the Judge to certify his findings on the above issues within two months.

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23 B. 375.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice and Mr. Justice Fulton.

KOTRABASSAPPAYA (*Original Defendant*), *Appellant v.* CHENVIRAPPAYA AND ANOTHER (*Original Plaintiffs*), *Respondents.**

[11th August, 1898.]

Specific Relief Act (*I of* 1877), *s.* 39—*Limitation Act* (*XV of* 1877), *sch. II, art.* 91—*Suit to cancel a void or voidable instrument—Reasonable apprehension of serious injury— Limitation.*

Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him

* Second Appeal No. 172 of 1898.

(1) 14 B. 597. (2) 15 C. 70. (3) P. J. (1889), p. 248.
(4) P.J. (1891), p. 18. (5) 20 C. 453.

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serious injury, may sue to have it cancelled. The test is "reasonable apprehension of serious injury." Whether that exists or not, depends upon the circumstances of each case. It cannot be laid down, as a rule of law, that in no case can a man, who has parted with the property in respect of which a void or voidable instrument exists, sue to have such instrument cancelled.

[376] *Iyyappa* v. *Ramalakshmamma* (1) referred to.

[Rel. on, 17 Bom. L.R. 157.]

SECOND APPEAL from the decision of T. Walker, District Judge of Dharwar, reversing the decree of E. S. Kulkarni, Subordinate Judge of Ranebennur.

Suit under s. 39 of the Specific Relief Act (I of 1877) to have a document declared cancelled.

The plaintiff was the swami of a math. He had become old and blind, and had no *mari* (disciple) to succeed him. On the 13th August, 1892, he executed a *jimmapatra* to the defendant appointing him manager of the properties of the math, and making them over to him as such manager, upon certain terms as to service and upon condition that he should give his son, if he should have one, to the plaintiff as his *mari* (disciple), or if he had not, that he should select a *mari* for the plaintiff. It further provided that, in case the defendant failed to act according to its terms, he should have no right over the property.

The following extract from the judgment of the District Judge gives a summary of the contents of the *jimmapatra* :—

"As the decree to be passed in this case depends almost entirely on the construction placed on Ex. 125, I will summarize it in English.

"It is described as a *jimmapatra* passed on the 13th August, 1892. by Chenvirappa, Guru, to Kotrabassappa *bin* Baslingappa, and after giving a list of the property recites that the said property is made over to Kotrabasappa for the performance of the worship and ceremonies of the math, the terms of agreement being as follows. Paragraph 1 stipulates that if Kotrabasappa should have a male child within a year or two, that child was to be made the guru's *mari* or disciple; failing to have a child, Kotrabasapa was to find a *mari* somewhere else to succeed plaintiff No. 1 in the math.

"Paragraph 2 requires defendant to feed and clothe the *mari*, and paragraph 3 to feed and clothe succeeding *maris* chosen by this one. Paragraph 4 authorizes defendant to deal with the tenants of the land, and paragraph 5 to pay the assessment, and so enjoy the property from generation to generation. Paragraph 6 states that the math and lands are to be kept in repair.

"Paragraph 7 states that the khata was to be entered in the name of the *mari*, and never in that of defendant or his successors.

"Paragraph 8 states that, in case of defendant's failing to live in the math and keep the property in repair, he has to have no right to the property.

"Paragraph 9 provides that defendant should feed and clothe plaintiff.

[377] "Paragraph 10 states that neither plaintiff No. 1, nor his successors, nor defendant or his successors, should have any power to alienate the property.

"Paragraph 11 requires defendant to act as required above, to manage the property from generation to generation, and render service to the guru and future gurus in matters of worship. If defendant failed to act as

(1) 13 M. 549.

required above, he was to have no power or right over the property, but plaintiff No. 1 and succeeding gurus were to have it.

"It thus appears that the guru, who was at the time seriously ill, contemplated obtaining a successor to himself through defendant. Defendant was to serve the succeeding *maris*, and was to manage the land for their benefit, but was to have no right in it himself or his successors. Plaintiff No. 1 expected the arrangement to be permanent and last for generations, but, if defendant failed to do what was required of him, he was to have no right over the property."

On the 18th June, 1894, the plaintiff Chenvirappa sold the same properties to one Rudrapayya for Rs. 2,000. The deed of sale recited the above *jimmapatra*, but stated that the defendant had failed to act according to its terms.

On the 13th August, 1895, the plaintiff Chenvirappa filed this suit under s. 39 of the Specific Relief Act (I of 1877), praying for a declaration that the *jimmapatra* was void, and that it might be delivered up to be cancelled. He alleged that the defendant had failed to act according to its terms; and that he (the plaintiff) had, therefore, cancelled and set it aside and had sold the property to Rudrappayya; that he was apprehensive that, if the *jimmapatra* was allowed to remain in the defendant's possession, injury might be caused to him (the plaintiff) and to the math, and he, therefore, brought this suit.

The defendant pleaded (*inter alia*) that the plaintiff had no right to sue; that he was in possession of the property as owner, and he denied that he had violated the terms of the *jimmapatra*.

On the 13th July, 1896, on his own application Rudrappayya was joined as co-plaintiff in the suit.

The Subordinate Judge held that the plaintiff had no right to bring the suit, and he, therefore, dismissed it.

On appeal by the plaintiff the District Judge reversed the decree, and passed a decree for the plaintiff, directing that the *jimmapatra* should be delivered up and cancelled.

[378] The defendant preferred a second appeal.

Scott and *Shamrao Vithal*, for the appellant (defendant).—Under the *jimmapatra* the plaintiff gave us possession. Subsequently he sold the property to the second plaintiff, and yet he brought the suit in his own name only. We contend that the plaintiff had then no interest in the property and was not entitled to sue. *Iyyappa* v. *Ramalakshmamma* (1). Further, there is no cause of action disclosed in the plaint. The plaintiff says that possession was not given to us. If so, then no cause of action has accrued to him. But, as a matter of fact, possession was given to us as found by both the lower Courts, and we submit that there are no circumstances in the case which would entitle the plaintiff to set aside the document. A deed can only be set aside under the circumstances mentioned in s. 39 of the Specific Relief Act. We say that we are the owner, because the property is conveyed to us from generation to generation.

The next point is as to limitation. The suit as originally brought was not properly constituted. We submit that the subsequent addition of the second plaintiff did not cure the defect. Plaintiff No. 2 had the right to bring the suit, and when he was put on the record, four years had elapsed since the *jimmapatra* was executed. The suit is, therefore, clearly

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time-barred—*Hasan Ali* v. *Nazo* (1) ; *Janki Kunwar* v. *Ajit Singh* (2). Further, the suit cannot be maintained, because the plaint does not contain a prayer for consequential relief.

Macpherson and *Narayan G. Chandavarkar* appeared for the respondents (plaintiffs).—Under the *jimmapatra* the defendant was not to be the owner, but merely a manager. The first plaintiff is still the swami of the math and is, therefore, interested in the property. At the most, the *jimmapatra* was an absolute conveyance subject to defeasance on defendant's failure to carry out the conditions mentioned therein. As to the joinder of the second plaintiff, we say that he is not barred by limitation. He has three years from the time at which the facts of the case became known to him. He was put on the record within three years of his **[379]** purchase. Both the lower Courts have found that the defendant was put in possession. This is a finding of fact and it is binding in second appeal.

JUDGMENT.

FARRAN, C. J.—The original plaintiff in the suit, out of which this second appeal arises, sued to have it declared that a *jimmapatra* which he had passed in favour of the defendant on the 13th August, 1892, had been cancelled. The plaint was filed on the 13th August, 1895. The suit in the lower Courts has been treated as a suit to cancel or set aside an instrument not otherwise provided for, and as falling within the scope of art. 91 of the second schedule to the Limitation Act, and such is doubtless its true nature. The period, within which it must be brought, is, therefore, three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him.

The original plaintiff was the swami of a math. He had become old and blind and had no *mari* to succeed him. The *jimmapatra* which he executed in favour of the defendant need not be referred to in detail. In effect it appointed the defendant manager from generation to generation of the properties of the math upon certain conditions as to service, and provided that the defendant should give his son, if one should be born to him within a year or two, to the original plaintiff as his '*mari*,' or in default of such a son should select a '*mari*' for the said plaintiff. It also provided that, in the event of the defendant failing to act according to its terms, the defendant should have no right over the property.

Subsequently on the 18th June, 1894, the original plaintiff by a sale-deed of that date (Ex. 124) reciting the above *jimmapatra* and further reciting that the defendant had failed to act according to its terms, sold the properties of the math to the second plaintiff for the sum of Rs. 2,000. The second plaintiff was by amendment added as a plaintiff on the record on the 13th day of July, 1896. If the original plaintiff is not entitled to maintain the suit, the claim of the added plaintiff to sue would appear to have been time-barred at the time when he was added as a plaintiff to the suit.

[380] The first question which we have to consider, therefore, is whether the original plaintiff, under the circumstances of the case, was entitled to bring the suit. The law upon this subject is contained in s. 39 of the Specific Relief Act, which enacts that "any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him

(1) 11 A. 456.

(2) 15 C. 58.

serious injury, may sue to have it adjudged void or voidable." The District Judge considered that the original "plaintiff naturally thought it most dangerous to leave such a document (as the *jimmapatra*) in the hands of a man who was actually in possession of the lands as manager," and held that he was entitled to sue. We do not dissent from his view. It appears to us that, if the document is not cancelled, the added plaintiff, the purchaser, may sue the original plaintiff for a return of his purchase-money, if he cannot get possession of the lands by reason of the defendant holding them under the *jimmapatra*, and that thus the original plaintiff may have had reasonable apprehension of permanent injury. He was also in danger of the defendant suing him in respect of the lands of which the defendant had not obtained possession, for it does not appear that the defendant has obtained possession of all the lands; and there is, lastly, the suggested risk that the added plaintiff may not act fully up to the terms of his purchase and that the original plaintiff may be in a position to resume the lands. As to the judgment in *Iyyappa* v. *Ramalakshmamma*(1), which has been relied on for the appellant, we are not prepared to follow it if it was intended to lay it down, as a rule of law, that in no case can a man, who has parted with the property, in respect of which a void and voidable instrument exists, sue to have such instrument cancelled. The decision in the Madras case may be correct with reference to the facts before the Court, but we think that we ought not to depart from the wording of the section which we have quoted or to add to it a condition which is not to be found in the section itself. The test is "reasonable apprehension of serious injury." Whether that exists or not, must depend upon the circumstances of the particular case with which the Court has to deal. In this view the question of limitation does not [381] arise. The suit was brought by the original plaintiff within three years of the date of the *jimmapatra*. Mr. Scott also contends that as the plaint averred that the defendant had not got possession of the lands, the defendant could not have broken the conditions of the *jimmapatra*, and that the suit must, therefore, be dismissed, even though the Courts have found that such averment has not been supported. We cannot allow this peculiarly technical argument to prevail. The plaint also averred that the defendant after the execution of the document began to act improperly, and not in accordance with its conditions. This averment the written statement traversed. We think that an issue should have been framed by the Court of first instance on this averment and traverse, which raised in fact the main issue between the parties.

Strangely enough, though the Court of first instance found that the defendant had obtained possession, in part at least, of the lands, the appellate Court did not raise an issue as to whether the original plaintiff was entitled to cancel the *jimmapatra* by reason of the defendant having broken its conditions, but that Court dealt with the appeal as if that issue had been before it. Its judgment on this point is as follows:—

"Defendant seems to have mistaken his position altogether, and almost as soon as the document was registered he discontinued attendance at the math and the personal service of plaintiff No. 1. Differences arose almost immediately, and finally plaintiff No. 1 sold the property and math by Ex. 126 to plaintiff No. 2. How great was defendant's misapprehension is shown even by the pleadings in the case. * * * Defendant does not in his written statement attempt to make out that he

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did his duty and was entitled to remain in possession and retain his title-deed. He merely raised technical pleas and pleaded that under the terms of the deed he was in possession as owner. No further justification is needed for this suit."

There has been no ground of appeal to this Court directed particularly against that finding, but the grounds of appeal generally involve it. The District Judge has misread the pleadings and has based his finding upon the assumption that the defendant did not aver that he had acted up to the agreement. If he had raised a formal issue, the parties would have argued it, and he possibly would not have fallen into this error. We must send down the issue:—"Was the original plaintiff entitled [382] to cancel the *jimmapatra* by reason of the defendant's non-observance of its conditions or for any reason?"

The District Judge to be at liberty, if he considers it necessary, to record fresh evidence. Findings to be certified within two months.

Issue sent down.

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23 B. 382.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

RAMCHANDRA (*Original Plaintiff*), *Applicant v.* GANESH (*Original Defendant*), *Opponent.** [16th August 1898.]

Civil Procedure Code (Act XIV of 1882), s. 25—"Court of Small Causes"—Meaning of the expression—A Court invested with Small Cause Court powers not a Small Cause Court within the section—Appeal.

The expression "a Court of Small Causes" in the last clause of s. 25 of the Code of Civil Procedure (Act XIV of 1882) means a Court properly and strictly so called, and does not include a Court invested with the jurisdiction of a Court of Small Causes.

Mengal Sen v. *Rup Chand* (1) dissented from.

[R., 31 B. 314=9 Bom. L.R. 327 (330); 31 C. 1057 (1061); 17 Ind. Cas. 425=23 M.L. J. 373=(1912) M.W.N. 1086; 63 P.R. 1903=154 P.L.R. 1903.]

APPLICATION under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiffs filed a suit to recover Rs. 49-15-11 as their share, for the years 1890-91, of the profits of a khoti village from the defendant, who was the managing khot.

The suit was originally filed in the Court of the First Class Subordinate Judge at Ratnagiri, who was invested with the jurisdiction of a Judge of a Court of Small Causes under s 28 of the Bombay Civil Courts Act (XIV of 1869).

The suit was afterwards transferred to the Court of the Assistant Judge by the District Judge under s 25 of the Civil Procedure Code (Act XIV of 1882).

The Assistant Judge passed a decree for the plaintiff.

On appeal the District Judge reversed the decree and rejected the plaintiff's claim.

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* Application No. 72 of 1898.

(1) 13 A. 324.

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[383] Thereupon the plaintiffs applied to the High Court, under its revisional jurisdiction, to set aside the District Judge's decision, contending that the suit was cognizable by a Court of Small Causes and that it was filed in the Court of a Subordinate Judge invested with Small Cause Court powers, and that although it was transferred to the Court of the Assistant Judge, such transference did not alter its character, and the Court to which it was so transferred should be regarded as a Court of Small Causes, and from the decree of such a Court no appeal lay to the District Judge.

A rule *nisi* was granted calling upon the defendant to show cause why the District Judge's decree should not be set aside as *ultra vires*.

Mahadev V. Bhat, in support of the rule.—The decree of the Assistant Judge was final, and no appeal lay to the District Judge. He had, therefore, no jurisdiction to reverse the decree in appeal —*Mangal Sen* v. *Rup Chand*.(1)

JUDGMENT.

PARSONS, J.—The contention on behalf of the applicant (original plaintiff) is that there was no appeal from the decree passed by the Assistant Judge, since his Court trying this suit must be deemed to have been a Court of Small Causes. There is no appearance on behalf of the defendant.

The facts are these:—The suit, which is said by the applicant to have been (and for present purposes we assume that it was), of a nature cognizable by a Small Cause Court, was filed in the Court of the Subordinate Judge, First Class, who was invested with the jurisdiction of a Judge of a Court of Small Causes up to Rs. 500 under s. 28 of the Bombay Civil Courts Act, 1869. The District Judge, under s. 25 of the Code of Civil Procedure, transferred the suit to the Court of the Assistant Judge, and the latter tried the suit and passed a decree in favour of the plaintiff. The defendant appealed to the District Court and obtained a reversal of that decree.

The argument that no appeal lay from the decree of the Assistant Judge is based on the last clause of s. 25 of the Civil Procedure Code: "The Court trying any suit withdrawn **[384]** under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes." The answer depends upon whether a Court invested with the jurisdiction of a Court of Small Causes is a Court of Small Causes within the meaning of that section. In our opinion, it is not. A Court of Small Causes is defined in the Provincial Small Cause Courts Act, 1887, to mean a Court of Small Causes constituted under that Act, but the Court of the Subordinate Judge is not such a Court. The Act, moreover, throughout draws a marked distinction between a Court of Small Causes and a Court invested with the jurisdiction of a Court of Small Causes which is totally opposed to the idea that they were intended to be one and the same, and both come under the definition of Court of Small Causes (see for instance s. 32 and s. 35). There is no definition in the Civil Procedure Code of Courts of Small Causes, but s. 5 mentions "Courts of Small Causes constituted under Act XI of 1865," and also "all other Courts exercising the jurisdiction of a Court of Small Causes." If the expression "Courts of Small Causes" were intended, whenever it was used in the Code to include both, there was no necessity for this separate mention of the two classes of Courts. We construe the expression Courts of Small Causes in s. 25

(1) 13 A. 324.

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to mean Courts properly and strictly so called, and not to include Courts only invested with the jurisdiction of Courts of Small Causes. This point does not seem to have attracted the attention of the learned Judges who decided the reference in the case of *Mangal Sen* v. *Rup Chand*(1). As long ago, however, as 1883 it was ruled by this Court that "the Courts of Subordinate Judges invested with the jurisdiction of a Judge of a Small Cause Court under s. 28 of Act XIV of 1869, do not thereby become 'Courts of Small Causes constituted under Act XI of 1865.' They merely exercise a similar jurisdiction" : see *Bhagvan* v. *Balu*(2). We discharge the rule.

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23 B. 385.

[385] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

LAKSHMAN (*Original Plaintiff*), *Appellant* v. GOPAL AND OTHERS (*Original Defendants*), *Respondents.** [18th August, 1898.]

Partition—Co-sharer—Mortgage by co-sharer of undivided share—Partition suit subsequently brought by other co sharer to which mortgagee not a party—Mortgaged property allotted to a sharer other than mortgagor—Rights of such co-sharer—Partition re-opened—Fraud of mortgagor and mortgogee.

Four brothers, *viz.*, Damodar, Lakshman, Balvant and Parashram, were joint owners of certain land. For purposes of convenience each was in possession of a certain portion, but there was no formal partition. The particular land in question in this suit (Pot Nos. 1 and 2 of Survey No. 174) was a part of the land in possession of Balvant. In 1867, without the knowledge of his brothers, Balvant mortgaged these plots of land to the first defendant for Rs. 2,800. In 1886 Damodar sued for partition of the whole property, and in 1891 Lakshman brought a similar suit. By the decrees in these suits, Pot No. 1 was allotted to Damodar and Pot No. 2 was awarded to Lakshman. The mortgagee was not a party to either suit, the plaintiffs in these suits (as found by the High Court) having had no notice of the mortgage. Damodar and Lakshman, on attempting to get possession of the lands allotted to them respectively by the partition decrees, were obstructed by the mortgagee, and now brought these suits against him and the heirs of Balvant (defendants Nos. 2—9), claiming possession of the lands allotted to them free of the mortgage-debt, or that the partition should be re-opened, and that unencumbered land should be allotted to them and the mortgaged land given to Balvant's branch of the family (defendants Nos. 2—9).

Held, that the partition should be re-opened and the mortgaged land assigned to the defendants Nos. 2—9.

Where a co-sharer of joint property has mortgaged his share without the knowledge of his co-sharers, and there has subsequently been a partition suit to which, through the fraud of the mortgagor and the mortgagee, the latter has not been made a party, he (the mortgagee) will only be allowed to proceed for the recovery of his mortgage-debt against that portion of the property which has been allotted to his mortgagor.

Hem Chunder v. *Thako Moni Debi* (3) approved.

[Appl., 34 M. 175=6 Ind. Cas. 991=20 M.L.J. 394=8 M.L.T. 133 ; R., 33 M. 429 (435)=5 Ind. Cas. 92=20 M.L.J. 330=7 M.L.T. 143 ; 2 L.B.R. 167 ; 1 S.L.R. 187.]

CONSOLIDATED second appeals from the decision of Rao Bahadur N. G. Phadake, Joint First Class Subordinate Judge, A.P., at Poona.

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* Second Appeals Nos. 111 and 112 of 1897.

(1) 13 A. 324. (2) 8 B. 230. (3) 20 C. 533.

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[386] The plaintiffs in these two suits sued to recover possession of certain lands (Pot Nos. 1 and 2 of Survey No. 174) under the following circumstances :—

These lands were situated in the village of Govitri, the whole of which was the joint family property of four brothers, *viz.*, Damodar, Lakshman, Balvant and Parashram. By arrangement among themselves each had a portion of the property in his possession and management, but there had never been any formal partition. The lands in question (Pot Nos. 1 and 2) were a part of the land in the possession of Balvant.

In 1867 Balvant, without the knowledge of the plaintiff, mortgaged Pot Nos. 1 and 2, together with other land, to Gopal Vasudev Barve (defendant No. 1) for Rs. 2,800 with possession.

In 1886 Damodar brought a partition suit to recover his share of the whole village, and obtained a decree in 1887, by which, with other land, Pot No. 1 of Survey No. 174 was awarded as his share. To this suit the mortgagee (defendant No. 1) was not made a party, and the High Court found that at the date of suit the plaintiff had no notice of the mortgage.

In 1891 Lakshman brought a similar partition suit for his share and obtained a decree, which awarded him (*inter alia*) Pot No. 2 of Survey No. 174. The first defendant (the mortgagee) was not a party to this suit either, the plaintiff (as found by the High Court) having then no notice of the mortgage.

In execution of their respective decrees, Damodar and Lakshman endeavoured to obtain possession of Pot Nos. 1 and 2 of Survey No. 174, and being obstructed by defendant No. 1 (mortgagee) they applied under s. 328 of the Civil Procedure Code (Act XIV of 1882) to have the obstruction removed ; but their applications were refused under s. 332.

Lakshman thereupon now sued to recover Pot No. 1 and Damodar sued to recover Pot No. 2. In both suits the first defendant was the mortgagee, the other defendants (Nos. 2 to 9) were the heirs of the mortgagor Balvant. In each suit the plaintiff prayed as follows :—

(*a*) for possession of the land sued for free from any mortgage lien, or

[387] (*b*) that the land sued for should be given over to the defendants Nos. 2 to 9 (the sons and heirs of Balvant) and in their stead other unencumbered lands should be given to the plaintiff out of the lands that had been allotted to the share of Balvant in the partition suits, or

(*c*) that the plaintiff should be allowed to pay off the mortgage-debt in proportion to the value of the land claimed by him, and that the sum so paid should be made a charge on the lands allotted to Balvant's branch of the family.

The Court of first instance dismissed both suits, holding that neither plaintiff could recover the land he sued for without paying off the whole of the mortgage-debt due to defendant No. 1 (the mortgagee).

This decision was confirmed, on appeal, by the First Class Subordinate Judge, A. P., at Poona.

Thereupon the plaintiffs preferred second appeals to the High Court. The appeals were consolidated and heard together.

M. B. Chaubal (with him *P. P. Khare*), for appellants (plaintiffs) :— The lands in dispute were joint family property. They were mortgaged by Balvant without plaintiffs' knowledge or consent. It is not pretended that the mortgage was effected for family purposes. That being so, the mortgage is not binding on the plaintiffs. A person taking a mortgage of joint property from one co-sharer takes it subject to the rights of the other

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co-sharers—*Byjnath Lall* v. *Ramoodeen* (1). The lands in question have now been allotted to the plaintiffs by the partition decrees, and the plaintiffs are entitled to recover them free from the mortgage-debt. The lower Court finds that the mortgagor as well as mortgagee fraudulently kept the plaintiffs in ignorance of the mortgage. This accounts for the fact that the mortgagee was not made a party to the partition suits. If the plaintiffs had been aware of the mortgage, they would have made the mortgagee a party to the suit. And in that case the Court, in decreeing partition, would have divided the family property among the co-parceners so as to allot the mortgaged lands to the share of the mortgagor: see *Pandurang* v. *Bhaskar* (2); *Udaram* v. *Ranu* (3). [388] What the Court would have done then, ought to be done now, especially as it is found, as a fact, that both mortgagor and mortgagee fraudulently concealed the mortgage. The plaintiffs are, therefore, entitled to ask that the partition should be reopened. The mortgaged property should be assigned to the heirs of Balvant who mortgaged it, and in its place an unencumbered portion of the property of equal value should be given to plaintiffs—*Hem Chunder* v. *Thako Moni Debi* (4). The mortgagee can only enforce his lien against the share of his mortgagors.

N. V. Gokhale, for respondents (defendants).—The plaintiffs omitted to make the mortgagee (defendant No. 1) a party to their partition suits. They had full notice of the mortgage, for it was duly registered, and the mortgagee was in possession. That was sufficient notice to the plaintiffs and ought to have put them on inquiry. But they made no inquiry, and ignored the mortgage altogether. The partition effected by these suits was thus effected behind the back of the mortgagee (defendant No. 1). Such a partition cannot affect his rights. He cannot be treated as a trespasser, and must be paid his mortgage money before the plaintiffs can recover possession of the mortgaged lands. There is no evidence to show that the mortgagee has acted fraudulently or done any thing to keep the plaintiffs in ignorance of the mortgage. The lower Court's finding on this point rests on mere surmise. The partition ought not, therefore, to be re-opened. The ruling in *Vinayak* v. *Ramkrishna* (5) applies to the present case.

JUDGMENT.

PARSONS, J.—In order to see what relief the parties to these consolidated appeals are entitled to, it will be necessary to set out the facts briefly.

The plaintiffs and the defendants Nos. 2 to 9 are the descendants of one common ancestor Dhondo. In several suits they obtained decrees for the partition of their ancestral estate, and in execution of those decrees the lands were divided off and the share of each separately assigned to him. Thus the plaintiff Lakshman got his $\frac{1}{4}$ share, the plaintiff Damodar got his $\frac{1}{4}$ share, the defendants Nos. 2 to 9 as the sons of Balvant got their $\frac{1}{4}$ share, and the other member Parashram got his $\frac{1}{4}$ share.

[389] Among the lands assigned to the shares of the plaintiffs were Pot Nos. 1 and 2 of Survey No. 174. In taking possession of these fields, the plaintiffs were obstructed by the first defendant, who claimed to be in possession and to have the right of remaining in possession under a mortgage passed to him by Balvant. Orders having been passed adverse to the

(1) 1 I. A. 106. (2) 11 B. H. C. R. 72. (3) 11 B. H. C. R. 76.
(4) 20 C. 533. (5) P. J. (1889), p. 180.

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plaintiffs under s. 332, they have now brought the present suits claiming either that they should be held entitled absolutely to the possession of the lands unencumbered by any mortgage lien, or that these lands should be assigned to the share of the defendants Nos. 2 to 9 and other unencumbered lands given to them out of the lands that have been assigned to the defendants Nos. 2 to 9.

The lower Courts have dismissed the plaintiffs' suits, holding that they cannot obtain possession of the lands, or any relief, unless they redeem the whole mortgage of the first defendant (which is for a large sum of money and covers not only the two pot numbers, the subject of these suits, but other lands also). The plaintiffs have appealed against this decree, and the first defendant alone has appeared before us to support it.

It is quite clear that the order is wrong. Balvant had power to mortgage his own share only in the ancestral estate, that is, one-fourth. According to the findings of the lower Courts, Balvant did no more than mortgage that share, and the shares of the plaintiffs were not at all affected by the mortgage, nor were the plaintiffs themselves in any way liable for the debt. It is impossible, therefore, to uphold the order that they are bound (before they can get possession of their own share of the lands) to pay a debt for which the sons of Balvant and their lands alone are liable. A proper provision would, of course, have been made for this mortgage charge, had the first defendant been a party to the partition suits, but he was not, and the whole of this litigation is due to this omission. Although the Subordinate Judge, A. P., is of opinion that the plaintiffs were not to blame for the omission, yet he has made them suffer for it by applying the case of *Vinayak* v. *Ramkrishna* (1). I am of opinion that the principle of that case can only be applied where the partitioners combine together to ignore the existence of a mortgagee, and proceed to [390] partition behind his back fraudulently with the object of defeating his just claim. I do not think it can apply to the present case where the Judge finds that the defendants Nos. 2 to 9 were guilty of fraud in deliberately withholding all information about the mortgage through spite towards the plaintiffs. He adds that the first defendant appears to have withheld himself behind the other defendants. If such a state of things, *viz*, fraud and collusion between the mortgagee and his mortgagors, were proved, the proper rule to apply would be that laid down in *Hem Chunder* v. *Thako Moni Debi* (2). I cannot, however, say that this is proved. All that can be said is that the plaintiffs are perfectly innocent and brought their suits without any notice of the mortgage. In that case I think that the mortgagee, who has not been made a party to the partition suit, has still the right to the relief that he would have had, if and when he had been made a party to the suit, namely, to ask the Court to so divide the property as to assign, as far as possible, the property mortgaged to the share of his mortgagor. I do not think that he can possibly have any greater right. In a somewhat analogous state of things, a right of redemption is always preserved to a puisne mortgagee not made a party to a foreclosure suit.

For these reasons, and also on the general ground of the equitable relief that the plaintiffs are entitled to against the fraud of the defendants Nos. 2 to 9, we have come to the conclusion that they are entitled to demand that the defendants Nos. 2 to 9 shall take the property which

(1) P. J. (1889), p. 180.

(2) 20 C. 533.

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they have burdened with a mortgage, and give them unencumbered property of a similar value, and that the first defendant cannot resist this demand or ask for any other relief. If, as may turn out to be the case, the mortgaged lands cannot be fully exchanged for other lands, he must bear the loss of the security of these lands, falling back upon the defendants Nos. 2 to 9 for his remedy, taking, as he did in mortgage, the share only of Balvant in the lands in suit.

We, therefore, vary the decree of the lower appellate Court and order that the partition that has been effected between the plaintiffs and the defendants Nos. 2 to 9 be re-opened, and that, as far as possible, Pot Nos. 1 and 2 of Survey No. 174 be assigned to be [391] share of defendants Nos. 2 to 9, and that in place thereof unencumbered land of a similar value to each pot number be given from their lands to the plaintiffs respectively. The plaintiffs must bear the costs of the first defendant and they can recover them and their own costs from the defendants Nos. 2 to 9.

RANADE, J.—Both the lower Courts have held that the appellant (original plaintiff) was entitled to none of the reliefs claimed by him in this suit and that his proper remedy was to bring a regular redemption suit against respondent No. 1 for an account of the mortgage of the land in dispute.

This land, together with other property, was mortgaged to respondent No. 1 by the ancestor of the other respondents Nos. 2 to 9, who were joint owners with appellant of the inam village of Govitri, where the land is situated. The facts are fully and correctly stated in the judgments of both the lower Courts; and it appears therefrom that the appellant has a 4-annas' share in the village, the remaining 12 annas were held in common by other sharers including appellant in appeal No. 111 of 1898. and the respondents Nos. 2—9. The present appellant sued the other sharers for partition, in which suit the mortgagee (respondent No. 1) was not made a party. The appellant obtained a decree in 1887 by which Pot No. 1 of the land in dispute was allotted to his share. Later on, some of the other sharers also brought a partition suit in 1891, and the decree therein settled their shares in the village, and, among others, Lakshman, the appellant in appeal No. 111 of 1898, was allotted Pot No. 2 of this same land. When appellant in this appeal and Damodar, the appellant in appeal No. 112 of 1898, went to take possession, they were resisted by the mortgagee (respondent No. 1), and his obstruction being upheld, these two appellants brought two separate suits claiming alternative reliefs (1) actual possession of the two lands in dispute by the removal of the mortgagee's obstruction; or (2) a re-adjustment of the partition already made by an exchange for the lands in dispute of others of equal value out of those allotted to respondents Nos. 2—9's share. A third relief was also claimed for permission to pay off respondent No. 1's mortgage-debt in proportion to the value of the lands in dispute, with a declaration [392] that the sum so paid should be made a charge on the shares allotted to respondents Nos. 2—9.

In so far as the first and third of these prayers are concerned, there can be no doubt that they were clearly inadmissible. A mortgagee of one of the co-sharers of joint property, who is not made a party to the partition suit brought by the sharers among themselves, cannot be ousted from his possession of any portion of the mortgage security unless his debt is fully

paid off—*Vinayak* v. *Ramkrishna* (1). No arrangement between the sharers which ignores his mortgage can adversely affect his rights. In respect of these two reliefs, the appellant's only remedy was, as held by the Courts below, to bring a regular redemption suit, and to pay off the balance of the mortgage-debt.

The second prayer of the appellant-plaintiff, however, stands on a different footing, and the equities of the parties in regard to it do not appear to have been sufficiently considered by the Courts below. It must be noted in this connection that the village was admittedly held in common by all the sharers. The mortgage bonds recite this state of things in clear terms. Some of the sharers for reasons of convenience held possession of portions of the village lands, but this kind of possession by the ancestor of respondents Nos. 2—9 of the land in dispute conferred no rights on his mortgagee which were not controlled by the equities represented by the common ownership of all the sharers. As held by their Lordships of the Privy Council in *Byjnath Lall* v. *Ramoodeen Chowdry* (2), where the owner of an undivided share in a joint estate mortgages his undivided share, he cannot by so doing affect the rights of the other sharers, and the mortgagee takes his security subject to the rights of those sharers to enforce a partition. In this case, where the mortgagor was allotted other lands for his share in a partition made by the Revenue authorities, the mortgagee was allowed to enforce his security on the lands so allotted, even though they did not form part of the original security. For the purpose of such re-adjustment, a partition once made is liable to be re-opened. The Courts below have distinguished this case on the ground that there was no possession given, while in the present case the mortgagee is in possession. This **[393]** circumstance, however, does not appear to make any essential difference in the equitable rights of the parties, where, as in the present case, the estate was admittedly undivided and held in common. On the authority of the principal case noted above, the High Court of Calcutta held in *Sharat Chunder* v. *Hurgobindo* (3), that one co-sharer in a joint estate connot deal with his share so as to affect the rights of the other co-sharers, and that the assignee of such co-sharer takes subject to those rights. In a later case decided by the same Court—*Hem Chunder* v. *Thako Moni Debi* (4)—a co-sharer had mortgaged his share in undivided property, and in a subsequent partition suit to which the mortgagee was not made a party, the mortgaged property was allotted to another co-sharer, and it was held that the mortgagee must enforce his debt against the property allotted to the share of his mortgagor. The mode in which this re-adjustment can be made is clearly laid down in *Ooma Dutt* v. *Hunooman* (5). These decisions seem clear on the point in dispute in the present appeal.

It is true that the rulings on this side of India about the necessity of joining mortgagees of co-sharers as parties to partition suits are stricter than appears to be the practice in Bengal—*Sadu* v. *Ram* (6). This circumstance, however, in no way affects the equitable principles which must govern cases where a partition is effected without making the mortgagee-creditor of a co-sharer a party to the partition suit. Even in the case of an auction-purchaser of the interest of a co-sharer, it was held in *Mahabalaya* v. *Timaya* (7) that he can take no more than the interest of the co-parcener as a member of a united family, and the manner in which the

(1) P.J. (1889), p. 180. (2) 1 I.A. 106=21 W.R. 233. (3) 4 C. 510.
(4) 20 C. 533. (5) 22 W.R. 453. (6) 16 B. 608.
(7) 12 B. H.C.R. A.C.J. 138.

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equitable adjustment and marshalling has to be made so as to give effect, as far as may be possible, to the rights of all parties, is laid down in *Pandurang* v. *Bhaskar* (1). These equitable principles, which govern the rights of purchasers, equally govern the case of mortgagees—*Vinayak* v. *Ramkrishna* (2). The circumstances of the case of *Sidasavant* v. *Balsavant* (3) were [394] rather peculiar, but it is clear from the judgment recorded in that case that, as against the mortgagor-co sharers who had redeemed their share, it was open to the plaintiffs in the partition suit to enforce their remedy by execution, even though they had failed to execute their decree against the mortgagee in possession.

On the whole, it appears to me that the appellant has a right to require the respondents Nos 2—9 to take back the encumbered lands as part of the lands allotted to their shares, and in exchange make over to appellant land of equal value out of their share to make up his full share. This re-adjustment becomes more equitable in the present case, because, as held by the lower appellate Court, there is good reason to suspect that the mortgagee-respondent held back his claim fraudulently, and in collusion with the other respondents.

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APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice and Mr. Justice Fulton.

MANAGER HANMANT SANTAYA PRABHU (*Original Defendant*), *Appellant v.* SUBBABHAT (*Original Plaintiff*), *Respondent.**
[18th August, 1898.]

Civil Procedure Code (Act XIV of 1882), ss. 244, 258—Agreement not to execute decree—Execution—Breach of contract—Suit to recover damages.

The provisions of s. 244 of the Civil Procedure Code (Act XIV of 1882) are no bar to a suit to recover damages for breach of a contract not to execute a decree.

APPEAL from a remand order passed by H. L. Hervey, District Judge of Kanara, against the decision of Rao Saheb T. V. Kalsulkar, Subordinate Judge of Honavar.

The plaintiff alleged that in 1889 the defendant had obtained a decree against him, and on the 26th June, 1891, agreed to accept Rs. 65 from him in full satisfaction of it; that he accordingly paid this sum and got a receipt from the defendant, who undertook to certify the same to the Court and promised not to claim any further sum under his decree. The defendant, however, did not certify the payment and subsequently applied for execution [395] against the plaintiff, who was obliged to pay into Court the sum of Rs. 103-2-2.

The plaintiff, therefore, now sued to recover back this sum, together with certain costs incurred by him in resisting the plaintiff's application for execution.

The Subordinate Judge held that the suit was not maintainable in the form in which it was brought, and that the plaintiff's only remedy was to seek to recover the Rs. 65, alleged to have been paid by him to

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* Appeal No. 9 of 1898 from order.

(1) 11 B. H.C.R. 72. (2) P. J. (1889), p. 180. (3) P.J. (1893), p. 64.

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the defendant in 1891, with interest. He, therefore, without going into the merits of the case, rejected the claim.

On appeal by the plaintiff the Judge, having held that the form of the suit was not objectionable, reversed the decree and remanded the case for trial on the merits.

The defendant appealed against the said order of remand.

Dattatraya A. Idgunji, for the appellant (defendant):—The alleged payment of Rs. 65 cannot be taken to have satisfied the decree. The payment not having been certified as required by s. 258 of the Civil Procedure Code (Act XIV of 1882), the Court executing the decree could not take notice of it. All questions relating to the satisfaction of decrees are in the cognizance of the Court of execution. See s. 244 (*c*) of the Civil Procedure Code. By enforcing an uncertified adjustment of a decree, the provisions of that section would be nullified. The same result would follow if a suit for damages for breach of contract in such a case were allowed. The money actually paid may be recovered, but it cannot be recovered as money paid in satisfaction of the decree—*Gunamani Dasi* v. *Prankishori Dasi* (1); *Haji Abdul Rahiman* v. *Khoja Khaki Aruth* (2); *Ghanasham* v. *Kashiram* (3); *Mukund Harshet* v. *Haridas Khemji* (4); *Azizan* v. *Matuk Lal Sahu* (5).

Narayan G. Chandavarkar, for the respondent (plaintiff):—The provisions of s. 244 of the Civil Procedure Code are not a bar to the present suit. We seek to recover the money by way of damages—*Viraraghava Reddi* v. *Subbakka* (6); **[396]** *Sellammyyen* v. *Muthan* (7); *Ishan Chunder* v. *Indronarain* (8); *Hukum Chand Oswal* v. *Taharunnessa Bibi* (9).

Idgunji, in reply, cited *Gulwad* v. *Rahimtulla* (10) and *Davlata* v. *Ganesh* (11).

JUDGMENT.

FARRAN, C. J.—A question, which the executing Court can itself consider, must be considered by that Court, and another Court cannot determine it for such executing Court. This results directly from the provisions of s. 244. Whether an uncertified adjusted agreement not to execute a decree has been entered into or not, cannot, by reason of the provisions of s. 258, be considered by the Court executing the decree. The provisions of s. 244 do not, therefore, appear to me to be a bar to the present suit. The judgment of Turner, C. J., in *Viraraghava Reddi* v. *Subbakka* (6) is an authority for this view. There is now no other provision of the law which stands in the way of such a suit as this. That a suit for damages can be sustained, when after an uncertified adjustment a decree has been improperly executed, has been expressly decided in *Hukum Chand Oswal* v. *Taharunnessa Bibi* (9) and several other decisions which I am prepared to follow. In *Azizan* v. *Matuk Lal Sahu* (5), what the plaintiff sought to do was indirectly to compel the Court executing the decree to refrain from executing it by an injunction obtained in another Court. The case is distinguishable from the present, and the Calcutta High Court so regarded it, as will be seen from the conclusions in the judgment of Macpherson, J., at the bottom of p. 444. I would dismiss the appeal with costs.

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(1) 5 B L. R. 223. (2) 11 B. 6. (3) 16 B. 589.
(4) 17 B. 23. (5) 21 C. 437. (6) 5 M. 397 (400).
(7) 12 M. 61. (8) 9 C. 788. (9) 16 C. 504.
(10) 4 B. H. C.R.A.C.J. 7. (11) 4 B. 295.

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FULTON, J.—I entirely concur in the judgment delivered by the Chief Justice. I think the reasons why s. 244 of the Civil Procedure Code is no bar to a suit like the present, which is one to recover damages for breach of a contract not to execute a decree, are very clearly and correctly stated by Chief Justice Turner in *Viraraghava Reddi* v. *Subbakka* (1) as follows :—" The question relates not to the execution of the decree, but to a **[397]** contract which formed no subject of inquiry in the suit, and could not form the subject of inquiry in execution of decree." It is equally clear that s. 258, as now worded, is no bar to the Court's taking cognizance of such suit, for it is only the Court executing the decree which is precluded from recognizing the payment. A contract whereby a decree-holder engages not to execute a decree seems valid ; and I can see no reason why, if it has been broken, the injured party should not be entitled to sue for compensation in respect of any loss which he has suffered in consequence. I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

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23 B. 397.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

SUNDRABAI (*Original Defendant*), *Appellant v.* JAYAWANT (*Original Plaintiff*), *Respondent.** [23rd August, 1898.]

License—Easement—Indian Easements Act (V of 1882), ss. 4 and 52—Right of growing rice plants in another's land to be afterwards transplanted to his own.

A 'license' as defined by s. 52 of the Indian Easements Act (V of 1882) is not, as in the case of an 'easement,' connected with the ownership of any land, but creates only a personal right or obligation. License rights are not generally transferable, and the transferee is not bound to continue the license granted by the former owner, while easements once established follow the property.

The plaintiff claimed and proved a prescriptive right of using certain land belonging to the defendant's mortgagor for a part of every year for raising rice plants to be afterwards transplanted to his own land.

Held, that the right was clearly enjoyed by the plaintiff as owner of some land to which the young rice plants were transplanted, and that such a right, so attached to plaintiff's land, was not a license but an easement of the nature of *profits a prendre*.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum.

The plaintiff sued to establish his right to grow *malak* or young rice plants in a certain field, to be afterwards transplanted to his own land.

[398] Plaintiff alleged that this right had been enjoyed from time-immemorial ; that it had been acknowledged and confirmed to him in 1864 by a grant from one Bapu, the owner of the field in question, who had agreed to allow him in perpetuity the use of the land for the purpose of raising *malak* during a certain time of each year, and to pay him compensation in case of obstruction.

The cause of action was alleged to have accrued in 1894, when plaintiff was obstructed by defendant, who was in possession of the field as a mortgagee under Bapu.

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* Second Appeal No. 218 of 1898.

(1) 5 M. 397.

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Defendant denied the plaintiff's right and pleaded limitation.

The Subordinate Judge found that in the village of Halkarni, where the parties resided, only a small portion of land was capable of producing *malak* being low ground, and that the young plants raised thereon were afterwards transplanted to other land; that without the help of the low-lying land this other land would not yield any rice crops; and that it was this fact which originated the practice of raising rice shoots in another's land for subsequent transplantation elsewhere.

The Subordinate Judge further found that the plaintiff had acquired the right he claimed by prescription, he having been in enjoyment of it for more than fifty years prior to 1864, in which year it was admitted and confirmed by a grant executed by Bapu in plaintiff's favour. He, therefore, awarded the plaintiff's claim.

This decision was upheld, on appeal, by the District Judge, who held that the right was in the nature of an easement. His reasons were as follows:—

"It appears that for many years, certainly since 1814 A.D., plaintiff has enjoyed the right of sowing rice in the land. It is afterwards transplanted to his own land, which lies higher. If he could not raise the young shoots in the land in suit, he could not use his own land for rice crops. Viewed in this light, it may, I think, fairly be held that there are dominant and servient *prædia*."

Against this decision defendant preferred a second appeal to the High Court.

Branson (with him *V. G. Bhandarkar*) for the appellant (defendant).—The question is, what is the nature of the right **[399]** claimed by plaintiff? Is it a license, or is it an easement? We submit it is a license as defined by s. 52 of Act V of 1882. The terms of the grant relied on by plaintiff show that it is nothing more than a license. The grant confers on the plaintiff personally the use of the land in order to raise rice plants for a certain part of the year. The grantor, moreover, agrees to pay damages in case of obstruction. The grant does not refer to any land in respect of which the right is conceded. There is thus no dominant tenement to which the right in question attaches. And this is confirmed by the fact that the right is granted to the plaintiff *in perpetuity*. There would be no necessity to use this expression if the right were one attaching to the land. The right is thus a purely personal right, and is, therefore, a license and not an easement—*Ramakrishna* v. *Unni Check* (1).

Macpherson (with him *M. V. Bhat*) for respondent (plaintiff).—It is found by both the lower Courts that the plaintiff cannot use his lands for rice crops unless he first sows rice in the field in question and afterwards transplants the rice-shoots to his own lands. It is also found that plaintiff has used the field in dispute for this purpose from time immemorial. The right has been thus exercised for the benefit of the dominant tenement. That being so, it is not a license, but an easement, as defined by s. 4 of Act V of 1882. It is, strictly speaking, a right of the nature of *profits a prendre in alieno solo*. But such rights are included under easements as defined by the Act. No doubt the grant of 1864 does not specifically mention plaintiffs' lands as the lands for the beneficial enjoyment of which the right in question exists. But the grant does not create any new rights, but merely confirms the plaintiff in the exercise of those rights, which had been previously enjoyed for more than fifty years.

(1) 16 M. 280.

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And the grant should be construed with reference to the surrounding circumstances. These circumstances show that the right in question is an easement and not a mere license.

JUDGMENT.

RANADE, J.—The chief contention in this appeal relates to the question whether the right to raise *malak*, or young rice plants, in the land in dispute, to be afterwards transplanted elsewhere, was [400] of the nature of a license, as defined in s. 52 of the Easements Act, or was an easement proper, as held by both the lower Courts.

The Easements Act, s. 52, defines licenses as being rights to do, or continue to do, upon the land of another something which would otherwise be unlawful when such rights do not amount to an easement or an interest in property. This negative definition makes it necessary that, before a right can be shown to be a license only, it must be proved not to be an easement, or an interest in property. The essential requisites of an affirmative easement, as defined in s. 4, are that it is a right which the owner or occupier of any land, as such, has to do, and continue to do, something for the beneficial enjoyment of his land in, or upon, or in respect of, land not his own. A license is not, as in the case of easements, connected with the ownership of any property, but creates only a personal right or obligation. License rights are not generally transferable, and the transferee is not bound to continue the license granted by the former owner, while easements, once established, follow the property. An interest in immoveable property is correctly described in s. 58 of the Transfer of Property Act. It is thus clear that the decision of this appeal turns upon the inquiry whether the right claimed by the respondent-plaintiff was in the nature of an interest in property or an easement, or whether it was a mere license as defined in s. 52; in other words, whether it was a limited interest to enjoy the use of land, or an incident attached to the land in dispute for the benefit of respondent's land, or whether it was a permission given to respondent which was not binding on the appellant, who is admittedly a mortgagee of the person who owned the land, and gave the permission.

The right claimed and found proved by both the Courts below is stated in the plaint to be confined to a small plot, measuring 310 cubits in length and 25 cubits in breadth, belonging to one Bapu, the mortgagor of the appellant. In this plot the respondent claims that he has, by immemorial prescription, as also under a grant from Bapu, made in 1864, a right to raise *malak*, or young rice plants, to be transplanted elsewhere. The agreement of 1864 recites the user as having obtained from former times [401] and Bapu gave the right to respondent to use the land every year for raising *malak*, and, after it was removed, to cease to use the land. The grant is stated to be *nirantar*, and Bapu agrees to pay compensation in case of obstruction. It is this covenant about compensation, and the use of the word *nirantar* in the grant without further specification, and finally the absence of all mention of the land owned by respondent in which the transplantation was made,—it is these circumstances that are relied upon by appellant's counsel as reasons for his contention that the grant was a license, and not an easement or lease of the lands. The Courts below have, on the other hand, found that in this village of Halkarni, only a few lands are suited for the purpose of raising *malak*, and that the other lands can grow no rice unless it is transplanted from these

low-lying lands. The obligation of the owners of the low-lying lands to those who own the upper dry lands is not confined to the plot in dispute. The liability is general, and is imposed by custom, and attaches to the lands by reason of their respective situations (Ex. 58). It is in evidence that the respondent-plaintiff has lands of his own in the dry part of the village area (Exs. 36, 57, 72). Two witnesses admit that both the parties to this suit raise *malak* in some temple lands cultivated by them; and appellant's witness No. 73 admits that respondent has such a vahivat in this temple land. Witnesses Nos. 58, 69 state that this is a general practice in Chandgad mahal within which Halkarni is situated, and that even if the lands change hands, this right remains unaffected. It is quite clear that though the agreement does not mention respondent's land in express terms, the right is enjoyed by the respondent as owner of some lands to which the young rice plants are transplanted. All these facts brought out by the evidence prevent the right from being a merely personal license, and show that it is a part of the customary obligations of the owners of low lying areas to the owners of the uplands where the water-supply is deficient.

We must accept this finding of fact, and it is plain that such a right cannot properly be described as being only a license. The words of the agreement absolutely prevent such a construction being placed upon them. The right did not originate in a grant, but in immemorial prescription, confirmed by a grant. The **[402]** personal covenant was not intended to destroy the right, but to confirm it. This is no doubt an easement of the nature of *profits a prendre* appurtenant to land. This last class of beneficial enjoyment is not technically regarded as easements in English law, but the Indian Easements Act includes this under easements. Illustration (*d*) to s. 4 of the Act mentions the right to pasture cattle in another person's lands, or to take fish out of a tank, or timber out of the forest of another man as instances of easement, and the present right resembles these easements. In *Ramakrishna* v. *Unni Check* (1), there is an illustration of a right in the nature of a license, pure and simple. The judgment in that case refers to an English case—*Doe* v. *Wood* (2)—where the distinction between a license and the demise of an interest in land is clearly laid down. If the authority gave only a right to dig for tin or other metals, and remove the ore so dug out, it was of the nature of a license; but if the grant demised all the ores existing in any particular area, then it was a demise of interest in land. The right claimed here conferred on the respondent the use of the land for a certain part of the year for raising rice plants for the purpose of transplanting them to his own land. The respondent has exercised this right from time immemorial, *i.e.*, at least for 50 or 60 years before the agreement of 1864, and since then down to 1893-94 against the grantor Bapu and his sons. Such a right, so attached to his lands, and so enjoyed, cannot be regarded as a mere license not binding upon the original grantor's and his son's mortgagee, the appellant. It is not a personal license revokable at the grantor's pleasure. It is an easement, or more correctly a permanent lease of the land for a portion of the year for a specific purpose. We must, therefore, overrule this contention of the appellant, and rejecting the appeal confirm the decree with costs on appellant.

Decree confirmed.

(1) 16 M. 280.

(2) (1819) 2 B. and Ald. 724.

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23 B. 403.

23 B. 403.

[403] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BAI DIVALI (*Original Plaintiff*), *Applicant v.* HIRALAL AND ANOTHER (*Original Defendants*), *Opponents.** [23rd August, 1898.]

Lunatic—Guardian of the person of a lunatic not competent to sue in respect of the lunatic's estate—Civil Procedure Code (Act XIV of 1882), *s.* 440—*Guardian—Right to sue—Practice—Procedure.*

A guardian of the person only of a lunatic has no right to bring a suit in respect of the lunatic's estate. The manager of the lunatic's estate is the only person who can institute such a suit.

The word "guardian" in s. 440 of the Civil Procedure Code (Act XIV of 1882) as amended by Act VIII of 1890, when applied to a lunatic means the manager of his estate. Under this section a person other than the guardian of the estate can also sue with the leave of the Court.

[**Appl.**, 3 P.R. 1906=109 P.L.R. 1906=28 P.W.R. 1906; **Appr.**, 33 C. 967 (982)=4 C.L.J. 22=10 C.W.N. 650; **R.**, 35 B. 182=13 Bom. L.R. 92 (99)=9 **Ind. Cas.** 765; 37 B. 217=13 Bom. L.R. 1011; U.B.R. (1897—1901) 544 (551).]

APPLICATION under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

One Ichhalal Vrijbhukan died in 1891 possessed of ancestral property worth about six lakhs of rupees. He had three sons, Navnidlal, Hiralal, and Chotalal.

Navnidlal was adjudged a lunatic under Act XXXV of 1858. His wife Bai Divali was appointed guardian of his person, and his brother Hiralal was appointed manager of his estate, under ss. 9 and 10 of the Act.

In 1897 Bai Divali, as guardian of the lunatic, applied for leave to sue in *forma pauperis* for partition of the lunatic's share in the ancestral property.

This application was rejected by the First Class Subordinate Judge of Surat on the ground that Bai Divali had no right to sue, and that the only person, who could bring a suit in respect of the lunatic's property, was the manager of his estate and not the guardian of his person.

Against this order Bai Divali applied to the High Court under its extraordinary jurisdiction.

[404] *Govardhanram M. Tripathi*, for applicant.—The applicant is the guardian of the person of the lunatic on whose behalf the suit is to be instituted. The lower Court is wrong in holding that the applicant is not entitled to sue. The provisions of the Code of Civil Procedure relating to suits by minors are made applicable to suits by or on behalf of lunatics. The last clause of s. 440 of the Code provides that a person appointed a guardian of a minor can bring a suit on behalf of the minor. This clause is added by s. 53 of the Guardians and Wards Act VIII of 1890. In that Act the word "guardian" is defined to be a person having the care of the person of a minor or of his property, or of both his person and property. In other words, the word "guardian" means both a guardian of the person and a guardian of the property of a minor. That being so, a guardian of the person of a minor or a lunatic can institute a suit under s. 440 of the Code. Before this section was amended by Act VIII of 1890, any adult person, whether a guardian or not, could sue as next friend of

* Application No. 63 of 1898.

a minor. The applicant is the wife as well as guardian of the lunatic. She is, therefore, competent to sue. In the present case, if she were debarred from suing on behalf of the lunatic, his interest would not be safe in the hands of the defendants.

Macpherson (with *Chitnis*, *Motilal* and *Malvi*), for the opponents.—The applicant's husband was adjudged to be a lunatic under Act XXXV of 1858. The opponent was appointed a manager of the lunatic's estate under s. 9 of the Act. The whole estate of the lunatic is now vested in the manager so appointed. Under s. 14 of the Act the manager has the same power in the management of the estate as might have been exercised by the proprietor if he had not been a lunatic. He alone has the power to collect and pay all debts and liabilities due to or by the estate of the lunatic. He is, therefore, the only person who can bring a suit in respect of the lunatic's estate. And it is the invariable practice, both here and in England, for the committees of the estate of lunatics to institute suits or other proceedings on behalf of lunatics. Section 440 of the Code of Civil Procedure does not alter the existing law on the subject. The word "guardian" as used in the section, so far as it is applicable to a **[405]** lunatic, means the manager of the estate of a lunatic. Moreover, the applicant has no right to sue for a partition of the ancestral property while her husband is a lunatic—*Dayabhai* v. *Umed* (1).

JUDGMENT.

PARSONS, J.—The Subordinate Judge, First Class, rejected the petition of the applicant for permission to sue as a pauper on the ground that it was presented by an unauthorized person.

It was presented by the applicant (the wife of a lunatic) who had been appointed the guardian of the person of the lunatic under the Lunacy Act, XXXV of 1858, and it asked for a severance of the share of the lunatic by a partition of the joint family property. A different person had been appointed manager of the estate of the lunatic, and the Subordinate Judge was of opinion that the manager alone had the power to bring a suit in respect of the estate of the lunatic. We think that he is right.

The contention of the applicant is that she, having been appointed guardian of the person of the lunatic, comes within the definition of guardian in s. 440 of the Code of Civil Procedure, and that as such she has, if not the sole right, yet the right to bring any suit she pleases in respect of his property.

Whatever may be the meaning of the word "guardian" used in the clause added to s. 440 of the Code of Civil Procedure by the Guardians and Wards Act, 1890, when minors are concerned, we have no reason to suppose that the Legislature, when making the addition, intended in any way to alter or affect the existing law in respect of the persons who alone are entitled to bring suits on behalf of the estate of a lunatic. The provisions of that section have by s. 463 to be applied to lunatics *mutatis mutandis*, and we cannot construe the word "guardian" in s. 440 to mean a guardian of the person who is, by the Lunacy Act itself, s. 13, given only the care of the person and maintenance of the lunatic. We must take it to mean the manager of his estate, who alone has the right to bring a suit in respect of the estate of the lunatic as being the person in whom by s. 14 all the powers of management of that estate are vested, and who has to provide for the maintenance of the lunatic. It would lead to endless confusion

(1) P.J. (1896), p. 654.

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if, in cases where [406] there is both a guardian of the person and a manager of the estate of a lunatic, we were to rule that each had the power to sue. The Legislature has provided for this contingency where a next friend has to be appointed (see the addition to s. 443 made by the Act of 1890), but it has used the single word "guardian" in s. 440, thereby, in our opinion, indicating that irrespective of the name of the appointment, the guardian intended in it must have the power to bring a suit which he could only have in the case of a lunatic by virtue of his being appointed the manager of the estate,—in other words, that the person denominated guardian must mean the person who is himself competent to sue. A guardian of the person only of the lunatic has no such power. While, however, holding that the Subordinate Judge was right in deciding that the application was presented by an unauthorized person, we must rule that he was wrong in summarily rejecting the application. Under s. 440 a person other than the guardian is given the power to institute a suit with the leave of the Court. The Subordinate Judge should have followed the provisions of that section, and determined whether or not such leave should be given. We reverse his order for this reason and return the application for him to dispose of it according to law. We express no opinion on the new point raised before us as to the right of the lunatic to a separate share. We make costs costs in the cause.

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23 B. 406.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice and Mr. Justice Fulton.

HONAPA (*Original Plaintiff*), *Appellant v.* NARSAPA AND OTHERS (*Original Defendants Nos.* 1 *to* 4 *and* 7), *Respondents.**

[29th August, 1898.]

Fraud—Fraudulent conveyance—Conveyance by plaintiff to defeat creditors—Subsequent suit by plaintiff to recover possession.

When property has been conveyed by the owner to another person with the object of defrauding his (the owner's) creditors, and the fraud has been carried out, the owner cannot succeed in a suit to recover possession.

[407] SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum, reversing the decree of Rao Saheb V. V. Tilak, Subordinate Judge of Chikodi.

Suit to recover possession of land.

The following are the only facts in the case material to this report.

In 1868 the plaintiff's father Narsapa, in order to defraud his creditors, mortgaged the land in question to one Jivaji Tregal, and in 1872 the plaintiff's brother Rama (with the plaintiff's consent) for the same purpose sold it to the mortgagee Jivaji. Notwithstanding this mortgage and sale, however, Narsapa and his son (the plaintiff and Rama) remained in possession until 1880. In that year the son of Jivaji (the mortgagee and vendee) sold the land to Shidapa (defendant No. 7) and the latter obtained possession. It was disputed at the hearing whether Shidapa remained in possession, but the allegations relating to this point are not material to this report.

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* Second Appeal No. 28 of 1898.

In 1895 the plaintiff brought this suit to recover possession of the land. The Subordinate Judge passed a decree in his favour, holding that he was not estopped from asserting his claim by the mortgage and sale in 1868 and 1872.

On appeal, the Judge reversed the decree and dismissed the suit, holding that the mortgage and sale were fraudulent transactions and that the plaintiff having thus parted with his estate the Court would not assist him to recover it.

The plaintiff preferred a second appeal.

Mahadev V. Bhat, for the appellant (plaintiff).—The fraudulent sale in 1872 was really the fraud of the plaintiff's brother, and the plaintiff is not precluded from recovering—*Sreemutty Debia* v. *Bimola*(1); *Param Singh* v. *Lalji Mal* (2).

Balaji A. Bhagvat and *Dhondu P. Kirloskar*, for respondents (defendants).—The plaintiff cannot be allowed to benefit by his own fraud. The lower Courts have found that the mortgage and sale were in fraud of creditors. By that fraud the plaintiff **[408]** lost possession and cannot now recover it—*Chenvirappa* v. *Puttappa* (3); *Yaramati* v. *Chundru Papayya* (4); *Babaji* v. *Krishna* (5).

JUDGMENT.

FARRAN, C. J. (after discussing other questions raised in the case continued:—) But assuming that Shidapa did regain, and is now in possession of, the land and that he claims to retain such possession on the strength of the mortgage and sale by Narsapa and his son Rama to Jivaji Tregal and of the sale by the son of the latter to himself (Shidapa), the question which has been discussed by the District Judge and my learned colleague arises. I do not enter upon the distinction which my learned colleague draws between a fraudulent conveyance in England and a fraudulent conveyance in India, but take the facts as they are found. The Subordinate Judge finds that the sale to Jivaji was fictitious and that the defendant No. 7, Shidapa, acquired nothing by his purchase. The District Judge raised these issues:—

(3) Is the plaintiff estopped from asserting his title to the land?

(4) In view of the fact that the plaintiff confessedly sold fraudulently to Jivaji, from whose son the defendant No. 7 alleges that he purchased *bona fide* and for valuable consideration, what right has the plaintiff (*a*) against him; (*b*) against the defendants Nos. 1—4 in possession whom he wishes to eject?

The findings are:—On the 3rd issue that the plaintiff is estopped, and on the 4th issue that the plaintiff has no right remaining against defendants Nos. 1—4 or defendant No. 7.

The District Judge does not anywhere set out the exact nature of the transaction. The nearest approach to it is found in the following passage:—

"The original mortgage to Jivaji Tregal was admittedly a fraud and intended to operate against honest creditors. It admittedly did so. Assuming for the sake of the plaintiff's argument at this bar that there was a distinction between the mortgage to Jivaji Tregal and the subsequent sale to him, inasmuch as the mortgage did, while the sale did not in fact protect the property from the creditors, it remains plain to all that the origin of Tregal's connection with the property was in fraud, and that

(1) 21 W. R. 422. (2) 1 A. 403. (3) 11 B. 708.
(4) 20 M. 326. (5) 18 B. 372.

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[409] since the sale was admittedly pursuant to and in completion of the mortgage, the same taint affects it." Later on he writes: "The plaintiff having perpetrated a fraud and pursuant thereto parted with his estate, neither law nor equity will help him."

The above findings taken all together appear to me to represent the following state of facts:—By a mortgage and sale, which formed one single transaction, the plaintiff conveyed the property in question to Jivaji Tregal for the purpose of defeating the claims of honest-creditors, who were in consequence defrauded; that the said Jivaji Tregal or his son transferred the estate thus conveyed to Jivaji to the defendant Shidapa; that Shidapa under colour of the above deeds ousted the defendants Nos. 1—4 from the property, and that they (defendants Nos. 1 to 4) recovered possession through the Court of the Mamlatdar. The plaintiff now seeks to recover the estate which he conveyed away in order to defraud creditors from the defendants Nos. 1—4 and Shidapa.

The law applicable to that state of facts is, in my opinion, that laid down by Benson, J., in *Yaramati Krishnayya* v. *Chundru Papayya* (1), which I think that we should follow in preference to the Allahabad decision in *Param Singh* v. *Lalji Mal*(2). There is no question of estoppel in the matter. When both parties are equally conversant with the true state of the facts, it is absurd to refer to the doctrine of estoppel. The rule is *in pari delicto potior est conditio possidentis*. Equity will not lend her aid to enable a successfully fraudulent plaintiff to avoid the coils which his own fraud has woven around him. All the Courts, except the Allahabad Court in the above case, refer to the English authorities to guide them in this matter. I am of opinion that they rightly do so. The judgment in the Madras case, which I have referred to, gives, I think, succinctly the result of the English authorities. Therefore, I consider that we should follow it. The Calcutta decisions in *Goberdhan Singh* v. *Ritu Roy* (3) are to the same effect, though the learned Judges have not stated the law so elaborately as has been done in the Madras case to which I have referred. The decree is confirmed with costs.

[410] FULTON, J. (after dealing with other questions in the case continued:—) But as regards Shidapa the case is different. As this man claims under a title derived from Narsapa, he cannot dispute the fact of Narsapa's ownership. He says he is in possession, and if this is so, the question arises whether, as against the plaintiff, who alleges that the conveyance to Tregal was a sham transaction entered into to defeat creditors, he is entitled to retain possession. The District Judge, without determining whether Shidapa was a *bona fide* purchaser for value or whether the plaintiff's claim is barred by limitation, has held that the plaintiff alleging a fraud on creditors, which he has found to be successful, cannot maintain this suit to recover possession. To support this view he relies on the decision in *Chenvirappa* v. *Puttapa* (4), but though many of the remarks in that case are in favour of the important principle for which the learned District Judge so ably contends, the decision cannot be cited as an authority governing the present case, inasmuch as the point decided was simply that a party to a collusive decree is bound by it. Quite apart from the equitable considerations referred to by the learned Judge, that decision seems to depend really on s. 13 of the Civil Procedure Code. See *Varadarajulu* v. *Srinivasulu* (5). Here, however, the question is

(1) 20 M. 326.
(2) 1 A. 403.
(3) 23 C. 962 (966).
(4) 11 B. 709.
(5) 20 M. 333.

unaffected by any decree between the parties. The plaintiff in effect says: "The land is mine, because though I assented to a deed in favour of the defendants' vendor, and put him in possession, the transaction was a sham transaction and had no effect in conveying any property to him." Now, assuming the facts alleged to be proved, it is difficult to avoid the conclusion that the property still remains in the plaintiff. The mere execution of a conveyance and transfer of possession does not appear sufficient, in India, to effect a change of ownership, unless there be an intention to convey. The intention, I think, is essential to the conveyance. This is obvious in the case of a man who signs a conveyance in ignorance of its contents. The surrender of his property to another is an act of the will, and if there is no will, there is no surrender. *A fortiori*, if, the attention being directed to the nature of the deed, the will is exerted, not towards the surrender [411] of the property, but towards its retention, there can, I think, be no conveyance. Of course, if the opposite party, in whose favour the deed purports to be executed, is ignorant of the intention and takes the property believing that it has been conveyed to him, the law of estoppel will intervene for his protection. But if he, too, knows of the want of intention to convey and assents to the proceeding, no question of estoppel seems to arise. In such a case the decisions in *Tillakchand* v. *Jitamal*(1) and *Abdul Hye* v. *Mir Mohammed* (2) show that the property remains in the original owner. Referring to these cases, the Chief Justice in *Sadashiv Vaman* v. *Trimbak Divakar* (3) said (p. 170): "In India, where the *benami* system is common, it has been recognized by our Courts that there may be a sham conveyance, which, though registered and delivered to the grantee, not being intended to pass the property, but merely to be used as a blind to deceive creditors or others, conveys no estate to the nominal grantee." In such a case possession is given not under the deed, the execution of which has no bearing on the real transaction between the parties, but under the private arrangement.

The question, then, arises whether, when the owner of the property seeks to recover it, the Court has any discretion to refuse him its aid. Doubtless the private arrangement, being *ex hypothesi* in fraud of creditors, is a void agreement, and if it is necessary for the plaintiff to rely upon it to support his claim, his case must break down. But is it necessary? The general rule of law, I believe, is that a man is entitled to possession of his own property unless the defendant can show some right for retaining it. It may, therefore, be argued that the Court has no discretion in the matter, and it seems necessary to consider the point.

In *Rangammal* v. *Venkatachari* (4) and *Yaramati Krishnayya* v. *Chundru Papayya* (5), the Madras High Court refused a declaration of invalidity in respect of certain collusive deeds; but as those were suits under s. 39 or s. 42 of the Specific Relief Act, in which a discretion is reserved, they are not exactly in point. They leave open the question whether, when a claim [412] is made in a form which would not have come within the cognizance of Courts of Equity in England, there is the same latitude. In England probably the plaintiff could not obtain relief without first setting the deeds aside (see *Sadashiv Vaman* v. *Trimbak Divakar* (3)), but here this preliminary step appears unnecessary. See *Nagathal* v. *Ponnusami* (6) and *Sham Lall Mitra* v. *Amarendro Nath Bose* (7) in which their Lordships said (p. 466): "Here,

(1) 10 B. H. C. R. 210. (2) 10 C. 616. (3) 23 B. 146.
(4) 18 M. 378=20 M. 323. (5) 20 M. 326. (6) 13 M. 44.
(7) 23 C. 460.

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if the plaintiff's allegations are substantiated, the deeds in question were never intended to be operative, and, therefore, would not be operative, no matter whether they are set aside or not."

On the simple question whether, notwithstanding the fraudulent execution of a sham conveyance, the owner is entitled to recover his property, the cases of *Phool Bibee* v. *Goor Surun Doss* (1), *Bykunt Nath Sen* v. *Goboollah Sikdar* (2) and *Param Sing* v. *Lalji Mal* (3) are explicit in his favour. But the last of these three cases, in which a decree had to be set aside, is inconsistent with the decision of this Court in *Chenvirappa* v. *Puttappa* (4). The cases of *Mahadaji Gopal* v. *Vithal Ballal* (5) and *Dharma Sakharam* v. *Nago Badgu* (6), which at first sight seem authorities in the plaintiff's favour, have been explained in *Chenvirappa* v. *Puttappa* and *Babaji* v. *Krishna* (7), and owing to special circumstances depended on an estoppel preventing the defendants, who were mortgagees, "from setting up the fictitious form of the transaction as fraudulently intended to shield the property from the claims of creditors." In *Sreemuty Debia* v. *Bimola Soonduree* (8) and *Babaji* v. *Krishna*, the defendants in possession were allowed to prove the unreality of the deeds relied on by the plaintiffs. In *Sham Lall Mitra* v. *Amarendro Nath Bose* (9) where the fraud had not been carried into effect, the plaintiff was allowed to get relief notwithstanding his execution of a collusive deed. But in *Goberdhan Singh* v. *Ritu Roy* (10) **[413]** where the fraud was complete, the claim of a plaintiff seeking to recover possession from his so-called benamidar was rejected.

This last decision should, I think, be followed. I know of no technical rule compelling the Court to pass a decree for possession, and the mere fact that in this country the owner is not obliged to sue to get the deed set aside as he would probably have to do in England, does not seem any ground for coming to a result different from that at which on similar facts Courts in England would arrive in exercise of their equitable jurisdiction. The distinction in the form of the suit is merely nominal. If relief is granted, the fraudulent object, namely, the preservation of the property by the owner, is achieved through the action of the Court. And, whatever may be the form of the suit, whether cancellation of the deed or for recovery of possession, the object is one for the accomplishment of which no Court ought, I think, to render any assistance.

Where a defendant in possession proves that he is the real owner and that the deed under which the plaintiff is claiming is fraudulent and collusive, he is left in possession, because the plaintiff has no just claim to the property. He owes his safety, not to the Court's action, but to the fact that he is in possession, and the plaintiff cannot establish a right to turn him out. But, if we look to the substance rather than the form, similar reasoning seems to apply when the original owner, after a successful fraud, seeks to recover possession from the benamidar. In justice he has no right to the land which ought to have been sold for the benefit of his creditors, and the Court, therefore, will not give him what he is not equitably entitled to. In the one case, as in the other, the Court considers whether the plaintiff can make out, not merely a technically correct title, but also a substantially just one. Where the fraud is not completed, it

(1) 18 W. R. 485.
(2) 24 W. R. 391.
(3) 1 A. 403.
(4) 11 B. 708.
(5) 7 B. 78.
(6) P. J. (1890), p. 275.
(7) 18 B. 372.
(8) 21 W.R. 422.
(9) 23 C. 460.
(10) 23 C. 962.

may well be contended that, as the collusive transaction has not really frustrated justice, the original owner still retains a good claim to the property.

For the foregoing reasons I would confirm the decree with costs.

Decree confirmed.

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[414] SMALL CAUSE COURT REFERENCE.

Before Mr. Justice Strachey and Mr. Justice Fulton.

SOONDERLAL AND ANOTHER (*Plaintiffs*) *v.* GOORPRASAD AND ANOTHER, (*Defendants*) * AND GOORPRASAD AND ANOTHER, (*Plaintiffs*) *v.* SOONDERLAL AND ANOTHER, (*Defendants*). † [23rd September, 1898.]

Decree—Ex-parte *decree*—*Appearance of party*—*Appearance by pleader or recognized agent*—*Appearance only for purpose of applying for adjournment*—*Civil Procedure Code* (*Act XIV of* 1882), *ss.* 36, 37, 100, 102, 103—*Presidency Small Cause Courts Act* (*XV of* 1882), *s.* 38—*Dismissal for default*—*Remedy of plaintiff*—*Practice*—*Procedure.*

A suit and cross-suit between the same parties were on the board for hearing on the 23rd April, 1898. On that day A, the counsel who was instructed for the defendants in the first suit and for the plaintiffs in the second, was unable to attend, and B, another counsel, held his brief and appeared on his behalf and applied for two months' adjournment of both suits. The munim of his clients was then in Court. B was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused and B said he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed for non-appearance. On the 7th May following, an application was made for a re-hearing of both suits. The Court, regarding the decrees as *ex-parte* decrees, granted a rule for a new trial, which was made absolute. On appeal to the full Court the matter was referred to the High Court.

Held, that under the circumstances the suits were to be considered as having been disposed of under ss. 100 and 102 of the Civil Procedure Code (Act XIV of 1882) respectively, and that whether or not they, or either of them, fell within the category of contested suits as defined by s. 38 of the Presidency Small Cause Courts Act (XV of 1882), the remedy under s. 103 of the Civil Procedure Code was opened to the plaintiffs in the cross-suit.

Where, on the day fixed for hearing, a party is present in person merely for the purpose of applying for an adjournment which is refused, he must be taken to have "appeared" within the meaning of Ch. VII of the Civil Procedure Code. The party has appeared in person. The purpose for which he appeared, or the action which he took on appearance, are immaterial.

But where the party is absent and an application for adjournment is made on his behalf by a pleader who has no other instructions, and whose functions are at an end when the adjournment is refused, in that case the party has not appeared within the meaning of the chapter.

[415] Where the pleader who applies for an adjournment is accompanied by a recognized agent of the party, but the latter neither makes any application, nor does any act, the question is whether he *intends* to appear and in fact does appear for the party in the exercise of his powers under s. 36 of the Civil Procedure Code. That section is merely permissive and enabling. If the recognized agent although able to do so does not think proper to conduct the case on behalf of his principal, his mere presence in Court is not an "appearance" in the suit. An appearance may be made by a pleader or a recognized agent: but the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented.

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* Small Cause Court Suit No. 13201 of 1897, and † Small Cause Court Suit No. 14928 of 1897.

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Section 38 of the Presidency Small Cause Courts Act (XV of 1882) does not preclude a plaintiff whose suit has been dismissed for default from applying under s. 103 of the Civil Procedure Code (Act XIV of 1882) to have the order of dismissal set aside. There is no inconsistency between the two sections. A plaintiff whose suit has been dismissed for default has two separate remedies under different enactments. If he chooses to apply for a new trial under s. 38, he must do so within eight days. If he prefers to apply for an order setting aside the dismissal under s. 103 of the Civil Procedure Code, he can do so within thirty days (Limitation Act, XV of 1877, Sch. II, Art. 163).

[Diss., 1 S.L.R. 115 (116); F., 34 C. 403=5 C.L.J. 247 (255)=11 C.W.N. 329=2 M.L.T. 12; 6 Ind. Cas. 851= 3 S.L.R. 203 (217); Appr., 22 A. 66 (73); R., 26 M. 163 (164); 33 M. 241=5 Ind. Cas. 23 (24)=19 M.L.J. 760=7 M.L.T. 369; 18 M.L.J. 51=3 M.L.T. 225 (228); 46 P.R. 1905=173 P.L.R. 1905=32 P.W.R. 1905.]

CASE stated for the opinion of the High Court under s. 617 of the Code of Civil Procedure (Act XIV of 1882) by C. W. Chitty, Chief Judge, and Khan Bahadur Hormusji Dadabhai, Fourth Judge :—

"1. The above two suits, which were suit and cross-suit between the same parties, were placed on the board of the Fourth Judge for hearing on the 29th October, 1897, 15th December, 1897, and the 1st February, 1898. On each occasion they were adjourned by consent, and on the last occasion the adjournment was granted to the 23rd April, 1898.

"2. On the 23rd April, 1898 (Saturday), Mr. Davur was instructed for the defendants in the first and plaintiffs in the second suit. As he was unable to attend, Mr. Dadysett held his brief and appeared on his behalf as authorized by Rule XVII of the Rules of this Court. Mr. Dadysett, who was accompanied by one Bunsidhur Nathuram, the munim of his clients, applied for two months' adjournment of both suits. He was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused and Mr. Dadysett said that he withdrew from the case. Both suits were then and there [416] disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed as for non-appearance.

"3. On the 7th May, the said Bunsidhur Nathuram instructed Mr. Brown to apply for a re-hearing of both suits. He made an affidavit in which he described himself as the munim of the defendants in the first and the plaintiffs in the second suit. He stated the facts out of which the suits arose. The 6th para. of his affidavit as to what happened on the 23rd April contains some mis-statements, but he offered to deposit the amount of the claim in the first suit in Court. The Fourth Judge regarding the decree as *ex parte* granted a rule *nisi* for a new trial on deposit of the amount. The rule finally came on for hearing on the 18th June last, when it was made absolute.

"4. The plaintiffs in the first and defendants in the second suit appealed to the Full Court, consisting of myself and the Fourth Judge, to have that order set aside on the ground that the Fourth Judge had no power to make it. The matter was argued before us on Tuesday, the 5th July, 1898, when we reserved judgment.

"5. It should be stated that we are agreed that Bunsidhur Nathuram must be regarded as the recognized agent of the defendants in the first and plaintiffs in the second suit. He was admittedly their munim, who was carrying on their business in Bombay, they being residents outside the jurisdiction of this Court. He, therefore, falls directly within the definition of recognized agents contained in s. 37 (*c*) of the Civil Procedure Code. As to how far he was conversant with the

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facts of the case (he states them very fully in his affidavit), or to what extent he was instructed by his masters, we cannot say.

"6. The sole question for their Lordships' consideration will be, whether, under the circumstances above stated, the suits must be considered as having been disposed of under ss. 100 and 102 of the Civil Procedure Code (Act XIV of 1882) respectively, or whether they, or either of them, fall within the category of contested suits as defined by s. 38 of the Presidency Small Cause Courts Act (XV of 1882) as amended by Act I of 1895.

[417] "7. So far as the Code of Civil Procedure is concerned, both suits appear to stand on the same footing. Sections 100 and 102 prescribe the procedure 'if the plaintiff appears and the defendant does not appear,' and 'if the defendant appears and the plaintiff does not appear.' By s. 36, appearance can be made by the party in person or by his recognized agent or by a pleader duly appointed. Chapter VII of the Code draws no distinction between appearances. It does not, that is to say, recognize an appearance for a limited purpose, nor does it make allowances in the case of a person appearing by a pleader partially or imperfectly instructed. In our opinion, therefore, it follows that, if the wording of the sections in Chap. VII is to be strictly construed, the defendants in the first and plaintiffs in the second suit must be held to have "appeared" on the 23rd April, 1898, as not only was their advocate but also their munim in Court.

"8. There is, so far as we are aware, no definite ruling of the Bombay High Court on the subject. In Calcutta under the old Code it was held that where a counsel applied for an adjournment, and on its being refused said he did not appear further, that the decree was *ex parte*: see *Administrator-General of Bengal* v. *Lala Dyaram* (1). In the recent case of *Rampertab Mull* v. *Jakeeram Agurwallah* (2) the plaintiff instructed his counsel to move for an adjournment. It was refused; the case was dismissed for want of prosecution. The head-note is quite misleading, and from the body of the report it is difficult to ascertain whether the plaintiff was or was not actually present in Court. It would rather appear that he was. The learned Judge, however, did not actually decide the question whether or not the case fell within s. 102 of the Civil Procedure Code, but dismissed the application on the merits.

"9. With regard to suit No. 14928 of 1897, it should be noticed that this suit stands on a somewhat different footing, because of the wording of ss. 37 and 38 of the Presidency Small Cause Courts Act above mentioned. The explanation to s. 38 defines all cases to be "contested in which the decree is made [418] otherwise than by consent of or in default of appearance by the defendant." This makes no exception in the case of suits in which the defendant appears and denies the claim, and which are dismissed for non-appearance of the plaintiff. If this section be taken literally, it would follow that such suits must be regarded as contested, and that the plaintiff has only eight days in which to come in and set aside the order of dismissal. Such a decision would be somewhat inconsistent with the application to this Court of ss. 102 and 103 of the Civil Procedure Code, which would in that case be, to say the least, superfluous, but it appears to us that the wording is clear and admits of no other interpretation.

"10. As on full consideration of the matter we entertain doubt as to how it should be decided, and as the point is one of great importance

(1) 6 B. L. R. 688.

(2) 23 C. 991.

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and of the most frequent occurrence in this Court, we submit it for the decision of their Lordships. We have, as required by s. 618, stayed the proceedings in both cases pending the return of this reference. The case being stated by the Court *suo motu*, no deposit has been called for from the parties."

The Fourth Judge had made a note at the end of the case as follows :—

In making the order of the 16th June, 1898, I followed the rulings of the Allahabad and Calcutta High Courts. As, however, I entertain some doubt on the point, I concur in making the reference.

Lang (Advocate-General) as *amicus curiæ*, for the plaintiffs in the first suit and the defendants in the second.

Scott, *amicus curiæ*, for the defendants in the first suit and the plaintiffs in the second.

The following authorities were referred to :—Small Cause Courts Act XV of 1882, ss. 37 and 38 ; Act I of 1895, s. 5 ; *Bhimacharya* v. *Fakirappa* (1) ; *Ramchandra Pandurang* v. *Madhav Purshottam* (2) ; *Hildreth* v. *Sayaji Piraji* (3) ; *Administrator-General of Bengal* v. *Lala Dayaram* (4) ; *Janardhan Dobey* v. **[419]** *Ramdhone Singh* (5) ; *Hira Dai* v. *Hira Lall* (6) ; *Ramtahal Ram* v. *Rameshar Ram* (7) ; *Buldeo Misser* v. *Syad Hossein* (8).

JUDGMENT.

STRACHEY, J.—The principal question raised by this reference is whether the Fourth Judge of the Court of Small Causes was right in holding that the decree against the defendants in the suit had been passed *exparte* and that their cross-suit had been dismissed for non-appearance, and whether he was competent to set aside the decree and the dismissal. The suit and the cross-suit were on the board for hearing on the 29th October and 15th December, 1897, and the 1st February, 1898, and on each of those days were adjourned by consent. The last adjournment was to the 23rd April. What happened on that day is thus stated in the reference :—" Mr. Davur was instructed for the defendants in the first, and plaintiffs in the second, suit. As he was unable to attend, Mr. Dadysett held his brief and appeared on his behalf as authorized by Rule XVII of the Rules of this Court. Mr. Dadysett, who was accompanied by one Bunsidhar Nathuram, the munim of his clients, applied for two months' adjournment of both suits. He was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused and Mr. Dadysett said that he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed as for non-appearance." It is stated in the reference that the munim Bunsidhar Nathuram was, within the meaning of s. 37 (*c*) of the Code, a recognized agent of the defendants in the suit and plaintiffs in the cross-suit, but that how far he was, on the 23rd April, conversant with the facts of the case, or to what extent he was instructed by his masters the Court is unable to say. All that appears in connection with this point is that, although the munim was present when the application for adjournment was made, the counsel applying was unable to state what was the defence, if any, to the first suit.

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(1) 4 B.H.C.R.A.C J. 206. (2) 16 B. 23. (3) 20 B. 380.
(4) 6 Ben. L.R. 688. (5) 23 C. 738. (6) 7 A. 538.
(7) 8 A. 140. (8) 15 W. R. 143.

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On the 7th May, however, an application was made on behalf of the defendants, and upon the munim's instructions, for a rehearing of both suits, and eventually the Fourth Judge, [420] regarding the suit and the cross-suit as having been disposed of under ss. 100 and 102 of the Code respectively, set aside the decree in the suit and the dismissal of the cross suit. The question raised before the Full Court of Small Causes, and referred to us, is whether he had power to do so. In other words, can a party be said to "appear" at an adjourned hearing when, in his absence, but in the presence of his recognized agent, who is not shown to be conversant with the facts of the case, his counsel, instructed only for the purposes of the application, applies for a further adjournment, and, the adjournment being refused, withdraws and takes no further part in the proceeding?

The question depends first on s. 157 of the Code (Act XIV of 1882), which provides that "if on any day to which the hearing of the case is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Chap. VII, or make such other order as it thinks fit." The word "appear" in this section in reference to the adjourned hearing must have the same meaning as in ss. 100 and 102 and other sections in Chap. VII in reference to the day originally fixed for the hearing. What, then, is meant by the words in s. 100 "if the plaintiff appears and the defendant does not appear," and in s. 102 "if the defendant appears and the plaintiff does not appear"? Is the mere presence in Court of a recognized agent, or the presence of a pleader instructed only to apply for an adjournment, an appearance by the plaintiff or the defendant? The whole of Chap. VII deals with "the appearance of the parties and consequence of non-appearance." The "appearance" to which all the sections refer, is shown by the opening words of ss. 96, 97 and 98 to be appearance "on the day fixed in the summons for the defendant to appear and answer. Section 64, read with form No. 117 of the fourth schedule, explains the nature of the defendant's appearance in obedience to the summons to appear and answer. He is to appear "in person or by a duly authorized pleader of the Court duly instructed and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions", on a specified date "to answer the above-named [421] plaintiff." He is further given notice that, in default of his appearance,—that is, appearance in either of the ways specified,—on the day abovementioned, the suit will be heard and determined in his absence, that is, under Chap. VII.

Thus the appearance of the defendant mentioned in Chap. VII means appearance either (1) by the defendant in person, or (2) by a pleader either himself duly instructed and able to answer all material questions relating to the suit, or accompanied by some other person able to do so. The test of whether the defendant has or has not "appeared" within the meaning of the chapter, is whether such of the requirements of the summons as relate to appearance have or have not been complied with. If the defendant has appeared in either of the two ways specified, then he has appeared, and it is immaterial for what purpose he has appeared, or what action he has taken on appearance, and in particular that, when appearing, he may not have intended to comply with the other requirements of the summons—"to answer the above named plaintiff," to produce his witnesses or to bring or send his documents. So far as Chap. VII is concerned, the only question is

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appearance or non-appearance. The appearance of the plaintiff also must mean appearance by either of the two modes specified, for the word "appearance" is clearly used in Chap. VII in the same sense whether the plaintiff or the defendant is spoken of. To these two modes of appearance a third must be added, that is, appearance by a party's recognized agent under ss. 36 and 37.

This being what Chap. VII means by "appearance," let us consider what happens on the day fixed for hearing. If a party wholly fails to appear, that is, if neither he, nor his pleader, nor his recognized agent, is present, the procedure provided by the chapter is plain enough. The difficulty is where one of them is present, but only for the purpose of applying for an adjournment, and, when the adjournment is refused, withdraws from the Court. Now, taking in turn each of the possible modes of appearance just stated, a party, who, on the day fixed, attended the Court and personally applied for an adjournment could not, in my opinion, be said not to have appeared. In such a case the requirements of the summons, so far as regards appearance, have [422] been fully complied with. The party has appeared in person: the purpose for which he appeared, or the action which he took on appearance, is immaterial. Next, take the case in which, the party being absent, an application for adjournment is made on his behalf by a pleader who has no other instructions, and whose functions are at an end when the adjournment is refused. In such a case, has the party appeared within the meaning of Chap. VII? I think that he has not. Such of the requirements of the summons as relate to appearance have not been complied with. Appearance by a pleader within the meaning of the chapter does not, like appearance by a party in person, mean mere presence in Court: it means appearance "by a pleader duly instructed and able to answer all material questions relating to the suit." In the case supposed, the pleader is not "duly instructed," or instructed at all in the suit: he is instructed only to apply for an adjournment. He is not "able to answer all material questions relating to the suit": he knows nothing about such questions. So far as appearance by a pleader is concerned, Chap. VII, read in the light of s. 64 and Form No. 117, does, in my opinion, "draw a distinction between appearances," and contemplates appearance by a pleader only if he is duly instructed and able as described. Lastly, take the case in which the party being absent, the recognized agent is present. If the recognized agent accompanies a pleader who applies on the client's behalf for an adjournment, but who is otherwise uninstructed, then it is a question of fact whether the recognized agent is able to answer all material questions relating to the suit, in which case s. 64 (*c*) and Form No. 117 seem to show that the party must be deemed to appear by the pleader. In such a case the requirements of the summons as to appearance are as fully satisfied as if the party had appeared in person and applied for an adjournment, and equally in such a case the purpose of the appearance, or the action taken on appearance, seems immaterial. It can hardly be suggested that the words in s. 64 (*c*) and Form No. 117 "some other person able to answer all such questions" could not include a recognized agent. If, however, the party being absent, neither the pleader applying for adjournment, nor any person accompanying him, whether a recognized agent or [423] not, is able to answer all material questions relating to the suit, then, apart from s. 36, there is no appearance within s. 64 (*c*), Form No. 117, or Chap. VII; and the only remaining question is whether the party appears by his recognized agent under s. 36. That is a

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question of fact. In connection with it, the ability or inability of the recognized agent to answer material questions is, of course, immaterial. But s. 36 says only that any appearance required or authorized by law to be made by a party *may* be made by his recognized agent. It does not say that the presence of the recognized agent in Court is *necessarily* an appearance by the party. The section is purely enabling. Section 37 only defines the recognized agents by whom appearances *may* be made. If the recognized agent personally applied for an adjournment, that would, under s. 36, be an application by the party, and such an application would include an appearance, as to which it is unnecessary to decide whether it would or would not constitute an appearance of the party within Chap. VII. But if the recognized agent neither made any application, nor did any act, the question would be not merely whether he was present in Court when the application for adjournment was made, but whether he intended to appear and in fact appeared for the party in the exercise of his power under s. 36. If, at the time, he stated, either in answer to the Court or otherwise, that he appeared or that he did not appear for his principal, the question of the party's appearance would be definitely determined. If he made no such statement, the question might be difficult to determine ; but in the absence of all evidence on the point, his presence at the time of the application should not, I think, be assumed to constitute an appearance by the party. It is likely enough that he might regard the pleader's appearance for the purposes of the application as sufficient, without any additional appearance by himself.

Applying these principles to the present case, the defendants in the suit and plaintiffs in the cross-suit did not on the 23rd April appear in person. They did not appear by their counsel within the meaning of s. 157 and Chap. VII, because their counsel was neither duly instructed and able to answer all material questions relating to the suit, nor accompanied **[424]** by any other person who is shown to have been able to answer such questions. They did not appear by their recognized agent, because the recognized agent, though present, is not shown to have appeared under s. 36 on his principal's behalf. The decree in the suit was, therefore, passed *ex parte*, and the cross-suit was dismissed for non-appearance, and the Fourth Judge was competent to make the order setting aside the decree and the dismissal. This view of the case is in accordance with *Bhimacharya Vyankatacharya* v. *Fakirappa Anandappa* (1) ; *Shankar Dat Dube* v. *Radha Krishna* (2); *Hira Dai* v. *Hira Lal* (3); *Ramtahal Ram* v. *Rameshar Ram* (4), and the *Administrator-General of Bengal* v. *Lala Dyoram Das* (5), which was referred to apparently with approval by the Privy Council in *Sahebzada Zain-ul-Abdin Khan* v. *Sahebzada Ahmad Raza Khan* (6).

The only other point raised by reference relates exclusively to the cross-suit. It arises in connection with s. 38 of the Presidency Small Cause Courts Act (XV of 1882) as amended by Act I of 1895. That section provides that

"Where a suit has been contested, the Small Cause Court may, on the application of either party, made within eight days from the date of the decree or order in the suit (not being a decree passed under s. 522 of the Code of Civil Procedure) order a new trial to be held, or alter, set aside

(1) 4 B.H.C.R.A.C.J. 206. (2) 20 A. 195. (3) 7 A. 538.
(4) 8 A. 140. (5) 6 B. L. R. 688. (6) 5 I.A. 233 (237).

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or reverse the decree or order, upon such terms as it thinks reasonable, and may in the meantime stay the proceedings.

"*Explanation.*—Every suit shall be deemed to be contested in which the decree is made otherwise than by consent of or in default of appearance by the defendant."

What happened here was that, after the dismissal of the cross-suit, the plaintiffs made an application which is described in the reference as an application "for a re-hearing of both suits." It is not stated that the application purported to be made under s. 38; and I infer that the provision of law under which it was made was not mentioned. So far as it related to the cross-suit, it appears to have been treated by the Fourth Judge as made under s. 103 of the Code. As the same application related **[425]** to both the suit and the cross-suit, and, so far as regards the suit, could not have been made under s. 38, it is probable that, as regards the cross-suit also, it was made not under that section, but under the Code. It was made on the 7th May, beyond the eight days' period mentioned in s. 38, but within the thirty days' period prescribed by the Limitation Act for an application by a plaintiff under the Code for an order to set aside a dismissal by default.

It is, however, suggested in the reference that, as the cross-suit was "contested" within the definition contained in the explanation, the plaintiffs could only apply to the Court to set aside the dismissal within the eight days' period prescribed by s. 38, and the question is raised whether s. 38 is consistent with the application to the Small Cause Court of s. 103 of the Code. In reply to this suggestion, Mr. Scott, who appeared on behalf of the plaintiffs in the cross-suit as *amicus curiæ*, contended that s. 38 did not apply to an application to the Court to set aside a dismissal for default. He laid stress on the fact that a "contested" suit as defined in the explanation is a suit in which a "decree" is made, and he argued that a dismissal for default is not a "decree" as defined by s. 2 of the Code, but only an order. Without, however, discussing that question, I observe that s. 38 expressly includes applications to the Court to set aside "the decree or order in the suit," and as the explanation was clearly intended to be co-extensive with the first paragraph, I think that it must be held to include orders which at all events are so far in the nature of decrees that, unless and until set aside, they put an end to the whole suit.

But there is another and, I think, sufficient answer to the suggestion made in the reference. Section 37 enacts that "save as otherwise provided by this chapter, or by any other enactment for the time being in force, every decree and order by the Small Cause Court in a suit shall be final and conclusive." This saving includes Chaps. VII and XIII of the Code, unless the procedure prescribed by them is inconsistent with that prescribed by any specific provision of the Presidency Small Cause Courts Acts, and also includes s. 38 itself. That it includes to this extent **[426]** Chaps. VII and XIII appears from Rule I read with the schedule of the "Rules of procedure and practice of the Court of Small Causes at Bombay" framed by the High Court under s. 9 of Act I of 1895. So far, then, as s. 37 is concerned, the right of a plaintiff to apply to the Court under s. 103 of the Code to set aside a dismissal for default, is expressly saved. The only specific provision of the Presidency Small Cause Courts Acts, with which it is suggested that such a right may be inconsistent, is s. 38. I do not think that there is any such inconsistency. No doubt, as is pointed out in the reference, a suit which is dismissed for

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default is a "contested" suit within the explanation to s. 38, and the section, therefore, applies to it. The explanation is in accordance with ordinary language. Whether a suit is contested or not, depends exclusively upon the defendant. The plaintiff does not "contest" his own suit, and if he fails to appear, the suit is nevertheless contested if the defendant resists it. The object of the Legislature was to give the right to apply for a new trial in all except undefended cases. But although s. 38 includes cases to which s. 103 of the Code applies, the two remedies are not inconsistent. As shown in several decisions, the jurisdiction under s. 38 is revisional—*Sasoon* v. *Hurry Das Bhukut* (1); *Sadasook Gambir Chund* v. *Kannayya* (2); *Srinivasa Charlu* v. *Balaji Rau* (3). Whether in the exercise of its discretion under the section the Court would revise a dismissal for default in the manner contemplated by s. 103 of the Code, is a question upon which I need express no opinion. In any event, I can see no inconsistency between the two provisions, and no reason why a plaintiff whose suit has been dismissed for default should not have two separate remedies under different enactments. If the plaintiff chooses to apply for a new trial under s. 38, he must do so within eight days. If he prefers to apply for an order setting aside the dismissal under s. 103 of the Code, he can do so within thirty days. As most plaintiffs would probably do, the plaintiffs in this cross-suit have preferred the latter remedy.

[427] Our answer to the question referred is that, in the circumstances stated, the suits must be considered as having been disposed of under ss. 100 and 102 of the Civil Procedure Code, respectively, and that whether or not they or either of them fall within the category of contested suits as defined by s. 33 of the Presidency Small Cause Courts Act, the remedy under s. 103 of the Code was open to the plaintiffs in the cross-suit. Costs will be costs in the case.

FULTON, J.—I concur with my learned colleague in thinking that ss. 37 and 38 of the Presidency Small Cause Courts Act (XV of 1882) do not affect the applicability of the provisions of ss. 103 and 108 of the Civil Procedure Code (Act XIV of 1882) to suits in that Court. Section 37 expressly saves the provisions of other enactments and thus leaves untouched these sections of the Code which have been applied to the Small Cause Court. Section 38, if it applies to suits dismissed for default (on which point I think it unnecessary to give any opinion), may offer an additional remedy to the plaintiff, but does not deprive him of the rights conferred by s. 103 of the Code.

I also concur in holding that the Fourth Judge had jurisdiction to deal with these suits as if the persons who were defendants in suit No. 13201 and plaintiffs in suit No. 14928 had not appeared on the day of hearing. On that day their counsel, Mr. Dadysett, appeared, accompanied by their recognized agent and applied for an adjournment. When this was refused, he retired, and the suits were proceeded with and disposed of.

The learned Chief Judge points out that Chap. VII of the Code does not recognize a limited appearance. This may be so, but it is so clearly settled by the authority that when a counsel or a pleader appears merely for the purpose of asking for an adjournment, his application, if refused, does not prevent the suit being treated as disposed of *ex parte*,

(1) 24 C. 455. (2) 19 M. 96. (3) 21 M. 232.

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that it seems to be impossible to re-open the question. Mr. Justice Strachey has collected the authorities on the subject. I need, however, only refer to *Bhimacharya* v. *Fakirapa* (1) as being a decision of this Court given more than thirty years ago. But there still remains the [428] question whether the fact that Mr. Dadysett was accompanied by the recognized agent distinguishes the case from the one just referred to. Whether this man was or was not able to answer all material questions, we have no means of knowing. But assuming that he was able, but for some reason did not think proper to conduct the case on behalf of his principals, his mere presence in Court would not, in my opinion, be an appearance in the suit. Section 36, as pointed out by my colleague, is permissive. An appearance may be made by a pleader or recognized agent; but it is evident that the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented.

Here Mr. Dadysett, though instructed to ask for an adjournment, was not instructed to appear at the hearing; and the recognized agent, though present in Court, was, it appears, unwilling to carry on the case. In these circumstances it seems to me that there was no appearance at the hearing of the defendants in suit No. 13201 or by the plaintiffs in suit No. 14928.

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23 B. 428 = Chitty's S.C.C.R. 580.

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Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

BHAIJI BHIMJI (*Plaintiff*) *v.* THE ADMINISTRATOR GENERAL OF BOMBAY (*Defendant*).* [11th November, 1898.]

Administrator General—Administrator General's Act (II of 1874), ss. 17 and 18—Order to collect assets—Decree against deceased's estate passed prior to such order—Attachment of part of deceased's estate subsequently to above order—Claim of Administrator General prior to that of attaching creditor.

On the 16th April, 1898, the plaintiff obtained an *ex parte* decree against the defendant as heir and legal representative of his deceased father. Previously to the date of the decree (*viz.*, on 4th March, 1898), an order had been made by the High Court under ss. 17 and 18 of the Administrator General's Act (II of 1874), authorizing the Administrator General to collect the assets of the deceased and ordering him, if necessary, to take out letters of administration to his estate. On the 29th April, 1898, the plaintiff under s. 268 of the Civil Procedure Code (Act XIV of 1882) attached certain money in the hands of a third party due to the deceased's estate. On the 2nd July, 1898, letters of administration were granted to the Administrator-General.

[429] *Held* that, as against the Administrator General, the attachment was void *ab initio*. At the date of the decree obtained by the plaintiff, the Administrator General was entitled by virtue of the High Court's order to take possession of the estate of the deceased. As soon as that order was made, his right to possession became paramount and excluded that of the defendant (the son of the deceased), who was then no longer entitled to recover payment of debts due to his father. A decree, therefore, subsequently obtained against the defendant could not, as against the Administrator General, confer any rights on the decree-holder, who could not stand in a better position than the defendant, his judgment-debtor. Under ss. 278 and 280 of the Civil Procedure Code, the Administrator General had the right to have the attachment removed, because he was exclusively

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* Small Cause Court Reference No. 126 of 1898.

(1) 4 B.H.R.A.C.J. 206.

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entitled, at first by reason of the order under s. 18 of Act II of 1874 and subsequently by his letters of administration, to recover the debt, and was not subject to any decree which affected hit title.

Lalchand v. *Gumtibai*(1) distinguished.

[D., 13 Ind. Cas. 795=22 M.L.J. 228=11 M.L.T. 27=(1912) M.W.N. 56.]

CASE stated for the opinion of the High Court, under s. 617 of the Civil Procedure Code (Act XIV of 1882), by C. W. Chitty, Chief Judge :—

"1. This was a suit brought by the plaintiff as creditor of one Devidas Khushal, deceased, against Kika Devidas, heir and legal representative of the said Devidas Khushal, to recover a sum of Rs. 1,145-10-0 and costs. Kika Devidas being a minor was sued by his guardian *ad litem*.

"2. On the 16th April an *ex parte* decree was passed against the said Kika Devidas, and on 29th April an attachment was levied under s. 268 of the Civil Procedure Code against a sum of money lying in the hands of Goverdhandas Govindji and due by him to the estate of the estate of deceased Devidas Khushal.

"3. On the 4th March, 1898, an order had been made by the High Court under ss. 17 and 18 of the Administrator-General's Act (II of 1874), authorizing and enjoining the Administrator-General to collect the assets and ordering him, if necessary, to take out letters of administration to the deceased's estate. On the 2nd July, 1898, such letters were granted to the Administrator-General.

"4. On the 15th August, 1898, the Administrator General was brought on the record as party-defendant, and a garnishee notice in respect of the said attachment came on for disposal. **[430]** As the garnishee had not paid into Court the amount admitted by him to be due to the estate of the deceased, the notice was perforce discharged, but the question arose between the plaintiff and the Administrator General whether the attachment was not bad, and whether it ought not now, in any case, to be set aside. I held that the attachment could not now be set aside at the instance of the Administrator-General, notwithstanding that the order under which he took out letters of administration was made under s. 17 of the Act, and that there had also been an order under s. 18.

"The facts of the case and the reasons for my decision are fully set out in my judgment, a copy whereof is hereto annexed and to which I crave leave to refer.

"The questions for their Lordships' consideration will be :—

"(1) Was the attachment bad *ab initio* ?

"(2) If not, did it become bad by reason of the grant of letters of administration to the Administrator-General under s. 17 of the Administrator-General's Act ?

"(3) Can the Administrator-General now claim to have the attachment set aside ?

"6. The Administrator-General has deposited in Court Rs. 50 to meet the costs of reference."

"The following is the judgment of the Chief Judge referred to above :—

"The plaintiff was a creditor of Devidas Khushal, who died in the month of November, 1896. On the 4th January, 1898, the plaintiff filed this suit against Kika Devidas as heir and legal representative of his father,

(1) 8 B. H.C.R. O.C.J. 140.

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Devidas Khusbal, to recover the sum of Rs. 1,145-10-0 and costs. Kika Devidas being a minor was sued by his guardian *ad litem*, Kuverbai. On the 4th March, 1898, on the petition of J. Duxbury and Co., Limited, the High Court made an order under s. 18 of the Administrator General's Act (II of 1874), authorizing and enjoining the Administrator General to collect and take possession of the assets of the said deceased, and by the same order directed him, if necessary, to apply for letters of administration of such assets under **[431]** s. 17 of the Act. It does not appear that the plaintiff was aware of this order. On the 18th April 1898, this Court passed a decree in the suit *ex parte* against Kika Devidas as heir and legal representative of his father, the said Devidas Khusbal. On the 29th April, an attachment was levied under s. 268 of the Civil Procedure Code against a sum of money, said to be Rs. 1,000, in the hands of Govardhandas Govindji and due by him to the deceased. On the 30th April, 1898, the Administrator General issued the usual notice by advertisement for creditors and debtors of the deceased. The notice must have been seen by the plaintiff, as on the 5th May his pleader wrote to the Administrator General to register his name as a creditor. On the 13th June, the Administrator General wrote to the plaintiff enquiring if his decree was *ex parte*. To this the plaintiff's pleader replied on the 1st July. On the 2nd July, 1898, letters of administration were issued to the Administrator General by the High Court. On the 22nd July, the usual garnishee notice was issued against the defendant then on the record, Kika Devidas, and the garnishee. On the 5th August, the garnishee appeared before me and wanted time to look into the accounts to ascertain the exact amount due to the deceased. The then defendant was not served, and as the plaintiff's pleader brought it to my notice that letters of administration had been granted to the Administrator General, and that he now represented the estate, I directed a notice to be issued to him to show cause why judgment should not be entered up against him at the suit of the plaintiff on the judgment obtained as aforesaid, and why execution should not issue thereon. On the 15th August, Mr. Motilal, for the Administrator General, appealed and consented to his name being brought upon the record as party defendant, and the matter was adjourned for a fresh garnishee notice to be served on the Administrator General in respect of the attachment already levied. That garnishee notice came on for disposal on the 22nd August, when Mr. Desai, for the garnishee, admitted Rs. 900 due to the estate of the deceased, but required time to pay. He was ordered to pay the amount into Court by Wednesday, the 24th August and the matter was further adjourned to that day for argument. On the 24th August, the garnishee was absent, and had also made default in payment of **[432]** the money. The usual order in that case would be to discharge the notice, and allow the prohibitory order to stand for some time to enable the plaintiff to take such steps as he might be advised. By consent, however, of the parties, I heard their arguments on the points raised by the Administrator-General, *viz.*, whether the prohibitory order ought not in any case to be discharged as being bad against him *ab inito*, or at any rate from the date of his obtaining letters of administration. The point is one of some difficulty, and the decision is not likely to be of much practical value in the present instance, as it may be impossible to recover anything from the garnishee. At the same time, it is a point of some importance, and one on which there ought to be a definite ruling. Mr. Carnac appeared to argue the matter, and he stated that had he been present on the 15th August, he would not have consented to his name being brought

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on the record, except on the condition that the suit should be treated as having been originally filed against him. Without conceding that he would have had the power to impose any such condition on the Court, I may say that Mr. Motilal, who then appeared for him, never suggested it, and his name was naturally inserted as party defendant as the person now representing the estate of the deceased. It was contended, in the first place, that the order of the High Court, of the 4th March, authorizing and enjoining the Administrator General to collect the assets, was equivalent to the order of the Insolvent Court vesting an insolvent's property in the Official Assignee, and that after such order no attachment could issue. This contention cannot, I think, prevail. The distinction between the offices of Official Assignee and Administrator General is well drawn by Westropp, C. J. (*Gumtibai's case* (1)). The wording of the two orders is entirely different. In my opinion, the Administrator General empowered under s. 18 to collect assets is much more in the position of a receiver appointed under s. 503 of the Civil Procedure Code, and the wording of those two sections seems to be in favour of this view. Then it was said that the grant of letters related back to the death of the deceased, and that no attachment could, therefore, be levied against such assets. In my opinion, this contention also fails. It is true that **[433]** since the decision at 8 Bom. H. C. Rep., 140, the Probate and Administration Act (V of 1881) has been passed and s. 14 of that Act enacts that letters of administration entitle the Administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death, but there is no saving here as to the liabilities of the deceased's estate. It is not suggested that a creditor properly and *bona fide* paid in full before the grant of letters of administration to the Administrator General could be compelled to refund any part of the money so paid. If carried to its logical conclusion, this conclusion would have that effect. It would involve, too, the setting aside of the decree which Mr. Carnac admits that he cannot do. Kika Devidas at the date of suit and down to the issue of letters to the Administrator General represented the estate of the deceased according to Hindu law. He was properly sued in that capacity and the attachment when levied was properly levied against him, and it cannot now, I think, be set aside unless there is some provision in the Administrator General's Act to that effect. Section 35 was relied upon by Mr. Carnac. That section is explicit, but it appears to me to be inapplicable to this case, as it was to that decided by Sir M. Westropp. This suit was not brought against the Administrator General, nor did he represent the deceased or his estate at the date of filing the suit, or at the date of the attachment. Besides that section, I find nothing in the Administrator General's Act which would justify me in setting aside this attachment. It is true that a judgment-creditor has no priority over other creditors merely by virtue of his decree; but if a judgment or other creditor has legally and properly secured an advantage to himself, I am not aware that there is any authority for saying that he can be deprived of it by the grant of letters of administration to the Administrator General. Under these circumstances my decision must be in favour of the plaintiff. I have not come to this conclusion without some doubt, and I am glad that the matter should go before a higher tribunal. The general policy of the Act seems to be in favour of a rateable distribution among all creditors, but I find nothing in the Act to meet the state of the facts which has arisen here. My present order will

(1) 8 B.H.C.R. O.C.J. 140.

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be that the [434] garnishee notice be discharged and the attachment continued until the further order of this Court, to enable the plaintiff to take such steps as he may be advised. This order will be contingent on the opinion of the High Court on a case to be stated at the request of the Administrator General."

The Chief Judge further stated a supplementary case for the opinion of the High Court, as follows :—

"1. In this suit I have already submitted a case on certain questions arising between the plaintiff and the defendant. To that case and the copy of my judgment I would crave leave for brevity's sake to refer.

"2. It will be remembered that on the 22nd August, 1898, the garnishee appeared by his pleader Mr. Desai, and admitted that he owed Rs. 900 to the estate of the deceased Devidas Khushal. This he was ordered to pay into Court by the following Wednesday, 24th August, by an order in the following form :—

"Upon reading the Judge's summons issued herein dated the 15th day of August, 1898, and on proof of service thereof and on hearing Mr. Rele, pleader on behalf of plaintiff, and attorney Mr. Motilal for defendant and pleader Mr. Desai for garnishee, I do order that the said garnishee do out of the moneys in his hands pay into Court the sum of Rs. 900 (nine hundred) in respect of the decree herein on or before Wednesday 24th instant at 11 A.M.

"3. The notice as far as the questions between the plaintiff and defendant were concerned was adjourned to Wednesday, 24th August, for argument, and from that day to the 29th August for judgment. On neither of the two latter days did the garnishee appear, and the notice being of no further use as against him was marked as discharged. The order of the 22nd August, 1898, however, still stood against the garnishee.

"4. As the garnishee did not obey the said order, the plaintiff by his pleader Mr. Rele asked me to issue execution against the garnishee under the provisions of s. 649 of the Civil Procedure Code. This I agreed, though not without hesitation, to do. An attachment by seizure was accordingly ordered, and the [435] garnishee paid the amount of the debt into Court under protest. He then moved the Full Court to set aside the order for attachment by seizure, alleging that the Court had no power to enforce the order of the 22nd August, 1898, in that way.

"5. The Second Judge and myself were of opinion that the Court had the power under s. 649 to enforce its order, but as this was a most important point of practice we delivered no formal judgment, but I readily consented to submit this point also for their Lordships' consideration.

"6. It may be stated that the form of the order of the 22nd August, 1898, has already received judicial sanction in the case of *Toolsa Goolal* v. *John Antone* (1), and Sir Charles Sargent there distinctly laid down that this Court had power to make such an order. If this be so, it must, I submit, follow that such an order is enforceable, and if enforceable, then s. 649 appears to be the proper section under which to enforce it.

"7. The sole question is whether such an order as is above set out is enforceable under s. 649, and relatively under Chap. XIX of the Code of Civil Procedure."

Scott, for the plaintiff.

Lowndes, for the defendant.

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(1) 11 B. 448.

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The following authorities were referred to—*Nilkomul* v. *Reed* (1); *Remfry* v. *De Penning* (2); *Emanuel* v. *Bridger* (3); *Fowler* v. *Roberts* (4); Administrator-General's Act II of 1874, ss. 17 and 18.

JUDGMENT.

FULTON, J.—The facts which have given rise to this reference are as follows :—

The plaintiff was a creditor of Devidas Khushal, who died in November, 1896. On 4th January, 1898, the plaintiff filed this suit against Devidas' minor son Kika as legal representative of his father.

On 4th March, the High Court made orders under ss. 17 and 18 of Act II of 1874, directing the Administrator-General, if **[436]** necessary, to apply for letters of administration of the deceased's estate, and authorizing and enjoining him to collect and take possession of the assets.

On the 18th April an *ex parte* decree was passed against Kika as legal representative of the deceased.

On the 29th April an attachment was made, under s. 268 of the Civil Procedure Code (Act XIV of 1882), of a sum of Rs. 1,000 said to be due by one Govardhandas to the deceased.

On the 30th April the Administrator-General issued the usual notice by advertisement for creditors and debtors of the deceased.

On the 5th May the plaintiff wrote to the Administrator-General to register his name as a creditor.

On the 2nd July letters of administration were issued to the Administrator-General.

Subsequently the Court issued notice to the Administrator-General to show cause why judgment should not be entered up against him at the suit of the plaintiff on the judgment obtained as aforesaid, and execution should not issue thereon.

On the 15th August, Mr. Motilal appeared for the Administrator-General and consented to his name being entered upon the record as a party-defendant.

Afterwards on Govardhandas admitting that he owed the amount, he was directed to pay into Court the sum of Rs. 900. Thereupon the Administrator-General raised the question whether the attachment should not be set aside as being bad against him *ab initio*, or at any rate from the date of his obtaining letters of administration.

Then the learned Chief Judge of the Court of Small Causes referred the following questions :—

1. Was the attachment bad *ab initio*?

2. If not, did it become bad by reason of the grant of letters of administration to the Administrator-General under s. 17 of the Administrator-General's Act?

3. Can the Administrator-General now claim to have the attachment set aside?

[437] To the first of these questions our answer is that against the Administrator-General the attachment was bad *ab initio*.

The second, therefore, becomes superfluous.

To the third question our answer is in the affirmative.

In the case of *Lalchand* v. *Gumtibai* (5) it was held that, when a creditor had obtained a decree against the legal representative of a

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(1) 12 B. L. R. 287. (2) 10 C. 929. (3) (1874) L.R. 9 Q.B. 286.
(4) (1860) 2 Giff. 226. (5) 8 B. H. C. R. O. C.J. 140.

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deceased Hindu as such, execution could be levied against the estate notwithstanding the subsequent grant to the Administrator-General of letters of administration. The reason for the decision was that at the time of the decree the widow, against whom the suit was brought, fully represented the estate, and the letters of administration subsequently obtained did not, by relating back to the death of the deceased, override the decree obtained against her. The case occurred in 1871 before the enactment of s. 14 of Act V of 1881, which perhaps leaves open to argument the question how far the decision is still binding. But on this point it is unnecessary for us to express any opinion, for that case is distinguishable from the present, inasmuch as in it, prior to decree, no order had been passed similar to the one here made under s. 18 of the Administrator-General's Act. At the time when that decree was passed, the Administrator-General had no claim whatever to possession of the estate, which was wholly vested in the widow. In this case on the 16th April, when the decree was passed against the deceased's son, the Administrator-General was entitled by virture of an order made under s. 18 to collect and take possession of the property of the deceased within the local limits of the ordinary civil jurisdiction of the High Court, and if necessary to maintain a suit for its recovery. As soon as that order was made, his right to possession became paramount and excluded that of the deceased's son, who was no longer entitled to receive payment of debts due to his father. From that time forward it was to the Administrator-General, and not to the deceased's son, that the debtor was bound to make payment. Therefore, a decree subsequently obtained against the son could not, as against the Administrator-General, confer any rights on the decree-holder, who could not stand in a better position than his judgment-debtor. **[438]** How far the position of the parties would have been changed if the Administrator-General had been made a defendant prior to decree, it is unnecessary to decide, though the case of *Haninabalu* v. *Cook* (1) may be referred to on the point. But the entry of his name as a party-defendant after decree could not under the Code of Civil Procedure subject him to any liability, nor was it contended in argument that such would be the case.

Mr. Scott referred to the cases of *Fowler* v. *Roberts* (2) and *Burton* v. *Roberts* (3), but they merely showed that in England a judgment-creditor, who had obtained a decree and attachment of a debt in a suit against an executor before the rights of the latter were superseded under an administration decree, could enforce payment from the garnishee. In *Emanuel* v. *Bridger* (4), which was also cited, it was held that a creditor who had obtained and made absolute a garnishee order, before the bankruptcy order, had a charge to the extent of the attachment on the bankrupt's estate. But cases of this sort do not touch the point now under consideration. Here the Administrator-General's rights had accrued before decree: the defendant at the time when the decree was passed merely represented the deceased's estate subject to those rights: and those rights could not be impaired by a decree to which the Administrator-General was not a party.

The learned Chief Judge noted that it was not proved that plaintiff had notice of the order under s. 18. But that does not seem to make any difference. There is nothing in the section to postpone the title of

(1) 6 M. H. C. R. 346.
(2) (1860) 2 Giff. 226.
(3) (1860) 29 L. J., Exch. 484.
(4) (1874) L. R. 9 Q. B. 287.

the Administrator-General till notice has been given. If it be argued that such a construction involves hardship on the plaintiff, it may be answered that we are not at liberty to alter the wording of the section, and, moreover, that if the plaintiff's decree were to prevail, the hardship to other creditors might be still greater. If the estate were insolvent, in which case alone could the question be of any importance, the recognition of priority in the plaintiff's decree would lead to his being paid in full out of moneys in which in equity all the creditors were entitled to share rateably. Such a result would be contrary to the intention of the Administrator-[439] General's Act and to the principle enunciated by Westropp, J., in *Gamble* v. *Bholagir* (1) in which his Lordship said: "We think it more agreeable to the justice and equity of the case that there should be a distribution of the property of an insolvent amongst his creditors at large than that individual creditors should carry off the whole fund."

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In these circumstances it appears clear that under ss. 278 and 280 of the Civil Procedure Code the Administrator-General has a right to have the attachment removed, because he was exclusively entitled, at first by reason of the order under s. 18 and subsequently by his letters of administration, to recover the debt, and was not subject to any decree which affected his title.

The supplementary question whether the order made to the debtor to pay the money into Court, can be enforced under s. 649, and relatively under Chap. XIX of the Civil Procedure Code, does not, therefore arise. We accordingly abstain from expressing any opinion on it. Costs of this reference to be costs in the case.

Attorney for plaintiff :—Mr. *D. Bazonji.*

Attorneys for defendant :—Messrs. *Bicknell, Merwanji and Motilal.*

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23 B. 439.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* CHAGAN JAGANNATH.* [1st September, 1898.]

Criminal Procedure Code (Act X of 1882), s. 423—Appellate Court—Powers of appellate Court to enhance sentence—Sentence—Alteration of sentence.

The accused was convicted of criminal breach of trust and sentenced to nine months' rigorous imprisonment. On appeal, the conviction was upheld, but the sentence was altered to one of six months' rigorous imprisonment and a fine of Rs. 1,000, or, in default of payment, three months' further rigorous imprisonment. The accused applied to the High Court in revision, contending that the alteration of the sentence amounted to an enhancement of the [440] sentence beyond the powers of the appellate Court under s. 423 of the Code of Criminal Procedure (Act X of 1882).

Held, that there was no enhancement of the sentence.

Queen-Empress v. *Ishri* (2) distinguished.

[**Diss.**, 23 A. 497 (498) = 21 A.W.N. 176; 27 C. 175 (176); 6 Cr.L.J. 100=3 N.L.R. 90 (91); **R.**, 30 M. 103 (104)=5 Cr.L.J. 236=16 M.L.J. 560=1 M.L.T. 375; **Doubted**, 36 A. 485=12 A.L.J. 827=24 Ind. Cas. 607=15 Cr.L.J. 519.]

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* Criminal Revision No. 207 of 1898.

(1) 2 B. H. C. R. 146 (161).

(2) 17 A. 67.

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APPLICATION under s. 435 of the Code of Criminal Procedure (Act X of 1882).

The accused was convicted by the First Class Magistrate of Broach of criminal breach of trust in respect of a sum of Rs. 725, and sentenced to nine months' rigorous imprisonment.

On appeal, the Joint Sessions Judge upheld the conviction, but altered the sentence of nine months' rigorous imprisonment to one of six months' rigorous imprisonment and a fine of Rs. 1,000, or, in default of payment, three months' further rigorous imprisonment.

The accused applied to the High Court under its revisional jurisdiction, contending that the alteration of the sentence in appeal amounted to an enhancement of the sentence, which was illegal, and *ultra vires* of the appellate Court.

N. G. Chandavarkar, for the accused.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

JUDGMENT.

PARSONS, J.—In this case the Sessions Judge on appeal altered the sentence of nine months' rigorous imprisonment to a sentence of six months' rigorous imprisonment and a fine of Rs. 1,000, in default of payment three months' further rigorous imprisonment. It is contended that this is an enhancement of the sentence beyond the powers of the appellate Court: see s. 423 of the Criminal Procedure Code. If we treated the case as one of fact only, then the objection of the applicant might alone be sufficient to show that the altered sentence was more severe than the original one, for whether it is so or not to him depends upon the circumstances of the accused. And we think, as a general rule, that a sentence ought not to be so altered, except where the Court expressly purports to mitigate it in this manner, which would almost always be at the instance of the accused person himself. We have, however, to deal with the case as involving a point of law, and **[441]** looked at in that light we think that we cannot yield to the contention. A sentence of fine is always considered lighter than a sentence of imprisonment. A sentence, therefore, of a fine of Rs. 1,000 would not be so severe as a sentence of three months' rigorous imprisonment, and the substitution of the former for the latter would not be an enhancement. The sentence of three months' rigorous imprisonment, in default of payment, does not make the whole sentence of imprisonment larger than it was before. In a case which came before the Madras High Court, (which has not been reported, but the record of which has kindly been sent to us—Criminal Revision Case No. 460 of 1888 decided on the 27th August, 1888), where the original sentence of three months' rigorous imprisonment had been altered to one of two months' rigorous imprisonment and Rs. 30 fine, in default one month's additional rigorous imprisonment, Shepherd, J., passed the following decision:—" I do not think that there is any enhancement of the sentence. If the accused is in a position to pay the fine, and does pay it, the nature of the sentence is altered, but the sentence is not enhanced. If he cannot and does not pay the fine, the sentence remains unaltered." The case of *Queen-Empress* v. *Ishri* (1) is not an authority to the contrary, for there the term of imprisonment *plus*

(1) 17 A. 67.

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the additional imprisonment in default of the payment of the fine exceeded the original term, and the altered sentence was on that account held to be an enhanced one.

We follow the decision of the Madras High Court and reject the application.

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23 B. 442.

[442] APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

YAMAJI (*Original Plaintiff*), *Appellant* v. ANTAJI AND OTHERS (*Original Defendants*), *Respondents.** [13th September, 1898.]

Limitation—Appeal—Limitation Act (XV of 1877), s. 12, sch. II, art. 152—Civil Procedure Code (Act, XIV of 1882) s. 205—Date of judgment——Date of decree—Bill of costs signed subsequently—Time requisite for obtaining copy of the decree—Time between pronouncement of judgment and signing of the decree—Practice.

The time for presenting an appeal against a decree or order is thirty days from the date of such decree or order (art. 152 of the Limitation Act, XV of 1877). The date of the decree or order is the date on which judgment is pronounced.

The time excluded from the period of limitation by s. 12 of the Limitation Act must be taken to commence only when the party appealing does something in order to obtain the copy of the judgment or decree, and to end when he obtains the copy. A party who delays to apply for such copy is not entitled to exclude the period of such delay.

A party is at liberty to apply for a copy of the decree, whether the decree has been signed or not. If he has applied, but the copy cannot be prepared because the decree has not been signed, then this time and the time taken up in preparing the copy will be excluded, but so long as he has made no application, the non-signature of the decree can have no effect at all upon him.

Judgment was pronounced on the 18th December, 1897, rejecting an application made by a plaintiff in execution of a decree; but the bill of costs (the order as to costs being a part of the order or decree) was not signed until 18th January, 1898. The plaintiff proposing to appeal against the above order applied for copies of the judgment and order on the 14th January. The copies were furnished to him on the 24th January, 1898. The appeal was presented on the 24th February. The lower Court held the appeal barred by limitation under art. 152 of the Limitation Act, not having been presented within thirty days from the date of judgment. On appeal to the High Court,

Held, that the appeal was barred. The only time allowed by law to be excluded was from the 14th January, 1898, on which date copies of the judgment and order were applied for, to the 24th January 1898, on which date they were furnished. The judgment was pronounced on the 18th December, 1897. The non-signing of the decree was no cause for or explanation of the delay between that date and the 14th January, 1898, or for the delay between the 24th January, 1898, and the 24th February, 1898.

[R., 10 C.L.J. 467 (469); F., 15 Bom. L.R. 681 = 20 Ind. Cas. 537; 3 L.B.R. 62 (64); 1 S.L.R. 71 (74); U.B.R. (1905) C.P.C., 24; 10 N.L.R. 139 = 26 Ind. Cas. 819.]

[443] IN execution of a decree the plaintiff made an application which was refused by the Subordinate Judge on the 18th December, 1897. The judgment was delivered on that day, but the bill of costs (the order as to costs being a part of the order or decree) was not signed until the 18th January, 1898.

The plaintiff proposed to appeal, and for that purpose applied on the 14th January, 1898, for copies of the judgment and order. These copies were furnished to him on the 24th January, 1898.

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* Second Appeal No. 373 of 1898.

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The plaintiff presented his appeal on the 24th February, 1898, but the Judge rejected it, holding that it was barred by limitation, not having been presented within thirty days from the date of the order (art. 152 of the Limitation Act, XV of 1877). In his judgment he said :—

"Allowing for the interval between application for copy of the order (dated 18th December), which was made on the 14th January and the date of granting copy, 24th January, this appeal is barred by time. The fact that the bill of costs, dated 18th December, was not signed by the Subordinate Judge till the 18th January, has nothing to do with the delay in making this appeal."

The plaintiff appealed to the High Court against this order rejecting his appeal.

Balaji A. Bhagvat, for the appellant (plaintiff).—The appeal is not barred. Article 152 allows thirty days from the date of the order or decree, and not from the date of the judgment—*Bani Madhub* v. *Matungini Dassi* (1). Here there was no order against which an appeal could be made until it was signed. That was not done until the 18th January, 1898 (Civil Procedure Code, Act XIV of 1882, s. 205). It was then that the time began to run against the appeal. But we are entitled to exclude the time necessary to obtain copies of the judgment and order. See s. 12 of the Limitation Act. They were obtained on the 24th January, 1898. We filed the appeal on the 24th February, which was within thirty days from that date; and, therefore, the appeal is not barred.

Sadashiv R. Bakhale, for the respondents (defendants).—The date of the decree or order must be the date on which the judgment was given (s. 205 of the Civil Procedure Code). **[444]** That was the 18th December, 1897. The appeal was not presented until the 24th February and, therefore, is barred—*Bechi* v. *Ahsan-Ullah* (2). The words "date of decree" are explained in *Golam* v. *Goljan* (3). The plaintiff is not entitled to any indulgence, as he obtained the copies on the 24th January, 1898, but delayed for a month after that date.

JUDGMENT.

PRASONS, C. J. (ACTING)—Judgment in this case was pronounced on the 18th December. The appellant applied for a copy of the decree on the 14th January, and it was furnished to him on the 24th January. He presented an appeal against the decree on the 24th February, and the District Judge rejected it, holding it to be time-barred.

It has been argued before us that the District Judge is wrong, since the decree was not signed until the 18th January, and, under the ruling of the Calcutta High Court, (subsequently noted), (1) the time between the 18th December and the 18th January and the time between the 18th and the 24th January ought to be excluded. The Judge has noticed the fact that in this case the decree, which was an order passed in execution, was really signed on the 18th December, and that it was the bill of costs only which was signed on the 18th January, and held that the delay in signing the latter had nothing to do with the delay in making the appeal. As, however, the decree has to state the amount of costs and by what parties and in what proportion they are to be paid, the possible distinction that there may be between a decree and an order in execution does not seem to us to be very material. The point

(1) 13 C. 104. (2) 12 A. 461. (3) 25 C. 109.

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is whether an appellant is entitled to deduct the time between the pronouncement of the judgment and the signing of the decree in computing the period of limitation prescribed for an appeal.

The Limitation Act, 1877, art. 152, prescribes the time for presenting an appeal to be thirty days from the date of the decree or order appealed against. It is clear that the date of the decree must be taken to be the date on which the judgment was pronounced. This is the language of s. 205 of the Civil Procedure Code, and it has been so decided by both the Calcutta and Allahabad [445] High Courts—*Bani Madhub Mitter* v. *Matungini Dassi* (1); *Golam Gaffar Mandal* v. *Goljan Bibi* (2); *Bechi* v. *Ahsan-Ullah Khan* (3). An extension of this time, however, is allowed by s. 12 of the Act, which says that in computing the period of limitation prescribed for an appeal the time requisite for obtaining a copy of the decree or order appealed against shall be excluded. In construing these words, the Calcutta High Court has held in *Bani Madhub* v. *Matungini Dassi*, that as, until a decree is signed, no copy of it can be obtained, the time between the judgment and the existence of the decree as a signed decree ought to be excluded in computing the time taken in presenting an appeal. We think that this construction gives these words too large and extended a meaning. The time requisite for obtaining a copy must, in our opinion, be confined to the action of the party who wishes to obtain the copy, and must be taken to commence only when he does something in order to obtain the copy and to end when he obtains the copy. We fail to see how any delay in signing the decree can be brought in to benefit a person who has not made any application to obtain a copy, or how it can be said that the time during which the delay lasted was time requisite for him to obtain a copy. It might be so, in some way or other it prevented him from asking for a copy, but this it certainly need not do. A party is at liberty to ask for a copy of the decree whether the latter is signed or not. If he has made the application and the copy cannot be prepared because the decree has not been signed, then, of course, this time and the time taken up in preparing the copy will be excluded, but as long as he has made no application, the non-signature of the decree can have no effect at all upon him. It will be found, we think, in most cases that a party is quite ignorant when the decree is actually signed. The decision of the Full Bench of the Allahabad High Court in *Bechi* v. *Ahsan-Ullah Khan* (3) seems to us to be correct upon this point.

In the present case, although the judgment was pronounced on the 18th December, the application for a copy was not made until the 14th January, and, when the copy was obtained as it was on the 24th January, the appeal was not presented until the 24th February.

[446] The only time allowed by law to be excluded is that from the 14th to the 24th January. The non-signing of the decree is no cause for, and no explanation of, the delay between the 18th December and the 14th January and between the 24th January and the 24th February. We dismiss the appeal with costs.

Appeal dismissed.

(1) 13 C. 104. (2) 25 C. 109. (3) 12 A. 461.

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CRIMINAL REFERENCE.

23 B. 446.

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CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Ranade.

THE MUNICIPALITY OF WAI *v.* KRISHNAJI GANGADHAR. *

[5th September, 1898.]

Municipality—House tax—House valuation—Valuation made by Municipality—Magistrate's power to revise the valuation—Bombay District Municipal Act (Bom. Act VI of 1873), s. 84, as amended by Bombay Act II of 1884.

Under the rules passed under the Bombay District Municipal Act (Bom. Act VI of 1873) as amended by Bombay Act II of 1884 the Municipality of Wai estimated the annual letting value of a house belonging to the accused at Rs. 50 and levied a house tax of Rs. 2-8. A, a tax-payer, applied to the managing committee for a reduction of the tax, but his application was dismissed. Default having been made in payment of the tax, A was prosecuted under s. 84 of the Act before a Second Class Magistrate. He contended that the estimate made by the Municipality was too high, and that his house would not let for more than 10 or 12 Rs. a year. The Magistrate took evidence on the point and found that the annual rental of the house would not exceed Rs. 12, and he ordered payment of 12 annas only on account of the tax.

Held, that the Magistrate had no power to go behind the estimate of value framed by the managing committee under the powers given to it by the rules. He ought to have accepted as conclusive the amount found by the managing committee to be the letting value of the house, and held the legal liability of the accused to pay the tax based on this amount to be proved.

The remedy of the accused, if he considered his house assessed too highly, was to apply to the managing committee, and no other mode of redress was open to him.

Municipality of Ahmedabad v. *Jumna Punja* (1) and *Imperatrix* v. *Nathu Hirachand* (2) distinguished.

[**Appl.**, 24 B. 607 (609); **R.**, 35 C. 859=7 C.L.J. 631=12 C.W.N. 709 ; 11 Cr.L. J. 87 =4 Ind. Cas. 951=2 P. R. 1910 (Cr.)=109 P.L.R. 1909=23 P.W.R. 1909 (Cr.).]

REFERENCE under s. 438 of the Code of Criminal Procedure (Act X of 1882) by C. G. Dodgson, District Magistrate of Satara.

[447] The Municipality of Wai applied to a Second Class Magistrate under s. 84 of the Bombay District Municipal Act (Bom. Act VI of 1873) as amended by Bombay Act II of 1884, to recover Rs. 2-8, being the amount of a house tax imposed on a house belonging to the accused Krishnaji Gangadhar Raste.

Krishnaji contended that the assessment fixed by the Municipality was too high, that the annual rental of his house on which the assessment was fixed was Rs. 10 or 12 and not Rs. 50 as estimated by the Municipality, and that he was not liable to pay the amount claimed by the Municipality.

The Magistrate took evidence upon the point and found that the annual rental of the house did not exceed Rs. 12. He, therefore, ordered Krishnaji to pay 12 annas only on account of the tax, instead of Rs. 2-8 as claimed.

The District Magistrate was of opinion that the trying Magistrate had no power to revise the assessment fixed by the Municipality and reduce the tax from Rs. 2-8 to 12 annas. He, therefore, referred the case to the High Court.

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* Criminal Reference No. 67 of 1898.

(1) 17 B. 731.

(2) Cr. Rul. No. 35 of 1891 (Rat. Un. Cr. Cas. 559).

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The reference was as follows :—

" The Magistrate has declined in this case to order the levy of the house tax on the ground that the tax has not been properly assessed. The municipal bye-law requires the house tax to be fixed on the rental value of the house. The Magistrate considers that the basis of the assessment has in reality been the value of the house itself, and he has, therefore, decided that the tax is not recoverable.

" In my opinion, the Second Class Magistrate is wrong. He has set himself up as an appellate Court for hearing decisions against the house tax assessments of the municipal committee. As I understand the law, the right procedure is for the tax to be assessed by the managing committee of the Municipality on behalf of the general committee, the right of appeal lying to the general committee. In case a taxpayer is dissatisfied with the decision of assessment imposed by the general committee he should either apply to the Collector to take action under s. 37 or 39 or to Government under s. 41 of Bombay Act II of 1864. A Magistrate proceeding under s. 84 of Bombay Act VI of 1873 should, in my opinion, only consider whether the order contravened is a legal one or not. He is not concerned with the administrative reasoning or argument which may have led the municipal committee to pass the order in question.

" The rules of the Wai Municipality regarding the levy of house tax were sanctioned by Government in Government Resolution No. 1876, dated 21st May 1894."

[448] The reference came on for hearing before a Division Bench (Parsons and Ranade, JJ.)

S. R. Bakhle, for the Municipality.

M. V. Bhat, for the accused.

JUDGMENT.

PARSONS, J.—By the rules framed under the Bombay District Municipal Acts, the Municipality is empowered to levy house tax on a certain scale according to the annual letting value of the house. The " letting value " is defined to mean the annual rent for which the house might be reasonably expected to let from year to year if the tenants were liable for all repairs ; and Rule 3 provides that an estimate of the annual letting value of each house shall be made by the managing committee and published not later than the 15th March in each year (the tax being payable on the 31st May) and that applications for the reduction of the estimates by persons made liable may be presented to, and shall be disposed of by, the managing committee. It is proved that the estimate made by the managing committee of the annual letting value of the house of the accused was Rs. 50 ; and his application for a reduction was dismissed by the managing committee. When prosecuted for the amount of the tax he contended before the Magistrate that the estimate was too high and that the house would not let for more than Rs. 10 or 12 a year. The Magistrate took evidence on this point and found that the annual rental would be Rs. 12 only, and he ordered payment of 12 annas on account of tax instead of the Rs. 2½ claimed. In our opinion, the Magistrate had no power to go behind the estimate of value framed by the managing committee under powers given to it by the rules. The remedy of the accused, if he considered his house assessed too highly, was to apply to the managing committee, and no other mode of redress seems open to him under the rules. In

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the case of the *Municipality of Ahmedabad* v. *Jumna Punja* (1), where the legal liability depended upon the possession of a *khalkundi* and a tub, and there was no provision for the determination of this point by the Municipality, we held that the Magistrate should himself determine the point. This is doubtless good law. In criminal references Nos. 119 and 120 of [449] 1891 (2) the legality of the assessment depended upon the amount of the earnings of the family and its possessing *Khalkuwas* or *Khalkundis*. In our judgments we say "Neither in the Municipal Acts nor in the rules framed thereunder was there any machinery provided by which the amount of the earnings of the family or the question of its possession of *Khalkuwas* or *Khalkundis* could be determined by the municipal authorities. Nor is there any mode provided by which a person assessed to pay the cess in question at a certain rate can contest that assessment before a municipal or other civil authority." It was obvious, therefore, that the Magistrate had to determine the point before he could hold legal liability proved. In the present case also the question of legal liability for a certain amount of tax has to be determined by the Magistrate, and he has to determine it upon the value of the premises of the accused. The determination, however, of this value is not placed in his hands. The rules provide for this value being estimated by the managing committee, and a mode of redress against over-valuation is provided by application to the managing committee. In such a case the Magistrate ought to have accepted as conclusive the amount found by the managing committee to be the letting value of the house and held the legal liability of the accused to pay the tax based on this amount to be proved. He had no power to review the decision of the managing committee, and reverse it on fresh evidence taken before himself.

We must, therefore, in this and the two other similar cases direct the Magistrate to order the recovery of the full amount claimed by the Municipality in each case.

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23 B. 450.

[450] APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting) and Mr. Justice Ranade.

RAMCHANDRA DHONDO AND ANOTHER (*Original Petitioners*), *Applicants*
v. RAKHMABAI AND OTHERS (*Original Opponents*), *Opponents.**

[26th September, 1898.]

Civil Procedure Code (Act XIV of 1882), s. 310-A—Act V of 1894—Execution sale—"Person whose immoveable property has been sold"—Prior private purchaser of property sold in execution not within the section.

A person who has purchased property which is afterwards sold in execution of a decree obtained against his vendor, is not entitled under s. 310-A of the Civil Procedure Code (Act XIV of 1882) to have the execution sale set aside.

[F., 7 C.W.N. 243 (244); **Appl.**, 30 C. 425 (427); **R.**, 15 C.L.J. 83=16 C.W.N. 904=10 Ind. Cas. 890; 18 Ind. Cas. 579=24 M.L.J. 205=13 M.L.T. 123=(1913) M.W.N. 101; 24 T.L.R. 41; **Expl.**, 8 C.L.J. 305 (306).]

APPLICATION under the extraordinary jurisdiction of the High Court, s. 622 of the Civil Procedure Code (Act XIV of 1882).

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* Application No. 128 of 1898 under the extraordinary jurisdiction.

(1) 17 B. 731.

(2) Cr. Rul. No. 35 of 1891 (Rat. Un. Cr. Cas. 599).

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23 B. 450.

The applicants applied to the Subordinate Judge of Chikodi to have a sale in execution set aside under s. 310-A of the Civil Procedure Code.

The property in question was sold on 1st April, 1898, in execution of a money decree against Rakhmabai and was purchased by opponent No. 2. The applicants, however, alleged that Rakhmabai had previously sold this property to them under a duly registered deed of sale dated 11th August, 1890, and they accordingly applied to have the execution sale set aside under s. 310-A, Civil Procedure Code (Act XIV of 1882).

That section provides as follows :—

" Any person whose immoveable property has been sold under this chapter may at any time within thirty days from the date of sale apply to have the sale set aside on his depositing in Court, &c., &c."

The Subordinate Judge rejected the application, holding that the section did not apply. The applicants thereupon obtained a rule from the High Court to set aside the order of the Subordinate Judge.

Mahadev V. Bhat, for the applicants, in support of the rule.—He relied on *Vithu* v. *Damodar* (1).

Gokuldas K. Parakh, for the opponents, showed cause.—The applicants do not belong to the class of persons referred to in [451] the section, and they cannot apply under it. Similar words are used in s. 311, and the cases upon that section apply to this case—*Bisheshar Kuar* v. *Hari Singh* (2) ; *Asmutunnissa* v. *Ashruff Ali* (3) ; *Ramchandra* v. *Gokul* (4) ; *Timmanna* v. *Mahabala* (5).

JUDGMENT.

PARSONS, C. J. (ACTING).—The words " person whose immoveable property has been sold" used in s. 311 of the Code of Civil Procedure had received a judicial meaning long before s. 310-A was added to the Code. (See *Asmutunnissa Begum* v. *Ashruff Ali* (3); *Bisheshar Kuar* v. *Hari Singh* (2); *Timmanna* v. *Mahabala* (5); and *Ramchandra* v. *Gokul* (4)). By employing the same words in s. 310-A the Legislature may be presumed to have intended them to bear the same meaning. It is argued that the words are of wide and general import and mean any person whose property has been sold. They may mean this, but then it has to be seen whose property has been sold *under this Chapter*, for these last three words must have a meaning also. It is only the judgment-debtor's right, title and interest in any property or the right, title and interest therein of any other person bound by the decree that can be sold under Chap. XIX in execution of a decree. In the present case there was a money decree passed against Rakhmabai in execution of which the property was attached as hers, and her right, title and interest therein was sold on the 1st April, 1898, and purchased by the opponent. It is the applicant's case that he bought it on the 11th August, 1890, that is, long before the suit was filed against Rakhmabai. It is thus clear that, even assuming the property as his, it has not been sold as his, and that he does not come within the meaning of the words " person whose immoveable property has been sold under this Chapter." In the case of *Vithu* v. *Damodar* (1), the applicant was rightly held to be the owner of the property, since he was bound by the decree, and the sale had disposed of his right of redeeming the property. We, therefore, discharge the rule with costs.

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(1) P.J. (1895), p. 200. (2) 5 A. 42. (3) 15 C. 488.
(4) P.J. (1891), p. 309. (5) 19 M. 167.

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[452] RANADE, J.—The decision of this application turns upon the construction of s. 310-A introduced into the Code of Civil Procedure by the amending Act V of 1894. There have been only two decisions of this Court on that section. In one of them, *Vithu* v. *Damodar* (1), it was held that the words "any person whose immoveable property has been sold" included other persons than the judgment-debtor, and that the applicant in that case (who was purchaser from one of two brothers, both of whom had mortgaged the property to a creditor who sold the property in execution of his decree obtained against the brothers and applicant, who was made a co-defendant) was a person who was entitled to apply under s. 310-A. In the other case, a co-sharer in the property sold was held not to be entitled to apply under s. 311—*Ramchandra* v. *Gokul* (2). In two Madras cases in which the new section was considered, the applicant was the judgment-debtor himself—*Rangasami* v. *Virasami* (3); *Muthu Ayyar* v. *Ramasami* (4). The Calcutta High Court has considered this section, as also a similar section of the Bengal Tenancy Act, (s. 174) in many cases, but the point considered had reference chiefly to the question whether the section conferred a new right, or effected a change of procedure only, and, therefore, was or was not retrospective in character—*Jogodanund Singh* v. *Amrita Lal Sircar* (5); *Girish Chundra* v. *Apurba Krishna* (6); *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (7); and *Uzir Ali* v. *Ram Komal* (8).

The effect of the corresponding words used in s. 311 was considered in *Abdul Huq* v. *Mohini Mohun* (9), and it was held that the words "any person whose immoveable property has been sold" include a person who alleges that he is the owner of the property, even though he is neither the judgment-debtor, judgment-creditor, or auction-purchaser. The correctness of this decision was questioned in *Asmutnnmnissa Begum* v. *Ashruff Ali* (10), and it was held by the Full Bench in that case that a [453] person who claims to be a purchaser of the judgment-debtor's rights at a prior execution-sale was not a person who could apply under s. 311 of the Code. A person claiming by a title paramount to the judgment-debtor is not a person within the terms of the section, as his rights are not affected by the sale. The Madras High Court followed this ruling in *Subbarayadu* v. *Pedda Subbarazu* (11). In a previous decision of the Calcutta High Court on s. 311 of the Code, *In the matter of the petition of Bhagabuti Churn Bhuttacharjee* (12), it was held that though the words used in s. 311 were not confined to the judgment-debtor, they did not include a person who had purchased at a prior execution sale. A mortgagee decree-holder was held to be a person who could apply under s. 311 of the Code, to set aside the sale—*Rakhal Chunder Bose* v. *Dwarka Nath Misser* (13). These decisions were all considered by a Full Bench of the Calcutta High Court in *Abdul Gani* v. *Dunne* (14), followed by the Madras High Court in *Timmanna* v. *Mahabala* (15). In the Calcutta case, Petheram, C.J., held that s. 311 did not exclude a person whose interest would pass by the sale. Mr. Justice Ghose stated that the test to be applied was whether the applicant would have been entitled to bring a suit to contest the sale, or to recover the property.

These decisions on s. 311 must govern the interpretation to be put on the similarly worded s. 310-A. In the absence of any ruling of this

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(1) P.J. (1895), p. 200. (2) P.J. (1891), p. 309. (3) 18 M. 477. (4) 20 M. 158.
(5) 22 C. 767. (6) 21 C. 940. (7) 14 C. 636. (8) 15 C. 383.
(9) 14 C. 240. (10) 15 C 488. (11) 16 M. 476. (12) 8 C. 367.
(13) 13 C. 346. (14) 20 C. 418. (15) 19 M. 167.

Court to the contrary, we must accept these decisions of the High Courts of Madras and Bengal, and hold that the applicant in the present case, who is a prior private purchaser from the judgment-debtor, is not a person who comes within the purview of s. 310-A. As his interests were not affected by the execution sale, his application was very properly rejected by the lower Court. We must discharge the rule.

Rule discharged.

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[454] APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

TUKARAMBHAT (*Original Defendants Nos. 2—5*), *Appellants v.* GANGARAM MULCHAND GUGAR (*Original Plaintiff*), *Respondent.**

[26th September, 1898.]

Hindu law—Joint family—Surety—Father's liability as surety—Liability of his sons for the debt for which he was surety.

Ancestral property in the hands of sons is liable for a father's debt incurred as a surety.

[F., 28 M. 377 (378); 1 N. L. R. 173 (175); **Appl.**, 26 A. 611 (615)=24 A. W. N. 142; **R.**, 39 C. 843=16 C.L.J. 107=16 C. W. N. 1103=14 Ind. Cas. 147; 39 C. 862=15 C.L.J. 228=16 C.W.N. 519=12 Ind. Cas. 609; 27 M. 45=12 M.L.J. 270 (272); **Doubted**, 13 C.W.N. 9 (10)=1 Ind. Cas. 153=4 M.L.T. 429.**]**

REFERENCE by F. C. O. Beaman, District Judge of Belgaum, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff sued to recover from the defendants Rs. 388, the price of grain supplied to the first defendant, who was a Mahomedan. The other defendants (Nos. 2—5), who were Brahmins, were the sons of the deceased surety of defendant No. 1. The Subordinate Judge passed a decree awarding the claim. On appeal by defendants Nos. 2—5 the Judge made a reference to the High Court in the following terms:—

"This is an important question of law which has never yet been decided by our High Court, except in one early case to which I have no means of access. That question is, whether ancestral property in the hands of sons is liable to a father's debt incurred as a surety?

"In this case the father, a Brahmin, stood surety for a Mussalman.

"Mayne says (para. 279) 'The sons are not compellable to pay sums due by their father.....for which he was a surety (except in the cases before mentioned).' What these cases are, does not very clearly appear, unless they are intended to be included in the general principles of pious obligation. That, however, begs the whole question. Jagannath, who is not of high authority in this Presidency, denies that a son is not liable for the debt of his father incurred as a surety. Whence it might be inferred that earlier commentators had so affirmed. In a foot-note Mayne says 'As regards suretyship, the son's liability has been expressly affirmed—*Moolchund* v. *Krishna* (1); *Sitaramayya* v. *Venkatramana* (2).' The first case is that to which I have once referred. Mofussil Courts are not

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* Civil Reference No. 5 of 1898.

(1) (1844) Bellasis' Reports, 54.

(2) 11 M. 373.

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furnished with Bellasis' Reports. But it must have been decided comparatively long ago and before the law of this Presidency had been moulded by the minds of successive great Judges into its present form. The latter case was decided by Muttusami Ayyar and Parker, JJ., and is a very inadequate authority. The point now in issue was conceded at their Lordships' bar, and the **[455]** issue to be tried was limited to whether that case was maintainable under the Contract Act. It it submitted that the question is still open to Bombay. I may add that the judgment contains this passage : 'The decision of the Subordinate Judge rests on the ground that ancestral property inherited by a son from his father ought to be treated as assets available for the payment of the father's debts neither vicious nor immoral, and that the debt incurred by him as surety for the repayment of a loan is within the scope of that obligation.'

"The Smritis of Manu and Yajnavalkya, Brihaspati and the Mitakshara support the decision, and that in Bhattacharji's Hindu Law the decision is cited without disapproval or any comment. Such a suretyship may very well fall within the meaning of 'an idle promise' : *vide* Mandlik's Hindu Law, 113. Brihaspati expressly mentions suretyship as not entailing any obligation on sons. In the view of most early Hindu moralists, suretyship was consistently disapproved. Grady's Hindu Law, 84,85, where Gautama, 1 Dig., 305, is quoted with approval 'So debts originating in suretyship shall not involve sons.'

"On the other side are Mandilik's Hindu Law, p. 108, quoting Katyayana, Strange's Hindu Law, p. 301. In suretyship the son is always liable subject to assets and without interest where the undertaking was for payment--Manu Chaps. 8, 160, 162 ; Yajnavalkya, 1 Dig., 247 ; Katyayana, 1 Dig., 248, 255.

"On principle I see no reason why a son should not be liable to pay his father's debt incurred as a surety. The criterion is not, I think, the advantage gained by the family, but the sin incurred by the parent should he not fulfil his promise. That sin in the eye of the moralist is not much affected by questions of consideration. A man may with perfect propriety stand surety for a friend, and he is as much morally bound to discharge his promise as he would be in law if it were supported by consideration."

Narayan V. Gokhale (*amicus curiæ*) appeared for the appellants (defendants Nos. 2—5).—He referred to Manu, Chap. VIII, pl. 159 ; Brihaspati, Chap. IX, pl. 40, 41 and 51 ; Gautama, Chap. II, pl. 41 ; Mandlik's Hindu Law, pp. 107, 108 and 206 ; Colebrook's Hindu Law, Vol. I, pp. 164—176 ; Strange's Hindu Law, Vol. I, pp. 300, 301 ; *Moolchund* v. *Krishna* (1) ; *Sitaramayya* v. *Venkatramanna* (2).

Vasudeo G. Bhandarkar (*amicus curiæ*) appeared for the respondent (original plaintiff).—In *Sitaramayya* v. *Venkatramana* (2) the present point was not really in dispute. *Moolchnd* v. *Krishna* (1) gives the old law as interpreted by the Shastris. See West and Bühler, p. 1239. The Mitakshara does not lay down that the son's liability is limited to a particular kind of suretyship **[456]** of his father. The liability as a surety is not included among the debts which are classed as immoral or illegal. Both the Mitakshara and the Mayukha make no distinction in the nature of the debt for which the sons are held liable. The text of Brihaspati also states the rule generally, but Jagannath in his commentary makes the

(1) (1844) Bellasis' Reports, 54.

(2) 11 M. 373.

distinction—Colebrooke's Digest, p. 110. Gautama also gives the text generally without any restriction as to liability.

JUDGMENT.

PARSONS, C. J. (ACTING).—The District Judge has referred the following point of Hindu law for the decision of this Court, *viz.*, whether ancestral property in the hands of sons is liable for a father's debt incurred as a surety. To that point we must add, to meet the facts of the case, the following words " for the repayment of grain lent," and we think that if the District Judge had noticed these facts, he would not have thought it necessary to make this reference, since upon it all the authorities agree and the conflict supposed to exist by the District Judge refers to a different kind of surety.

The general principle of English law, of course, is that the death of a surety does not affect his liability in respect of past transactions. Whatever liability had actually attached to the surety at the time of his death may be enforced against his representative.

Hindu law, however, recognizes four kinds of sureties : 1, for appearance ; 2, for honesty ; 3, for paying a sum lent ; and 4, for delivery of the debtors' effects. In respect of the two former kinds, sons may not be responsible, but in the last two they are expressly declared to be liable. In the Laws of Manu (I quote this and succeeding authorities from Max Müller's Sacred Books of the East) at s. 159 it is said that the son shall not be obliged to pay money due by a surety, but at s. 160 it is explained that this rule applies to the case of a surety for appearance only : and that if a surety for payment shall die, the Judge may compel even his heirs to discharge the debt. Brihaspati in s. 40 mentions the four classes of sureties and in s. 41 says : " If the debtors fail in their engagements, the two first (the sureties themselves, but not their sons) must pay **[457]** the sum lent at the appointed time ; both the two last (sureties), and in default of them their sons (are liable for the debt), when the debtors break their promise (to pay the debt)." Gautama, s. 41, repeats Manu, s. 159, but the note is to the effect that " Taking into account the parallel passages of Manu and Yajnavalkya, Haradatta very properly restricts this rule to a bail for the personal appearance of an offender." In Colebrook's Hindu Law, Vol. 1, at p. 164, the authorities on the subject of sureties will be found set out at length, and the liability of the sons in the case of suretyship for repayment of a debt is affirmed by Brihaspati (142), Yajnavalkya (144 and 152), (to which the note adds the Dipacalica and the author of the Mitakshara), Manu (151), Katyayana (153 and 158), Vyasa (157), and Smriti cited in the Mitakshara (159). The same authorities are quoted in Mandlik's Hindu Law at pp. 107, 108 and 206.

There is also a judicial decision which affirms the son's liability. In *Moolchund* v. *Krishna* (1) the Court of Sadar Divani Adalat concurred in the opinion of the Shastri to the effect that by Hindu law a son is always liable to fulfil the surety engagement of his deceased father to repay money as regards the amount of principal, and if a special agreement be made for interest, then he is also liable for interest.

We, therefore, answer the question in the affirmative.

RANADE, J.—The question of Hindu law referred for the decision of this Court is " whether ancestral property in the hands of sons is liable

(1) (1844) 2 Bellasis' Reports, 54.

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for the debts of the father incurred by him as a surety." Both sides of the question were ably set before us in the learned arguments of Mr. Gokhale and Mr. Bhandarkar, and a careful consideration of the original texts and commentaries fully satisfies us that only one answer is possible to the question, and that answer must be in the affirmative.

The apparent conflict of authorities noticed by the District Judge in his observations in submitting this reference is obviously due to a misapprehension of the real nature of these texts and commentaries. They do not form, and were not intended to be [458] a regularly promulgated code of laws, every part of which has to be carefully correlated to other parts. They are rather of the nature of expositions of the theory of the law, and collections of recognized customs and approved usages. When any particular question has to be considered, the more general exposition has to be controlled by the maxims laid down in the particular chapter or chapters which specially treat of that matter, and the deficiencies of one text supplied by reference to other texts and authorities. For instance, when the texts speak of the weakness, incapacity, and dependence of Hindu women, the general expositions must be qualified by the particular positions laid down in respect of the widow's estate, or woman's power over her *stridhan*, or the daughter's or sister's right of succession, found in the same or other works specially devoted to these subjects. An express particular text occurring in its proper place limits mere general statements of the principles made in other places. This is a rule of interpretation which is often found necessary even in more regularly constituted codes of law, but it is specially obligatory in the interpretation of ancient Hindu law books. With this clue in hand, the doubts and conflict noticed by the District Judge are easily removed or reconciled. Mr. Mayne, para 279, quotes apparently from Dayabhaga the general position that "sons are not compellable to pay sums due by their father for spirituous liquor, for losses at play, for promises made without consideration, or under the influence of lust or wrath, or *sums for which the father was a surety*, or for a fine or toll." This is, however, obviously a general exposition intended to set forth the limitations upon the son's liability to pay his father's debts. Occurring in the context where it stands, it simply suggests that surety obligations recklessly incurred stand in the same category with other extravagant or immoral acts of the father which entail no liability on the sons. These propositions occur in the chapter on the recovery of debts. It would not be safe, however, to infer from such texts occurring in such a place that the words above italicised are to be literally understood. They are controlled by the particular maxims laid down in the special chapter on surety obligations. The texts relating to this special subject are referred to by Mr. Mayne in the foot-note to the same para. [459] It is not necessary to set them out here at length. It will be sufficient to state that Brihaspati recognizes four different classes of sureties: (1) sureties for appearance, (2) sureties for honesty, (3) sureties for payment of money lent, (4) and sureties for delivery of goods. The obligation of the first two kinds of sureties is limited to themselves personally, and does not bind their sons; but the obligation incurred by the last two kinds of sureties binds them, and their sons also after their death. The commentary of Ratnakar on this text expressly states that the sons shall be compelled to pay debts incurred by their father under the last two classes of surety obligations. The text of Narad and Yajnavalkya recognize three classes of surety obligations only—those for appearance, those for honesty, and those for payment. Narad does not set forth the

son's obligation in this place, but the Yajnavalkya text is quite as explicit as that of Brihaspati. The sureties of the first two classes must pay the debt, and not their sons, but the sons of the last kind of surety may be compelled to pay their father's debt incurred by him as surety. Katyayana refers to the same kind of surety when he lays down that the grandson of such a surety need on no account pay the debt, but the son must make it good without interest. The text of Vyasa makes the same distinction between the son and grandson's liabilities for such suretyship. Manu's texts on the subject clearly distinguish between sureties for appearance or good behaviour, and sureties for payment. The son shall not, according to Manu, in general be compelled to pay money due for suretyship, or idly promised to musicians and actresses, or lost at play, or due for spirituous liquors, or for tolls or fines. The general words "money due for suretyship" used in the text are expressly stated by the commentator Kulluka to refer only to sureties for appearance and good behaviour, but as regards a surety for payment, it is enjoined that the Judge may compel even his heirs to discharge the debt. Even as regards the first two classes of sureties, if they have derived any advantage, or received a pledge, their heirs may be compelled to pay the debt. The commentator Haradatta explains a similar text of Gautama by affirming the same distinction. This exposition of the authorities removes all apparent conflict, and the Pandits, whose advice was sought by the [460] late Sadar Divani Adalat in the case of *Moolchund* v. *Krinsha* (1), must have based their opinion on these same texts, though there is no express mention of the texts in the judgment. The more general texts which class suretyship obligation with reckless and immoral debts must, therefore, be qualified by the particular texts quoted above, and when so explained, it becomes clear that they refer to particular classes of sureties which do not include sureties for payment of debts, in respect of which last class, unless the debts can be shown to have been incurred for immoral or illegal purposes, the sons are liable to discharge their father's debts.

Order accordingly.

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APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), Mr. Justice Ranade and Mr. Justice Fulton.

A (WIFE), *Petitioner v.* B (HUSBAND), *Respondent.** [3rd October, 1898.]

Divorce—Husband and wife—Indian Divorce Act (IV of 1869,) ss. 17 and 20—Decree for nullity of marriage—Confirmation by the High Court—Time of confirmation—Practice—Procedure.

Under the Indian Divorce Act (IV of 1869) a decree for nullity of marriage made by a District Court cannot be confirmed by the High Court before the expiration of six months from the pronouncing thereof.

[Diss., 22 A. 270 (274) ; **R.**, 17 Bom. L. R. 56.]

REFERENCE by W. H. Crowe, District Judge of Poona, submitting decree for confirmation : see s. 30 of the Indian Divorce Act (IV of 1869).

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* Civil Reference No. 7 of 1898.

(1) (1844) Bellasis' Reports, 54.

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Suit for declaration of nullity of marriage on the ground of impotence.

The respondent did not defend the suit.

The Judge passed a decree for the petitioner, subject to confirmation by the High Court under s. 20 of Act IV of 1869.

Lowndes, with *Marzban and Hemming*, appeared for the petitioner, and applied for immediate confirmation of the decree.

JUDGMENT.

[461] PARSONS, C. J. (ACTING) .—The point for decision is whether under the Indian Divorce Act, 1869, a decree for nullity of marriage made by a District Judge can be confirmed by a High Court before the expiration of six months from the pronouncing thereof.

Section 20 of the Act enacts " Every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court, and the provisions of s. 17, cls. 1, 2, 3 and 4, shall *mutatis mutandis* apply to such decrees." It is thus necessary to determine what are the 1st, 2nd, 3rd and 4th clauses of s. 17.

A reference to s. 17 shows that it consists of 6 paragraphs and it was argued that each paragraph was a clause, and that, therefore, the proviso, which is paragraph 5, was the 5th clause. I cannot accept this argument. The 5th paragraph is not, in my opinion, a clause of the section. It is a proviso to the clause which precedes it, joined to it, as printed in the Government of India (Legislative Department) Edition (1887) of the Acts, by a colon, and must be considered to be a part and parcel of the foregoing clauses governing and controlling them and not forming itself a separate clause. At the time the Act was passed, it was not usually the practice in Acts of the Government of India to number clauses, but had these been numbered, I think there cannot be a doubt that this proviso would not have been numbered as a clause. I take as an illustration of this the Code of Criminal Procedure just passed, and will refer to ss. 33, 35, 48, 57 and 123 only. Clauses 1, 2, 3 and 4 of s. 17, therefore, must be held to include the proviso, and this being so, the Act expressly orders that no decree shall be confirmed under that s. 17 till after the expiration of six months from the pronouncing thereof.

It was, however, further argued that decrees for nullity of marriage are confirmed not under that section, but under s. 20. The application of cl. 1 of s. 17 to such decrees is, however, fatal to this argument. Section 20 itself provides for confirmation, so that there was no object in applying the provisions of cl. 1 of s. 17, which provide for the same **[462]**confirmation, unless for the express purpose of enacting that the procedure for the confirmation of decrees for nullity passed by a District Judge shall be exactly the same as for the confirmation of his decrees for dissolution of marriage.

No doubt a difference is thus made between decrees for nullity passed by a High Court and those passed by a District Judge. The former are made absolute at once, the latter have to be confirmed by the High Court after a lapse of six months' time. No argument, however, can be based on this difference. Decrees for dissolution of marriage passed by a High Court are delayed in order to allow persons to intervene as provided by s. 16, but there is no provision allowing of intervention in the case of decrees of nullity passed by a High Court. They may, therefore, be made absolute at once. In the case of decrees passed by a District Judge for dissolution, there is no provision made for any intervention, but yet they have to wait

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for six months before they can be confirmed. There is no reason, therefore, why decrees for nullity should not wait the same time.

The fact that at the time the Act was passed, decrees for nullity were made absolute at once under English law gives us no assistance. All we can say about this is that the Legislature adopted the English law in the case of decrees passed by a High Court, and disregarded it in the case of decrees passed by a District Court, for which latter decrees a different procedure was expressly provided. For this reason we cannot under s. 7 apply the law that since 1873 has been in force in England, under which the Courts there have a discretion to shorten the period of six months for which decrees of nullity have ordinarily to wait. (See 36 Vic., c. 31).

We reject the application. It can be renewed when the six months' time has expired.

RANADE, J.—This is a reference made by the District Judge of Poona, who submits for confirmation a decree passed by him on 16th August, 1898, declaring the marriage between the parties to the suit null and void.

The first question for consideration is whether, under the latter portion of s. 20 of Act IV of 1869, which extends the provisions [463] of s. 17, cls. 1, 2, 3, 4, to nullity decrees, this Court can confirm the decree before six months have expired. Section 17 relates to decrees for the dissolution of marriages passed by District Judges. The first clause requires (like the first part of s. 20 in the case of nullity decrees), that decrees for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court. The second clause provides for the constitution of the Court for confirmation work; the third clause defines its powers, and the fourth clause empowers the High Court to dispose of such cases finally. There is a proviso added at the end of this last clause, which requires that no decrees shall be confirmed till after six months from the date of its pronouncement. The chief point for consideration is whether this proviso forms part of cl. 4, s. 17 or whether it is a separate clause by itself. The clauses in s. 17 are not separately numbered, but appear as separate paragraphs. The proviso appears as a separate paragraph, but it is clear from its context that it cannot be read as a separate clause from paragraph 4 which it qualifies. It does not, as the preceding four paragraphs, or the succeeding sixth paragraph, relate to distinct subject-matters. It was argued before us that, being shown as a separate paragraph, it should be construed as a separate cl. 5 of s. 17, and as such not made applicable to nullity decrees by s. 20, which extends only cls. 1, 2, 3, 4 to the confirmation of nullity decrees. The contention, however, does not appear to be well founded. Confirmation by the High Court of decrees passed by District Judges, both in the case of decrees for dissolution of marriage, and of decrees annulling marriage, seems to have been intended as a substitute for the usual remedy by way of appeal, which is expressly taken away by s. 55 of the Act. Quite apart from the requirements of strict legal construction, it may be noted that the reasons of expediency, which suggest that such confirmation should not be made in the case of decrees for the dissolution of marriages till after six months have expired, hold equally good in the case of nullity decrees. The interests of children have to be safeguarded equally in either case. In the case of decrees declaring marriages null on the ground of bigamy, for instance, the [464] status of the children, as legitimate or bastard, may often be involved in the confirmation of such decrees more seriously even

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than in the case of decrees for the dissolution of marriage. There is equal room for collusion in both cases. The same safeguards are, therefore, needed in the one case as in the other. Then again s. 7 of the Act directs that the principles and rules followed by English Divorce Courts shall govern, as far as may be, the Courts here in dispensing relief. The English enactments did not at first direct that decrees even in suits for dissolution of marriage should be made decrees *nisi*, but only allowed appeal within three months—(s. 55 of 20 and 21 Vic., c. 85). Such appeal was allowed in cases of nullity decrees also by s. 17 of 21 and 22 Vic., c. 108. Later on, s. 7 of 23 and 24 Vic., c. 144, provided that every decree for divorce should in the first instance be a decree *nisi*, not to be made absolute still after three months had expired, and s. 3 of 29 and 30 Vic., c. 32, extended this period to six months. In 1873 the same period was provided for in respect of nullity decrees. It is thus clear that both on grounds of strict construction, and general reasoning, as well as analogy with the corresponding provisions of English law, the principles of which are obligatory on Courts in India under s. 7, it must be held that cl. 4 of s. 17 with the proviso applies to nullity decrees sent up for confirmation under s. 20, and that no order of confirmation can be passed till after six months have expired.

FULTON, J.—I concur with the Acting Chief Justice in thinking that in s. 17 of Act IV of 1869, the proviso governs and forms part of the 4th clause, and is, therefore, applicable to decrees for nullity of marriage under s. 20.

Application rejected.

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[465] ORIGINAL CIVIL.

Before Sir Louis Kershaw, Kt., Chief Justice and Mr. Justice Parsons.

IN THE MATTER OF DARASHA RUSTOMJI COLABAWALLA (*Petitioner*).
[23rd November, 1898.]

University of Bombay—Act XXII of 1857, s. 12—Construction—Candidate for a degree.

The words "candidate for a degree" in s. 12 of Act XXII of 1857 to establish the University of Bombay mean a candidate for the final examination, the passing of which entitles him to a degree. They do not mean a candidate for a degree at any stage of his University career. Students, therefore, presenting themselves for the Previous Examination prescribed by the Senate of the Bombay University need not present the certificate required by that section.

RULE *nisi* dated 2nd November, 1898 requiring the University of Bombay to show cause "why the abovenamed petitioner should not be allowed to sit at the Previous Examination to be held at Bombay on the 7th instant, and why the answer papers of the said petitioner should not be examined and the result declared, and also why, in the event of the said petitioner not being allowed to sit at the examination to be held on the 7th instant, the University should not be ordered to examine the said petitioner for the Previous Examination at any other early and convenient day, and to examine the papers of the said petitioner and to declare the result, &c."

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The petitioner having presented his petition obtained the above rule under s. 45 of the Specific Relief Act (I of 1877).

The following were the material facts stated in the petition :—

The University of Bombay was established under Act XXII of 1857. Under the powers conferred on it by the said Act, the University prescribed that before any candidate could present himself at any degree examination, he should have passed two preliminary examinations, *viz.*, the "Previous Examination" and the "Intermediate Examination," and that candidates desiring to be examined at the "Previous Examination" must have passed the Matriculation Examination and kept two terms at a college or institution recognized in Arts (p. 42 of Calendar for 1897-98). With regard to candidates for degrees, it was further provided as follows by s. 12 of the Act :—

[466] "12. Except by special order of the Senate, no person shall be admitted as a candidate for the degree of Bachelor of Arts, Master of Arts, Bachelor of Laws, Licentiate of Medicine, Doctor of Medicine, or Master of Civil Engineering, unless he shall present to the said Chancellor, Vice Chancellor and Fellows a certificate from one of the Institutions authorized in that behalf by the Governor of Bombay in Council to the effect that he has completed the course of instruction prescribed by the Chancellor, Vice-Chancellor and Fellows of the said University, in the bye-laws to be made by them under the power in that behalf given by this Act."

The petitioner had duly passed the Matriculation Examination and had kept two terms at an Institution "recognized in arts" as required by the above-mentioned bye-laws of the University. This institution was known as the "Collegiate Institution", and by a resolution passed by the University Senate at a meeting held on the 20th February, 1897, it had been "recognized" for a period of three years for the purpose of the "Previous Examination" only. It did not, however, begin to receive and prepare intending candidates for the Previous Examination until December, 1897.

On the 17th December, 1897, the Registrar of the University by a letter of that date pointed out to the Principal (Mr. Karkaria) of the Collegiate Institution that the recognition of the Collegiate Institution was incomplete, and that to enable its members to proceed eventually to degrees, it would be necessary under s. 12 of the Act that the Institution should be authorized by the Governor in Council to give certificates to candidates that they had completed the course of instruction prescribed by the University. The Principal replied that such authorization was not required for the Collegiate Institution, as that institution did not send up candidates for degrees, but only for the Previous Examination. The following is the correspondence which took place on this subject .—

"No. 1925 of 1897-98.

"*Bombay*, 17*th December* 1897.

"To R. P. KARKARIA, Esq., B.A.,
Bombay.

"SIR,—I am instructed by the Syndicate of the Bombay University to let you know that the recognition of the Collegiate Institution by the Bombay University is still incomplete.

[467] "2. I am to say that Government have pointed out to the Syndicate that under s. 12 of the Act of Incorporation, an institution, in order to have such valid recognition as will entitle its members to eventually proceed to degrees, requires to be specifically authorized by His Excellency

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the Governor in Council to give certificates to candidates for degrees that they have completed the course of instruction prescribed by the University.

"3. Under these circumstances I am to suggest that before opening the institution you may think it advisable that the necessary authorization from Government should be obtained.

"I have, &c., &c.,
"(Signed) D. MACDONALD,
"University Registrar."

"*Bombay*, 21*st December*, 1897.

"To DR. D. MACDONALD,
"University Registrar.

"SIR,—In answer to your letter of the 17th instant, I regret to say that the alleged incompleteness in the recognition of the Collegiate Institution should have been brought to notice now ten months after the Senate has recognized it and when our arrangements for opening it have been quite completed.

"As regards the authorization from Government which is thought advisable by you to obtain from Government, I am advised that such an authorization is not necessary under the regulations for the recognition of institutions given on page 243 of the University Calendar. Regulation 3 says: 'It shall be competent for the Senate, on the recommendation of the Syndicate, to recognize an institution in any faculty for the purposes of a particular examination or examinations only.' And nothing is said here about Government authorization.

"Section 12 of the Act of Incorporation to which you refer, applies clearly and solely to institutions that send up candidates for a degree, whilst our institution has been recognized for the purposes of a particular examination—the Previous in Arts—only.

"That such is the case may be seen from the fact that institutions similar to ours have not obtained Government authorization, nor have they been advised by the Syndicate to apply for such authorization. Indeed, colleges teaching up to a degree have not obtained such authorization.

"Under these circumstances I do not see how I can apply to Government for authorization, as the Collegiate Institution is not to send up candidates for degrees, and as the regulations under which it has been recognized say nothing about its authorization.

"As our arrangements for opening the Collegiate Institution are quite complete, I shall be obliged by the favour of a very early reply to this letter.

"Yours truly,
"(Signed) R. P. KARKARIA,
"Principal."

[468] "No. 1949 of 1897-98.

"*Bombay*, 23*rd December*, 1897.

"To R. P. KARKARIA, Esq., B. A.,
"Bombay.

"SIR,—I have the honour by direction of the Syndicate to acknowledge receipt of your letter of the 21st instant and to state that after the warning given by them in my letter No. 1925 of the 17th instant the question of opening the Collegiate Institution is solely one for your

consideration and that it would be at your own risk if you opened the institution without such authorization as is referred to in that letter.

"I have, &c., &c.
"(Signed) D. MACDONALD,
"University Registrar."

In February, 1898, Mr. Karkaria addressed the following letter to the University :—

"SIR,—With reference to the correspondence we had in the last week of December, 1897, I have the honour to enquire whether the Syndicate has done anything in the matter there alluded to, *viz.*, authorization of this institution by Government, as this college has been opened and lectures on all the subjects for the Previous Examination are being regularly given during the last five or six weeks to the students, who number more than 25. An early reply will oblige."

The following reply was sent by the University (No. 2330 of 1897-98, dated 16th February, 1898):—

"SIR,—With reference to your letter of the 1st instant, I have the honour by direction of the Syndicate to state that in sending up to Government a list of the Colleges to which the authorization by Government under s. 12 of the Act of Incorporation should in their opinion extend, they have omitted the name of the Collegiate Institution. They have further informed Government that as Principal of the Institution you were warned by them last December, before the institution was actually opened, that authorization by Government might be necessary to give full effect to 'recognition' by the Senate, and that, if you opened the institution before you had obtained such authorization, you would do so at your own risk."

In September, 1898, the petitioner through Mr. Karkaria, the principal of the "Collegiate Institution," applied to the University to be permitted to appear at the Previous Examination to be held on the 7th November following, and forwarded the certificates and fees required by Regulations.

Thereupon the Registrar of the University sent the following letter refusing the required permission :—

[469] "No. 2174 of 1898-99.

"*Bombay, 7th October*, 1898.

"To THE PRINCIPAL, COLLEGIATE INSTITUTION,
"Bombay.

"SIR,—With reference to the applications for permission to appear at the ensuing Previous Examination received from you on 22nd September last, I have the honour by direction of the Syndicate to inform you that the candidates cannot be admitted to the examination. The candidates' fees will be returned to you in a few days.

"I have, &c., &c.
"(Signed) D. MACDONALD,
"University Registrar."

The petitioner then presented a petition to the High Court under s. 45 of the Specific Relief Act (I of 1877) and obtained the above rule. The question was whether, as the Collegiate Institution was not authorized by Government as required by s. 12 of the Act, the petitioner could claim to be examined at the Previous Examination. The petitioner contended

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that s. 12 only applied to a person presenting himself for the final B. A. Examination ; that such a person only could be considered as a "candidate for a degree" within the meaning of that section, and that he only could be called upon to give the certificate thereby required. The University on the other hand contended that the petitioner as a student who had matriculated and desired to pass the Previous Examination must be considered as a "candidate for a degree" within s. 12 and must present the certificate thereby required.

The prayer of the petition was as follows :—

(1) That the University of Bombay do allow your petitioner to sit at the Previous Examination to be held on the 7th instant.

(2) That the University do examine his answer papers and declare the result.

(3) That, in the event of the University being not ordered to allow your petitioner to sit at the Examination on the 7th instant the University do examine him for the Previous Examination at any other early and convenient date and declare the result.

(4) That, in the event of your petitioner failing to pass the Examination this year, the University do examine him once in every subsequent year for the Previous Examination and declare the result till he passes the said examination.

[470] "24. That your petitioner prays that this Honourable Court may pass such other and further order as the circumstances of the case may require."

Scott, for the University, showed cause.

Macpherson and *C. H. Setalvad*, *contra*, in support of the rule.

The Act of Incorporation (Act XXII of 1857), ss. 8 and 12, and the bye-laws of the University (see University Calendar for 1897-98) were referred to.

JUDGMENT.

KERSHAW, C. J.—There can be no doubt that this is a very important case, affecting as it does the course of studies of the students of the University of Bombay. I think I speak for my learned brother when I say that we have no doubt what our judgment should be in this case. I understand the course of proceeding which we are asked to adopt is analogous to that which the Court of Queen's Bench in England has been accustomed to take when applied to for a writ of mandamus. The Court of Appeal has been asked to compel the Bombay University, a Corporate Body, to carry out a duty imposed upon it by statute. And the Act, which corresponds in its procedure to the application for a writ of mandamus in England, is the Specific Relief Act of 1877, and under s. 45, chap. 8, of that Act it is laid down (His Lordship read the section and continued).

The facts are shortly these. The applicant to this Court was a student who was desirous of being examined at an examination, called the Previous Examination, which is one of the examinations that a student at the Bombay University must pass on his way to a degree. It is clear to me that he came under s. 12 of the Act of Incorporation of the University, and that he had a right to demand that he should sit and be examined at this examination. But it was said that before having the right to be so examined he must first produce a certificate to the effect that he had previously studied in one of

the institutions recognized by the University Governing body and authorized by the Governor in Council. I need not go into the facts of that part of the case, but need only say that it was admitted that he was not provided with such certificate, and he was, therefore, rejected by the University, who refused to allow him to sit and be examined at a "Previous Examination." A way out of the dead-lock was, [471] however, found that was praiseworthy, since he was allowed to be examined *de bene esse* pending the decision of this Court as to whether under the circumstances he had the absolute right to demand to be so examined or not.

Looking at s. 12 I think the first thing we have to ask ourselves is whether the applicant came under the designation of "Candidate for a degree of B. A." and it seems to us that having regard to the end of the section it can only be read as applying to those persons, and to those persons only, who asked to be examined for the third or final examination for the B.A. degree. (His Lordship then read s. 12 of Act XXII of 1857 and continued :—) Certificates as to the previous course of instruction are by the concluding words of the section to be demanded from and produced by those who have completed their course. The applicant in this case had come forward to be examined for the Previous Examination and could not be said in any sense to have "completed his course of instruction." He had only recently passed his Matriculation Examination and was approaching, as I have said, his Previous Examination, which was that which was only second on the list on his way to a degree. Therefore, it would be impossible for him to give any such certificate as would be required by the Act, and it seems to me that the bye-laws which were afterwards appended to the Act help us to that decision. On page 42 under the heading of B.A. are specified the various examinations a student has to go through on his way to a B.A. degree, and clause 9 says that "Candidates for the Degree of B.A." must have passed their Matriculation and will be required to pass three subsequent examinations to obtain such a degree. Regulation II may apply to this case, and he might be told on his entrance as a student of the University that he would be required to pass the "Previous," the "Intermediate" and the "Third or Final Examination for the Degree of B.A."

I do not agree with the arguments of Mr. Macpherson with regard to the whole of the examinations having to be passed before the student becomes a "candidate for the Degree of B.A." I agree with the interpretation of my learned brother. When a candidate appears for an examination which it is necessary for him to pass immediately prior to, and which is expressly [472] called the Final Examination for, the Degree of B.A., it seems to me that the words of s. 12 apply to him ; that he then becomes a candidate for the degree of B.A., and that he must produce before being allowed to take his B.A. degree a certificate showing he has received instruction at an "authorized" institution.

These, shortly, are the reasons which induce this Court to come to the conclusion that the University in this matter have struck too soon. We cannot find any authority that provides that he must produce these certificates at an earlier or at every preliminary examination. Section 12 means what it says. At the final examination the University should ask for the certificate to the effect that he has been introduced by a recognized institution. Those are the grounds upon which I base my decision, and I think they are the same upon which my learned brother will give judgment.

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PARSONS, J.—The first point for our decision in this case is the meaning of the words "candidate for the degree" used in s. 12 of Act XXII of 1857. Do they mean a candidate for a degree at any stage of his University career, or do they mean one who is a candidate for the final examination, the passing of which would entitle him to the degree? I think the latter. In s. 8 of the Act the expression "candidates for degrees" apparently means all persons who make use of the University with the object of obtaining a degree. It allows of the making of bye-laws and regulations touching the qualifications of the "candidates for degrees" and the previous course of instruction to be followed by them and the preliminary examinations to be submitted to by them. At the same time it shows clearly that there is intended to be only one examination for degrees which it calls "the examination for degrees." The holding of this examination is provided for by s. 13, which enacts that an examination for degrees shall be held at least once in every year, and that the candidates shall be examined at every such examination. Before this section comes s. 12, which provides that "no person shall be admitted as a candidate for the degree . . . unless he shall present . . . a certificate . . . to the effect that he has completed the course of instruction **[473]** prescribed . . in the bye-laws." The use of the word "admitted" might mean that he shall not be admitted at all to the University. This, however, is negatived by the use of the words "completed the course of instruction," and it was not a construction that was contended for on behalf of the University. Their counsel only argued that the words meant that he should not be admitted to any examination which was prescribed for the degree. But to this argument also the use of the same words seems to be equally fatal. To suit this argument we should have to read the section as providing that no person shall be admitted as a candidate for any examination, preliminary or final, prescribed for the degree without a certificate that he has completed the course of instruction prescribed down to the stage at which he has arrived, or for the examination at which he is about to present himself. This would, I think, be doing great violence to the words of the section as they stand. In my opinion, the course of instruction and the preliminary examinations, which are provided for by bye-laws, come within the words "course of instruction," and s. 12 enacts that no one shall be admitted to the examination for degrees without a certificate that he has conformed to the bye- laws and completed the prescribed course of instruction. All other matters the Legislature has left the University to arrange, but this certificate (and one only is mentioned) is to be given by an institution authorized in that behalf by the Governor of Bombay in Council. I am confirmed in this opinion by the order in which the sections are placed. Section 11 gives the power to confer degrees after examination (that is, after the final examination). Section 12 deals with the qualifications of candidates for degrees (that is, for that final examination for degrees). Section 13 provides for the holding of that final examination for degrees and s. 14 for the grant of degrees at the conclusion of the examination to those deemed entitled to them. All these sections deal in order with the same examination which can only be a final examination, the one which qualifies for a degree directly and immediately.

This, then, being my opinion on the meaning of s. 12, it follows that a certificate is not required by that section or by any other provision of law for the Previous Examination, which is **[474]** a preliminary one made by bye-laws under s. 8 of the Act. We need not, therefore, enter on the other points raised. The applicant is duly qualified and has

satisfied the requirements of the bye-laws of the University as to his appearance at the Previous Examination, and the University were under statutory obligation to examine him when he presented himself for it. We, therefore, make the rule absolute with costs.

Rule absolute.

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Attorneys for the petitioner :—Messrs. *Thakoredas, Dharamsi and Cama.*

Attorneys for the University :—Messrs. *Craigie, Lynch and Owen.*

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INSOLVENCY JURISDICTION.

Before Mr. Justice Russell.

DAYABHAI SARUPCHAND *(Insolvent)* *v.* SORABJI BYRAMJI COLAH *Opposing Creditor.** [21st December, 1898.]

Insolvency—Order of personal discharge—Finality of order—Indian Insolvent Act (Stat. 11 and 12 Vict., cap. 21). ss. 47, 56—Practice—Procedure.

An order under s. 47 of the Indian Insolvent Act (Stat. 11 and 12 Vict., cap. 21) for the final discharge of an insolvent once granted cannot be set aside except upon the grounds specified in s. 56 of that Act. The only course open to an opposing creditor is to appeal against the order under s. 73.

RULE obtained by the opposing creditor to have an order made under s. 47 of the Indian Insolvent Act (Stat. 11 and 12 Vict., cap. 21), for the personal discharge of the insolvent revoked or set aside.

The insolvent had filed his petition and schedule on 12th January, 1898. In pursuance of Rule 14 (see Rules and Orders, Bombay) he gave notice of his intention to apply to the Court for an *interim* order of protection under s. 13 of the Insolvent Act. Thereupon the opposing creditor filed grounds of opposition to such order, and appeared by counsel on the 4th May, 1898, to oppose the granting of the order. The Court, however, in spite of his opposition granted a protection order to the **[475]** insolvent for three months. On the 3rd August, 1898, the insolvent applied for an extension of the *interim* order, which, notwithstanding the opposition of the opposing creditor, was granted for a further period of two months.

In September, 1898, the insolvent served notices (under Rule 12) upon his creditors, and the 5th October, 1898, was appointed for the hearing of his petition. In the notices the creditors were called upon to file their grounds of opposition (if any) three clear days before the day so fixed for the hearing of the petition. (See Rule 18).

On the 5th October, 1898, the case came on for the first hearing, and on that day, according to the practice, the insolvent obtained a rule *nisi* for his personal discharge under s. 47 of the Insolvent Act, which was made returnable a fortnight later, *viz.*, on the 19th October. At the same time (*viz.*, 5th October) he obtained a further extension of his *interim* protection order for one month.

On the 19th October, 1898, the case came on again, and there being no opposition, and no grounds of opposition having been filed under Rule 18, the insolvent obtained his personal discharge under s. 47 of the Act.

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On the 16th November, 1898, the opposing creditor took out a rule calling upon the insolvent to show cause "why the matter of his petition should not be re-heard or reviewed, or why the order made in the matter on the 19th October, 1898 (whereby it was (*inter alia*) ordered that the said insolvent should be declared entitled to the benefit of the Act passed for the benefit of insolvent debtors in India) should not be revoked or set aside."

In the affidavit filed in support of the rule, the opposing creditor stated that he was in Court on the 5th October, 1898, when the insolvent's case was called on, but that, hearing that an extension of the protection order was granted for one month, he "left the Court under the impression that the hearing of the insolvent's petition would take place a month thereafter." The affidavit then proceeded as follows:—

"8. On reading the newspapers on the 20th instant, I was exceedingly surprised to learn that on the 19th instant the petition of the insolvent was heard and that he was discharged.

[476] "9. I say that I intended to oppose the discharge of the insolvent and that it is my intention to do so if I am permitted.

"10. I filed my grounds of opposition to the discharge of the insolvent and my affidavit of claim so far back as the third day of May, 1898, and I was informed that by reason of my having filed such grounds of opposition the petition of the insolvent was liable to be placed in the opposed list and, therefore, was not likely to be called on for hearing for some months, and such my belief was strengthened when on the 5th day of October, 1898, I attended the Court, the insolvent himself applied for an extension of the protection order, although, according to the terms of the notice served upon me, that day, *viz.*, the 5th day of October, 1898, was fixed by the Court for the hearing of the insolvent's petition.

"11. I, therefore, pray that the order for the discharge of the said insolvent may be annulled, and that his petition may be again set down for hearing, and that I may be permitted to oppose his discharge."

The rule now came on for hearing.

Mankar, for the insolvent, showed cause.—The order of discharge once made cannot be set aside, unless upon some of the grounds mentioned in s. 56 of the Act. None of these grounds are shown in the opposing creditor's affidavit. The Court has, therefore, no power to re-hear the matter. There has been no fraud or misconduct of any kind on the part of the insolvent in obtaining his discharge, nor is it alleged. The failure of the opposing creditor to appear on the day of hearing through accident or mistake is not sufficient cause under the section to justify the Court in reviewing its order—*In re Golam Hoosen* decided by Bayley, J., on 10th February, 1892 (not reported); *In re Jacob Auron* decided by Farran, J., on 16th January, 1895 (not reported); and *In re Shalom Balkoji Tagaokar* decided by Strachey, J., on 18th November, 1896.

Inverarity, for the opposing creditor, in support of the rule.—I don't apply for a review under s. 56. That section does not refer to a case like this. We ask to have the order of discharge set aside. The Court has power over its own order independently of that section. The order was passed under circumstances which make it an injustice to the opposing creditor. He was misled by what took place in Court on the 5th October and understood that the matter would not come on again for a month. It is only reasonable that the Court should set aside the order of discharge.

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JUDGMENT.

[477] RUSSELL, J.—The facts of this case I find from the records are as follows :—The insolvent filed his petition on the 12th January, 1898. He obtained an *interim* order on the 4th May, 1898, for three months notwithstanding that notice and grounds of opposition to the *interim* order were filed by the abovenamed opposing creditor on the 3rd May, 1898, and gone into. On the 3rd August, 1898, the said *interim* order was extended for two months, although the said opposing creditor again appeared and opposed.

Notices for discharge were issued by the insolvent and duly served upon the opposing creditor, among other creditors, on the 15th August, 1898, fixing the 5th October, 1898, for the first hearing. Such notices contain the usual clause :—" If you wish to oppose the discharge of the said insolvent, you must give notice thereof to me, *i. e.*, the Clerk of the Court, in accordance with Rule 18." As no such notice was ever received from any of his sixty-nine creditors, the insolvent on the 5th October, 1898, obtained his usual rule *nisi*, and on the 19th October, 1898, he obtained his personal discharge under s. 47 in the ordinary course unopposed.

The opposing creditor took out a rule calling upon the insolvent to show cause why the order for his discharge should not be set aside, to which Mr. Mankar showed cause on the 21st instant, and the matter was argued by him and Mr. Inverarity before me. I am of opinion that the rule must be discharged upon the ground that I have no power to set aside the order for discharge. Section 56 of the Insolvent Act provides as follows :—(His Lordship read the section and continued.) It has been argued before me that the word " review " there does not include setting aside an order. I am of opinion that this argument is not well founded. The section distinctly provides for the finality of orders of discharge, and I apprehend that the word " review " means " take again into consideration with a view of further dealing with the order." It seems to me that it is only when the Court can take into consideration the order with the view of further dealing with it upon the grounds mentioned in the section, that the Court can rehear the matter and then annul the original order. The circumstances of this case do not bring it within the purview of **[478]** s. 56 and consequently the only course open to the opposing creditor is to appeal under s. 73 from the order granting the discharge. See *Re Blackwell* (1). I would add that I have referred to two other cases: one *In re Jacob Auron* (2), where an application was made to set aside an order of discharge upon the ground that it had been granted owing to the Insolvent Court sitting unexpectedly, and the opposing creditor consequently not appearing. That application was refused. A similar application was made in No. 376 of 1895 in which the order of discharge had been granted in consequence of the opposing creditor's counsel being accidentally not present in Court. That application was also refused. The present case is stronger, because the opposing creditor took no notice of the express notice given to him by the Clerk of the Insolvent Court in accordance with the practice in that behalf. Having regard to that practice I do not think the mere filing of the grounds of opposition is a sufficient compliance with Rule 18. I cannot but regret this result, and discharge the rule without costs, which was the course adopted in the cases I have referred to.

(1) 9 B.H.C.R. 319.

(2) No. 147 of 1894, unreported.

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LATE
CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

KUSAJI (*Original Applicant*), *Appellant v.* VINAYAK R. PARABHU (*Original Opponent*), *Respondent.** [3rd October, 1898.]

Surety—Limitation Act (XV of 1877), sch. II, art. 179, Expl. I—Liability of surety in execution—Application for execution against a surety when a step in aid of execution against a principal—Mode of enforcing payment against a surety—Practice—Procedure.

Vinayak Ramchandra was awarded the sum of Rs. 4,951-13-11 by the District Judge as compensation for land taken up by the Collector under the Land Acquisition Act, 1870. The money was ordered to be paid over to him on his giving security for its refund in case the appellate Court so ordered. Damodar Viziarangam thereupon became his surety and executed a bond binding himself to pay into Court the said sum of Rs. 4,951-13-11, if ordered by the Court. On the [479] 25th September, 1893, the High Court varied the order of the District Court and awarded Rs. 4,204-7-11 (part of the Rs. 4,951-13-11) to another claimant Kusaji Ramji (the appellant). On 17th February, 1894, Kusaji applied for execution of this order against the surety Damodar and claimed also interest (Rs. 1,535-10-0) and costs (Rs. 550-15-4). Damodar objected to pay interest or costs, and the High Court held that, as surety, he was liable only for the principal sum, but not to interest or costs. Subsequently, *viz.*, on the 16th February, 1897, Kusaji applied for execution against the principal debtor Vinayak of the order of the 25th September, 1893, in respect of the interest and costs, contending that his application of the 17th February, 1894, against the surety was a step in aid of the execution of the order under art. 179 of the Limitation Act (XV of 1877) and prevented limitation.

Held, that this application was barred by limitation. The application for execution against the surety would not operate to keep alive the order as against the principal debtor unless it was made to enforce a liability which was common to both under the order. But under the order the surety was not liable for interest or costs. His liability was expressly confined by his bond to the principal sum, and it was only as to that sum that he was jointly liable with Vinayak. The previous application, therefore, for execution against the surety for money for which he was not liable under the order, could not be regarded as a step in aid of execution against the principal debtor Vinayak.

The mode of enforcing payment against a surety is by summary process in execution and not by separate suit.

[**F.**, 25 B. 409 (412) = 3 Bom.L.R. 35 ; 14 Bur.L.R. 170 = 4 L.B.R. 197 (198) ; 109 P.R. 1906 = 1 P.L.R. 1907 = (1906) P.W.R. (Vol. I), p. 141 ; **R.**, 36 B. 42 = 13 Bom. L.R. 909 = 12 Ind. Cas. 549; **D.**, 31 B. 50 (53) = 8 Bom.L.R. 807.]

APPEAL against the order of W. H. Crowe, District Judge of Poona, in a miscellaneous proceeding.

The Collector of Poona having acquired certain land under the Land Acquisition Act (X of 1870), it was decided that Rs. 4,951-13-11 should be paid as compensation to the owners. Several persons claiming this money, the Assistant Collector referred the adjudication of their claims to the District Judge. The Judge decided that the entire sum should be paid to Vinayak Ramchandra (the respondent), but ordered that the money should not be handed over to him until the expiration of the period allowed for an appeal, or till further order, unless he (Vinayak) gave security that he would refund it if ordered.

Accordingly one Damodar Viziarangam Mudliar stood surety for Vinayak, and passed a bond, binding himself, in case of Vinayak's default,

* Appeal No. 45 of 1898.

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to pay into Court the sum of Rs. 4,951-13-11. The material part of the surety bond was as follows :—

"In default, I, Damodar Viziarangam, will, when the Court shall order, repay into Court Rs. 4,951-13-11."

[480] Upon the execution of this bond, the whole sum was paid over to Vinayak.

The other claimants, however, appealed, and in appeal the High Court on the 25th September, 1893, varied the order of the District Judge by awarding the sum of Rs. 4,951-13-11 in different shares to three of the claimants, *viz.*, Kusaji Ramji (the present appellant) and two other persons. The share awarded to Kusaji (the appellant) was Rs. 4,204-7-11. The order was silent as to interest on this sum, but directed that Vinayak should pay Kusaji's costs.

On the 17th February, 1894, Kusaji applied to the District Court for the attachment and sale of the moveable property of the surety Damodar for the purpose of realizing his share (Rs. 4,204-7-11) together with Rs. 1,605-10-0 interest and Rs. 550-15-4 costs. Damodar objected that he was not liable to the interest or costs. The Judge held that he was liable for both. On appeal, however, the High Court on the 15th July, 1895, reversed this order and held that, as surety, Damodar was liable only for the principal sum and not for interest or costs (1).

Kusaji then proposed to recover the interest and costs from the principal debtor Vinayak, and accordingly on the 16th February, 1897, he applied that the original order of 25th September, 1893, against Vinayak (the opponent) should be transferred under s. 223 of the Civil Procedure Code (Act XIV of 1882) to the Court of Small Causes at Bombay for execution, stating that Vinayak was a resident of Bombay and claiming the said interest and costs from him in execution of the order. Vinayak (the opponent) contended that this application for execution of the order of 25th September, 1893, was barred by limitation.

[481] The question was whether the application for execution against the surety (Damodar) on 17th February, 1894, prevented limitation against the principal debtor (Vinayak).

The Judge held that the present application was barred by limitation, on the ground that the proceedings against the surety should have been by way of a separate suit and not in execution, that the application of the 17th February, 1894, was, therefore, not in accordance with law, and did not prevent limitation (see art. 179 of Limitation Act). In his judgment he said :—

"It is admitted that applicant did apply by application, dated 17th February, 1894, to recover from a surety a certain sum awarded by the decree of the High Court, dated 25th September, 1893. That surety had not under s. 253, Civil Procedure Code, become liable prior to the passing of the decree, but under s. 546 while the appeal was pending. His

(1) In that case Farran, C.J., gave judgment as follows :—

It must be conceded that Vinayak Ramchandra could rightly be ordered to repay the amount paid to him with interest. The question, however, is whether the surety can be ordered to repay more than the principal sum. The material part of the bond, which was passed by the surety, is as follows :—"In default I, Damodar Viziarangam, will, when the Court shall order, repay into Court Rs. 4,951-13-11." Section 128 of the Contract Act provides that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. We think here that the extent of the obligation of the surety is limited by the express terms of the bond to the precise amount which the surety has in it undertaken to repay. (See Printed Judgments for 1895, p. 227).

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liabilities, therefore, could not be enforced in execution of the decree but by separate suit. The various High Courts appear to have held different views with respect to the procedure to enforce a security bond prior to Act VII of 1888, which made express provision with regard to matters coming under ss. 549 and 610 of the Civil Procedure Code, but said nothing as to ss. 545 and 546. The ruling in *Subjoo* v. *Balmakund* (1) appears to me in point, and by the light of that judgment I cannot hold that the application to enforce a security bond was an application for execution, or to take some step in aid of execution."

Kusaji then appealed to the High Court.

Vinayak S. Bhandarkar, for the appellant (Kusaji).—Our application of 16th February, 1897, seeks execution against Vinayak of the order of the 25th September, 1893. The application against his surety Damodar on the 17th February, 1894, prevents limitation (art. 179, cl. 4). That application was a step in aid of execution and was the proper remedy against a surety—*Venkapa* v. *Baslingapa* (2); *Ex parte Bhikaji* (3). The liability of the surety and the principal debtor is co-extensive and joint, and the application for execution against one of two persons jointly liable keeps alive a decree against the other—*Janki Kuar* v. *Sarup Rani* (4); *Thirumalai* v. *Ramayyar* (5).

Trimbak R. Kotwal, for respondent (opponent).—This application for execution is in respect of interest and costs. The order [482] of 25th September, 1893, does not give interest. The applicant cannot, therefore, recover it in execution—*Pandarinath* v. *Lilachand* (6). The application of 17th February, 1894, was not a step in aid of execution, inasmuch as it sought to obtain what was not granted in the order—*Ramchandra* v. *Kondaji* (7); *Daya Kishan* v. *Nanhi Begam* (8); *Krishnaji* v. *Anandrav* (9).

The liability created by the order was joint so far as the principal sum was concerned, but not as to interest and costs; for while Vinayak as principal debtor was liable to both, the surety was liable to neither. The present application against Vinayak being more than three years after the date of the order is, therefore, barred by limitation, as the application against Damodar, a surety, does not keep alive the order against Vinayak, the principal.

JUDGMENT.

PARSONS, C. J. (ACTING).—The facts are these: Compensation was awarded to the respondent under the Land Acquisition Act. The appellant, who had made a counter-claim to the compensation, appealed to the High Court. The respondent, when paid the money, gave security for its refund if the appellate Court so ordered. The High Court decided the appeal in the appellant's favour on the 25th September, 1893. The appellant applied in execution on the 17th February, 1894, against the surety alone for the recovery of the principal amount paid with interest on the same and the costs of the litigation. He recovered the principal amount only, as the High Court held that the surety was liable for the amount named in his surety bond only, and not for any interest or for costs: see *Damodar* v. *Kusaji* (10). He filed his present application on the 16th February, 1897, to have the decree transferred to Bombay,

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(1) 23 C. 212.
(2) 12 B. 411.
(3) 4 B.H.C.R.A.C.J. 119.
(4) 17 A. 99.
(5) 13 M. 1.
(6) 13 B. 237.
(7) 22 B. 221 (224).
(8) 20 A. 304.
(9) 7 B. 293.
(10) P. J. (1895),227.

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in order to execute it against the respondent to recover from him the said interest and costs.

The District Judge held that the application to execute the decree against the respondent was time-barred, since the application against the surety was not made in accordance with law, citing *Subjoo Das* v. *Balmakund Das* (1). This High Court, however, has decided that the mode of enforcing payment by a **[483]** surety is by summary process in execution, and not by means of a separate suit—*Venkapa Naik* v. *Baslingapa* (2); and the District Judge ought to have followed that decision of this Court, rather than that of another High Court.

Treating, then, the application against the surety of the 17th February, 1894, as a step properly taken in execution against him, and assuming that he is to be treated as a party to the suit bound by the decree in so far as he was a surety for its due performance, we have to see if the application is one that takes effect against the respondent. The answer to this question depends upon whether the liability under the decree was joint or separate, and as to this there can be no doubt. The surety was not liable either for interest or for costs. His liability was expressly confined by his bond to the principal sum of Rs. 4,951-13-11, which was paid to the respondent, and as to that sum only can there be said to be any joint liability under the combined effect of the decree and the surety bond. For the interest and costs there was but one person made liable under the decree *viz.*, the respondent.

The case, therefore, is one in which the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, and according to Expl. 1 to art. 179 of the Limitation Act, the application takes effect against only such of the said persons as it may be made against. The application of the 17th February 1894, therefore, does not take effect against the respondent, and the present application to execute the decree is time-barred. For this reason we dismiss the appeal with costs.

RANADE, J.—I concur. The authorities, cited on behalf of the appellant, only go to show that, where a decree imposes joint liability upon several persons, execution taken out against any one of them is a step in aid of execution against the rest. In the present case, however, there is admittedly no joint liability in respect of the sum due for interest and costs, which the decree-holder now seeks to recover from his principal judgment debtor. The surety was not liable for these sums under his bond, and it **[484]** is thus obvious that the previous execution of the decree against the surety cannot be regarded as a step in aid of execution against the principal in respect of the sums now claimed. The District Judge, therefore, very properly held that the execution was time-barred under these circumstances.

Appeal dismissed.

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(1) 23 C. 212.

(2) 12 B. (411).

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Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

IN RE BULAKIDAS.* [3rd October, 1898.]

Maintenance—Husband and wife—Maintenance order obtained by a wife against husband—Subsequent decree for restitution of conjugal rights obtained by husband—Effect of such decree on previous order of maintenance—Criminal Procedure Code (Act X of 1882), s. 488.

A decree of a Civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance, if the wife should persist in refusing to live with her husband. A Magistrate ought to cancel a previous order of maintenance made by him, or rather treat it as determined, if the wife failing to comply with the decree for restitution refuses to live with her husband.

[F., 27 A. 483 (484)=2 A.L.J. 160=25 A.W.N. 54; **Appl.**, 11 Cr.L.J. 652=8 Ind. Cas. 658=6 L.B.R. 127; **R.**, 4 Cr. L.J. 73=4 P.R. 1906 (Cr.)=115 P.L.R. 1907.]

APPLICATION under s. 435 of the Code of Criminal Procedure (Act X of 1882).

On 22nd May, 1891, Bai Ganga obtained an order for maintenance against her husband Bulakidas under s. 488 of the Criminal Procedure Code (Act X of 1882) in the Court of the First Class Magistrate of Ahmedabad.

On the 1st February, 1892, Bulakidas sued Bai Ganga in the Court of the First Class Subordinate Judge of Ahmedabad, and obtained a decree for restitution of conjugal rights.

On 19th September, 1893, Bai Ganga applied to the Magistrate to enforce the order for maintenance and to recover twenty months' arrears of maintenance. Thereupon the arrears were paid into Court by Bulakidas.

On the 25th September, 1893, Bulakidas applied to the Magistrate for a refund of the money so paid into Court, alleging that his wife had returned to his house in obedience to the decree for [485] restitution of conjugal rights which he had obtained, and contending that she was, therefore, not entitled to recover the arrears of maintenance claimed by her. This allegation was held by the Magistrate to be not proved, and the application was rejected on 8th February, 1894.

In 1895, Bai Ganga filed a suit in the Agency Court at Rajkot for arrears of maintenance. This suit was ultimately dismissed on the ground that she had lost her right of maintenance by her own conduct, and that the Magistrate's order for maintenance could no longer be enforced.

Thereupon Bulakidas made the present application to the First Class Magistrate of Ahmedabad to cancel the order of maintenance passed in 1891.

The chief grounds upon which he made this application were:

(1) That he had obtained a decree in the Civil Court in 1892 for restitution of conjugal rights, and

(2) That after this decree his wife had returned to his house and lived with him for ten or twelve days, and that she had then left his house. This conduct (it was urged) disentitled her to any maintenance allowance.

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* Application for Revision No. 189 of 1898.

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The Magistrate held that both these objections had been raised before his predecessor in 1894, and had been overruled, and that he was, therefore, precluded from re-hearing them as decided by the Allahabad High Court in *Laraiti* v. *Ram Dial* (1). He was further of opinion that as the applicant had not executed the decree for restitution of conjugal rights, he was not entitled to the relief he claimed. He, therefore, dismissed the application.

Against this order of dismissal, Bulakidas applied to the High Court under its criminal and revisional jurisdiction.

Goverdhan M. Tripati, for applicant.

Ganpat S. Rao, for opponent.

JUDGMENT.

PARSONS, C. J. (Acting).—The authorities show that an order of a Civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance, if the wife should persist in refusing to live with her husband—**[486]** *Lutpolee Doomony* v. *Tikha Moodoi* (2), and that a Magistrate ought to cancel his order, or rather to treat it as determined, if the wife failing to comply with the decree for restitution refuses to live with her husband—*In re Kalidas Mansukram*(3).

The Magistrate in this case has not found whether or not the opponent persists in refusing to live with the applicant. All he says is that the applicant has not executed the decree which he obtained for restitution of conjugal rights or sought to obtain possession of his wife. This is beside the case. The Magistrate must find whether the wife has obeyed the decree; if she has not, then she would not be entitled to a maintenance order.

We reverse the order of the Magistrate and remand the case for a re-hearing.

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APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

DADA BHAU KITTUR (*Original Plaintiff*), *Appellant* v. NAGESH RAMCHANDRA AND ANOTHER (*Original Defendants*), *Respondents.* *

[5th October, 1898.]

Valuation—Court Fees Act (VII of 1870), s. 7, cl. 10 (a), cl. 4 (c), (d); s. 12—Class to which a suit belongs—Decision as to such class—Appeal—Practice.

An appeal lies against a decision as to the class to which a suit belongs although it does not lie against a decision as to the valuation of the suit in that class. A decision of the lower Court, holding that a suit is one for specific performance of a contract of sale and to be valued according to the amount of the consideration-money, is appealable.

[F., 28 C. 334 (335); R., 27 B. 140 (143); 16 C.L.J. 371=17 C.W.N. 503=16 Ind. Cas. 575; 16 Ind. Cas. 773=6 S.L.R. 72.]

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum, confirming an order passed by Rao Bahudur G. V. Limaye, First Class Subordinate Judge.

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* Second Appeal No. 227 of 1898.

(1) 5 A. 224.
(2) 13 W.R. Cr. R. 52.
(3) Criminal Revision No. 119 of 1878.

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The plaintiff brought the suit praying for a declaration that a certain purchase made in the name of the first defendant was a benami transaction for him (the plaintiff) and for an order that the defendants should execute a conveyance of the property to him. The consideration money for the purchase was Rs. 1,265. The Subordinate Judge held that the suit was one for specific **[487]** performance and fell under cl. x (*a*) of s. 7 of the Court Fees Act (VII of 1870; and that the plaint should be stamped according to the amount of consideration (Rs. 1,265), and he dismissed the suit as the plaintiff failed to pay this amount.

The plaintiff appealed, contending that the suit was not one for specific performance and did not fall under cl. x (*a*) of s. 7, but within cl. iv, sub-section (*c*) or (*d*), and had, therefore, been wrongly dismissed.

The Judge in appeal held, however, that the question was one of valuation, and that under s. 12 of the Court Fees Act (VII of 1870) the decision of the lower Court was final, and he dismissed the appeal. He said :—

"The Judge below decided that the valuation was incorrect, and the terms of his order bring the case under s. 12 of the Court Fees Act (VII of 1870). That section gives finality to the decision of the Judge below, and I must, therefore, dismiss this appeal, though I do not agree with the principle on which the learned Judge apparently valued the claim."

The plaintiff preferred a second appeal.

Sadashiv R. Bakhle appeared for the appellant (plaintiff).— The lower appeal Court dismissed the plaintiff's appeal, holding that the question was one of valuation and fell within s. 12 of the Court Fees Act (VII of 1870), which makes the lower Court's decision final. But the case does not fall under s 12. The question here is not a question "relating to valuation" within the meaning of that section. The question is as to the clause under which valuation is to be made. It has been held that the question as to the application of a particular section is distinct from the question of making the valuation after determining the section. It is only in the latter case that s. 12 of the Court Fees Act makes the decision final : see *Abaji Parashram* v. *Ramchandra Bhimaji*(1); *Vithal Krishna* v. *Balkrishna Janardan* (2). Such appeals have been entertained —*Chunia* v. *Ramdial* (3) ; *Annamalai Chetti* v. *Cloete* (4) ; *Sardarsingji* v. *Ganpatsingji* (5) ; *Sardarsingji* v. *Ganpatsingji* (6).

There was no appearance for the respondents.

JUDGMENT.

[488] PARSONS, C. J. (Acting).—The District Judge refused to hear the appeal presented to him on the ground that the valuation made by the Subordinate Judge was final under s. 12 of the Court Fees Act. The facts are these :—The plaintiff sued for a declaration that the purchase in the name of the first defendant was a benami transaction and for an order that the defendant should execute a conveyance to him. The Subordinate Judge held that this was a suit for specific performance falling under cl. x (*a*) of s. 7 of the Court Fees Act, and that the plaint should be stamped according to the amount of the consideration money for the purchase, which was Rs. 1,265, and dismissed the suit on the plaintiff failing to pay this amount. Plaintiff appealed on the ground that his suit fell under cl. iv (*c*) or (*d*) and had been wrongly dismissed.

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(1) P. J. (1885), 34. (2) 10 B. 610. (3) 1 A. 360.
(4) 4 M. 204. (5) 14 B. 395. (6) 17 B. 56.

The dismissal order was clearly appealable, and the District Judge ought to have entertained the appeal. There was no question of valuation raised in it, for the only valuation made, *viz.*, the value of the consideration, was admitted, but the order was contested on the ground that the Subordinate Judge was wrong in holding that the suit fell within a certain class of cases as defined in the Court Fees Act; in other words, it was contended that the Subordinate Judge was wrong, in law, in holding that the suit was one for specific performance, since it was one for a declaratory decree where consequential relief was prayed.

The distinction between cases in which the valuation of property is in dispute and cases in which the application of the law is questioned is clearly drawn in *Abaji Parashram* v. *Ramchandra Bhimaji* (1). It is not so clearly expressed in the Full Bench case of *Vithal Krishna* v. *Balkrishna Janardan* (2), but the principle therein laid down that "on the question of whether or not any particular suit was one admitting of valuation by the Judge an appeal lies" depends upon the same distinction, *viz.*, that a decision has to be come to, first, as to the class under which a suit falls, and secondly, upon its valuation in that class, and that an appeal lies from the former. In *Kashinath Narayan* v. *Govinda Piraji* (3) the decision should have been made to rest, **[489]** not upon valuation, but upon the improper inclusion of the suit within the class of cases to which s. 17 was applicable. So, too, in *Sardarsingji* v. *Ganpatsingji* (4), the Court entertained the appeal because the lower Court had held that the suit fell under cl. ii when it really fell under cl. iv of s. 7. In *Chunia* v. *Ramdial* (5) there was no question of valuation, but the appeal was entertained so as to "determine whether this suit is one in which specific relief is sought or not, so as to determine under what class of cases it falls for the purpose of the Court Fees Act." In *Annamalai Chetti* v. *Cloete* (6) an appeal was held to lie from the decision of a Court in respect of the class in which a suit ranks. In the present case, the order of the Subordinate Judge is questioned on the same ground, and we are of opinion that on that point an appeal lies.

We reverse the decree of the lower appellate Court, and remand the appeal for trial on the merits. Costs to abide the result.

RANADE, J.—In this case the suit was brought for a declaration that the appellant-plaintiff was the owner of the land, and that the deed of sale in regard to it was taken in defendant's name as benamidar for the plaintiff. There was a further prayer to the effect that defendant should be required to pass a deed of conveyance to plaintiff. The claim was valued at 50 rupees, and Court fees were paid accordingly. The Court of first instance held that the valuation should be according to the amount for which the sale-deed was passed. The plaintiff failed to pay the additional fees, and his suit was dismissed. In appeal, the District Judge held that no appeal lay to him, as the decision of the Court of first instance was final under s. 12 of the Court Fees Act.

There can be no doubt that the lower appellate Court was clearly wrong in dismissing the appeal before it on the ground of the alleged finality of the order made under s. 12. There were, no doubt, earlier rulings which might lead to such an inference—*Narayan Madhavrao* v. *The Collector of Thana* (7) and *Manohar Ganesh* v. *Bawa Ramcharandas* (8);

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(1) P.J. (1885), 34. (2) 10 B. 610. (3) 15 B. 82. (4) 17 B. 56.
(5) 1 A. 360. (6) 4 M. 204. (7) 2 B. 145. (8) 2 B. 219.

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but the whole subject was carefully considered in *Vithal Krishna* v. [490] *Balkrishna Janardan* (1), and it was laid down that an appeal lies against the decision of the question whether any particular suit was one admitting of valuation by the Judge; but if a valuation made by him is within his proper functions, its essential elements cannot be examined into in appeal. This ruling was followed by this Court in *Sardarsingji* v. *Ganpatsingji* (2) and *Sardarsingji* v. *Ganpatsingji* (3). The Calcutta High Court has taken this same view in *Ajoodhya Pershad* v. *Gunga Pershad* (4), *Rajkristo Banerjee* v. *Bama Soonduree Dassee* (5) and *Gunga Monee Chowdhrain* v. *Gopal Chunder Roy* (6). The Allahabad High Court has taken a different view of the section in *Balkaran Rai* v. *Gobind Noth Tiwari* (7), but the Madras High Court has preferred to follow in *Kanaran* v. *Komappan* (8) the Calcutta ruling in *Ajoodhya Pershad* v. *Gunga Pershad*.

The Bombay decision noticed above leaves no doubt on the point that the decision of the question of law as to whether a particular suit falls within s. 7, cl. 4 (*c*) and (*d*), or whether it is a suit for which *ad valorem* duty should be paid, is appealable.

For these reasons, I would reverse the decision of the lower appellate Court, and remand the appeal to the District Court to be disposed of according to law.

Decree reversed and case remanded.

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23 B. 490.

CRIMINAL REVISION.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

IN RE JIVANJI ADAMJI.* [5th October, 1898.]

Criminal Procedure Code (Act V of 1898), s. 557—Pleader—Appointment of a pleader to act as Presidency Magistrate—Appointment not forbidden by the Code.

The appointment of a pleader to act as a Magistrate is not forbidden by s. 557 or any other provision of the Code of Criminal Procedure (Act V of 1898).

[491] After the Criminal Procedure Code of 1898 had come into force, a practising pleader was appointed to act as a Presidency Magistrate. On his appointment he gave up practising and was not practising at the time the accused was tried and convicted by him of theft. The accused applied to the High Court, in revision, to quash the conviction, on the ground that the appointment of the Magistrate contravened the provisions of s. 557 of the Code of Criminal Procedure.

Held, that s. 557 of the Code does not deal with appointments, and had no application to the present case, as the Magistrate was not practising at the time the accused was tried and convicted.

APPLICATION under s. 435 of the Criminal Procedure Code (Act V of 1898).

Mr. S. B. Spencer was a pleader of the High Court practising, for the most part, in the Presidency Magistrates' Courts.

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* Criminal Application for Revision No. 245 of 1898.

(1) 10 B. 610. (2) 14 B. 395. (3) 17 B. 56. (4) 6 C. 249.
(5) 23 W. R. 296. (6) 19 W. R. 214. (7) 12 A. 129. (8) 14 M. 169.

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On the 27th July, 1898, Mr. Spencer was appointed to act as Fourth Presidency Magistrate in place of Khan Bahadur P. H. Dastur. As soon as the appointment was made, he ceased to practise.

On the 29th August, 1898, the accused was charged before Mr. Spencer with theft. The accused was convicted and sentenced to six months' rigorous imprisonment.

The accused thereupon applied to the High Court under its revisional jurisdiction, contending that the conviction was illegal, as the appoinment of Mr. Spencer to act as a Presidency Magistrate was in contravention of s. 557 of the Criminal Procedure Code.

The High Court sent for the record of the case.

Branson (with him *Ruttonji R. Desai* and *Manubhai Nanabhai*), for the accused.—The appointment of Mr. Spencer to act as a Presidency Magistrate was invalid under s. 557 of the new Code of Criminal Procedure (Act V of 1898) as he was practising exclusively in the Presidency Magistrates' Courts till the date of his appointment. From the Draft Bill (as printed in the *Gazette of India*, 1898, Part VI, pages 32-33) it appears that the section as originally drafted was much wider in its scope than the section as it now stands. It disqualified every pleader from sitting as a Magistrate in the Presidency towns. The disqualification is now [492] limited to those pleaders only who practise in the Presidency Magistrates' Courts. This disqualification is based on public policy, and the intention of the Legislature appears to be to prevent pleaders who practise in the Magistrates' Courts from acting as Magistrates in those Courts.

Lang, Advocate-General, for the Crown.—Section 557 of the new Code does not deal with the appointment of a pleader to act as a Presidency Magistrate. The section does not say that no pleader shall be "appointed," but the words used are, no pleader shall *sit*. This means that a pleader cannot practise and at the same time sit as a Magistrate in the Presidency Magistrates' Courts. The section was intended to check the practice prevailing in the North-West Provinces and in the Bengal Presidency, where pleaders used to act as Honorary Magistrates without ceasing to practise. The section has no application to the present case, as Mr. Spencer gave up practising as soon as he was appointed. He is not, therefore, disqualified from sitting as a Presidency Magistrate.

JUDGMENT.

PARSONS, C. J. (Acting).—It has been argued before us that the conviction in this case by the Acting Presidency Magistrate (Mr. Spencer) is illegal, because his appointment to act as a Presidency Magistrate, dated the 27th July, 1898, contravenes the provisions of s. 557 of the Criminal Procedure Code. That section, however, does not deal with appointments; all it says is that "No pleader who practises in the Court of any Magistrate in a Presidency town or district shall sit as a Magistrate in such Court or in any Court within the jurisdiction of such Court." Fortunately it is unnecessary for us to inquire into the object, meaning or general application of the section, or even to endeavour to ascertain what would happen if a pleader did practise and sit as a Magistrate in any Court. It is sufficient to say that Mr. Spencer has not done so in this case. He was a pleader when he was appointed to act as a Presidency Magistrate. The appointment of a pleader to act as a Magistrate is not forbidden by any provision of the Code. On appointment he gave up practising, and he does not now practise. The section has, therefore, no application to him. We dismiss the application.

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23 B. 493.

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[493] CRIMINAL REFERENCE.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* BHAU.* [6th October, 1898.]

Criminal Procedure Code (Act V of 1898), s. 337—Pardon tendered to one of the accused—Approver—Trial of approver for non-fulfilment of the condition on which pardon was offered—Practice.

No action can be taken against a person who has accepted a pardon for breach of the condition on which the pardon was tendered until after the case in the Court of Session has been finished, and then his trial should be commenced *de novo*.

[F., 4 Bom.L.R. 826 (827); 13 C.P.L.R. 123; 5 N.L.R. 134 (135); **Appl.**, 24 M. 321 (324) = 2 Weir 396 (399); **R.**, 25 B. 675 (679) = 3 Bom. L.R. 271; 37 B. 146 = 1 Bom. Cr. Cas. 193 = 14 Bom L.R. 897 = 13 Cr L.J. 842 = 17 Ind. Cas. 714; 14 Bur. L.R. 306 = 7 Cr. L.J. 245 = U.B.R. (1907) IV Qr. Cr. P.C., 7 (8); 6 O.C. 236 (237); 4 P.R 1903 (Cr.) = 52 P.L.R. 1903; **Disappr.**, 19 C.W.N. 295 = 26 Ind. Cas. 657 = 16 Cr. L.J. 65.]

REFERENCE under s. 438 of the Code of Criminal Procedure (Act V of 1898) by J. B. Alcock, Sessions Judge of Nasik.

The reference was in the following terms :—

" I have the honour to submit, for the High Court's revisional orders, the magisterial record of proceedings in the case of *Imperatrix* v. *Bhau valad Bhiva and others* committed to the Sessions Court by H. O. Brooke, Esquire, Magistrate, First Class, Nasik.

" Accused No. 1, Bhau valad Bhava, accepted a tender of pardon made to him by Mr. Brooke, and gave evidence as a witness. The Magistrate thought that he gave false evidence on certain points, though he has not given good reasons for thinking so, and declared the tender of pardon forfeited on the 16th August, 1898. The pardon was tendered on the 2nd August, 1898. The evidence of the witnesses for the prosecution was concluded on 6th August, 1898. The accused were examined on the 16th August. It appears, therefore, that the evidence for the prosecution was not taken in the presence of the accused Bhau, and he was not in the position of an accused person during the hearing of that evidence.

" Following the ruling of the High Courts in Indian Law Reports, 14 Allahabad, 336, and 15 Madras, 352, I hold that the commitment of accused No. 1, Bhau, is not legal, and that he cannot be tried until after the disposal of the case against the other accused.

" I, therefore, recommend that the committal of accused No. 1, Bhau valad Bhiva, may be quashed."

This reference came on for hearing before a Division Bench (Parsons, C. J., and Ranade, J.).

There was no appearance for the Crown or for the accused.

JUDGMENT.

PARSONS, C.J. (Acting).—The Magistrate, being of opinion that the accused No. 1 had not complied with the condition on which the [494] tender of pardon was made to him, committed him along with the

* Criminal Reference No. 109 of 1898.

other accused for trial by the Sessions Court. We think that the commitment is illegal. Section 337 of the Code of Criminal Procedure provides that every person accepting a pardon shall be examined as a witness in the case, and if not on bail shall be detained in custody until the termination of the trial by the Court of Session. It seems, therefore, to be clear that nothing can be done against him till after the case in the Court of Session has been finished, and that then his trial should be commenced *de novo*. This is what has been decided by the other High Courts in India —*Queen-Empress* v. *Sudra* (1), *Queen-Empress* v. *Mulua* (2), *Queen* v. *Petumber*(3), *Queen* v. *Bipro Dass* (4), *In re Joyudee Paramanick* (5), *Queen-Empress* v. *Rama*(6)—and we follow them. The commitment is quashed. After the trial in the Sessions Court is finished, proceedings can, if it is thought necessary, be taken against him.

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Before Mr. Justice Parsons and Mr. Justice Ranade.

NARAYAN GOVIND *v.* VISAJI. * [15th November, 1898.]

Criminal Procedure Code (Act X of 1882), ss. 522, 523, 524—Order to restore possession of immoveable property.

An order made under s. 522 of the Criminal Procedure Code (Act X of 1882) restoring possession of immoveable property to a person who has been dispossessed of it by criminal force, is an independent order and may be made subsequently to the date of the conviction of the offender. It need not be made at the same time as the conviction.

The case contemplated by s. 522 is that of a person in possession (the complainant) being dispossessed by force by another person (the accused) and the latter being in possession at the date of conviction. In such a case the section gives the Magistrate power to order possession to be restored to the complainant. In the case of a proper order, third persons could not be affected; if they are, the order is not thereby necessarily invalid. Clause 2 of the section gives them a remedy by civil suit.

[495] On 27th September, 1897, complainant charged one Ravlo with criminal trespass under s. 447 of the Indian Penal Code (Act XLV of 1860). He alleged that in the previous July, Ravlo had entered into possession of the land and sowed rice upon it, and that when in the month of September, 1897, he (the complainant) went to the field, Ravlo had turned him out by force and refused to vacate the land. On the 17th November, 1897, the case was heard by the Third Class Magistrate, who convicted Ravlo of the offence charged.

On the following day (18th November, 1897) the complainant applied to the Magistrate under s. 522 of the Code of Criminal Procedure (Act X of 1882) to be restored to possession of the land and of the standing crops. The Magistrate ordered possession of the land to be restored to the complainant, but attached the crops under Chap. XLIII of the Criminal Procedure Code.

Thereupon one Visaji intervened and claimed the crops as having been sown by himself. His claim was disallowed, and the crops were ordered to be sold and the proceeds credited to Government under ss. 523 and 524 of the Code.

Held, that the order made by the Magistrate under s. 522 restoring possession of the land to the complainant was bad, because it did not appear that the offence of which the accused was convicted was attended with criminal force, and that the dispossession was due to the use of such force. The illegal entry complained of had taken place in July, 1897. The accused then took possession, and in

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* Criminal Reference No. 89 of 1898.

(1) 14 A. 336. (2) 14 A. 502. (3) 14 W. R. Cr. R. 10.
(4) 19 W.R. Cr. R. 43. (5) 7 C.L.R. 66. (6) 15 M. 352.

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September, being then still in possession, forcibly resisted the complainant when he attempted to enter upon the land. The complainant, however, did not charge the accused with this assault, but with the trespass which had taken place in July. It is only when the actual use of criminal force leads to dispossession that an order under s. 522 can be made.

Held, also, that the order passed under ss. 523 and 524 with reference to the crops were illegal. The crops were not property in respect of which the offence was committed, nor were they used in the commission of the offence. They were not such property as is referred to in ss. 517, 523 or 524 of the Criminal Procedure Code.

Held, also, that the Third Class Magistrate, as such, had no authority to make an order under s. 524.

[**Appr.**, 15 P.R. 1914 (Cr.)=112 P.L.R. 1914=14 P.W.R. 1914 (Cr.)=23 Ind. Cas. 483 =15 Cr. L J. 275; **F.**, 14 Cr. L.J. 172=19 Ind. Cas. 172; **Rel.**, 39 C. 1050=13 Cr.L.J. 608=16 C.W.N. 811=16 Ind. Cas. 176; **Doubted**, 5 C.W N. 374 (375).]

REFERENCE under s. 438 of the Criminal Procedure Code (Act X of 1882).

On the 27th September, 1897, complainant Narayan charged the accused Ravlo with criminal trespass upon his field under s. 447 of the Indian Penal Code (Act XLV of 1860).

The complainant stated that in July, 1897, Ravlo had illegally entered upon the land in question and sowed rice there, and that **[496]** in September, when the complainant went to the field, Ravlo had turned him out of it and had refused to vacate the land.

The case was heard by the Third Class Magistrate on the 17th November, 1897, and he convicted Ravlo of the offence charged.

On the following day (18th November, 1897) the complainant applied to the Magistrate under s. 522 of the Criminal Procedure Code (Act X of 1882) to be put into possession of the land and of the rice crop on it. The Magistrate thereupon ordered possession to be given to the complainant, but directed that the crop should be attached under Chap. XLIII of the Criminal Procedure Code. Subsequently, however, as Ravlo disclaimed all interest in the crop, the Magistrate ordered that after deducting expenses it should be made over to the complainant.

One Visaji then intervened and claimed the crops, alleging that he had sown them, but his claim was disallowed.

Possession of the land was duly given to the complainant on the 29th January, 1898, but the crops were subsequently sold under ss. 523 and 524 of the Criminal Procedure Code (Act X of 1882) and the proceeds credited to Government.

Visaji then applied to the District Magistrate, alleging that he had been in possession both of the land and the crops, and had been illegally deprived of both by the order made by the Third Class Magistrate. The District Magistrate thereupon made this reference to the High Court, being of opinion that the order made by the Third Class Magistrate under s. 522 on the 18th November, 1897, was illegal, because (1) it had not been made at the time of the conviction, and (2) because it prejudiced the right of the intervenor Visaji, contrary to cl. 2 of that section.

The reference was as follows: —

"It appears to me that an order under s. 522 must be passed at the time of conviction, not subsequently, as was done here. The words of the section are 'whenever a person is convicted,' not 'has been convicted.' In that case I might have considered the order when hearing the appeal from the conviction. But as it is, the order stands separate, and there is no appeal from it.

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[497] "Besides the above reason, I think the order is bad, as it prejudices the right of a third party who was not concerned in the original criminal case."

The reference was heard by a Divisional Bench (Parsons and Ranade, JJ.).

G. S. Mulgavkar, for complainant.

B. N. Athavle, for Visaji.

JUDGMENT.

PARSONS, J.—The District Magistrate has referred this case on the ground that the order of the Third Class Magistrate passed under s. 522 of the Code of Criminal Procedure is illegal, because it was not passed at the time of conviction and because it prejudices the right of a third party who was not concerned in the original criminal case. The first objection I do not consider to be a tenable one in the present case. The District Magistrate considers that the use of the words "is convicted" necessitates a simultaneous order of restoration which would not have been so had the words used been "has been convicted," but I do not think his view is correct. All that the words mean is that there must be a conviction first, had, and then the order can be made. No Magistrate probably would make such an order unless he was asked to do so, and there must be some time allowed for that. Similar words are used in s. 519, but there an application is provided for. Section 522 makes no mention of any application, but the words used clearly allow of such being made and give jurisdiction to the Magistrate to make the order after conviction on such application. His order may be considered to be but a continuation of the former proceedings, and he would be the best person to judge whether or not on account of delay the application should be granted. Here there was no delay. The application was made immediately after the conviction, and the order of the Magistrate was passed on the 25th November.

The second objection raised by the District Magistrate seems to be dealt with and provided for by cl. 2 of s. 522. What the law evidently contemplates is the case of a person in possession (the complainant) being dispossessed by force by another person (the accused) and the latter being in possession at the date of conviction. In such a case it gives the Magistrate power **[498]** to order the complainant to be restored to possession. In the case of a proper order, third persons could not be affected; if they are, then they are given a remedy by civil suit, and the order would not on that account be necessarily bad.

In the present case, however, the order is bad, because, as pointed out by my colleague, the complainant was not dispossessed by the accused by force. The accused had possession both prior to and at the time the force was used. The order, therefore, must be reversed.

The other orders passed by the Third Class Magistrate as to the cutting, gathering, storing, and afterwards selling the crops that were on the land, are clearly illegal. The Magistrate seeks to justify them under ss. 523 and 524; but s. 523 has no application to the case, and the Magistrate was not empowered to act at all under s. 524. These orders must also be reversed.

RANANDE, J.—The principal point raised in this reference relates to the construction to be placed on s. 522 of the Code, and appears not to have been previously decided in any reported case. It was formerly

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raised in a reference made to the Calcutta High Court, but the case was disposed of on other grounds which made it unnecessary to decide the question—*Ram Chandra Boral* v. *Jityandria* (1).

The facts so far as they bear on the point to be considered appear to be, shortly, these. One Narayan Govind obtained possession through the Court of a certain field in execution of his decree against Ravlo Bhagwant in September, 1896. On 27th September, 1897, Narayan brought a complaint against Ravlo of criminal trespass under s. 447, in which he stated that Ravlo had illegally entered upon possession of the land about a month and a half previously, and sowed it with rice, and when Narayan went to the field, Ravlo pushed him out and refused to vacate the land or pass a *kabulayat*. The complaint was heard by a Third Class Magistrate, who convicted Ravlo under s. 447, and fined him Rs. 15 on 17th November, 1897. The Magistrate found that Narayan had obtained possession through the Court, **[499]** and that Ravlo had illegally entered upon the land and raised a rice crop on it and had pushed out Narayan when he went to the land in September, 1897. On the 18th of November, 1897, Narayan applied under s. 522 to be placed in possession of the land with the rice crop in it. The Magistrate passed an order directing that possession of the land should be given to Narayan, and that the crops should be attached under Chap. XLIII. Later on, as Ravlo had disclaimed all interest in the crops, the Magistrate directed that after deducting expenses the crops should be given to Narayan.

At this stage one Visaji intervened, and put in a claim to the crops as having been sown by him. His objection was overruled, and the land was made over into Narayan's possession on 29th January, 1898. The crops were subsequently sold under ss. 523 and 524, and the proceeds were credited to Government. Visaji, the intervenor, then applied to the District Magistrate complaining that he was in possession of the land and had raised the crops, and that he was illegally deprived of the possession of both. The District Magistrate thereupon made the present reference on the ground that the order about the restoration of the possession of the land was illegally made, as such an order under s. 522 can only be made at the time of the conviction, and not subsequently. He was of opinion that the order could not be enforced against the intervenor Visaji.

I do not think that the order in question was illegal on either of the grounds stated in the reference. The words used in s. 522 are "whenever a person is convicted" and might suggest the interpretation put upon them by the District Magistrate that the order about the possession of the land must be made simultaneously with the conviction of the offence. On a careful consideration, however, of the other sections in the same chapter, which relate to the disposal of moveable property in respect of which an offence has been committed, it is clear that this order is an independent order, and all that s. 522 contemplates is that the order can only be made on conviction of the offence. These are the very words used in s. 521, which precedes s. 522. Section 520 similarly empowers Courts of Appeal **[500]** or Revision to make any order modifying orders made under ss. 517, 518, 519. Section 519 expressly contemplates a separate application in respect of orders to be passed under it after conviction. The ruling in *Mohunt Luchmi Dass* v. *Pallat Lall* (2),

(1) 25 C. 434.

(2) 23 W. R. Cr. R., 154.

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on the corresponding s. 534 of the old code, shows that the order is to be based on the finding. The words used in the judgment are "the foundation of the order should be the finding of the Court." In *Ram Chandra Boral* v. *Jityandria* (1) the application was made six months after the conviction. The legality of the order was questioned on this ground, but as the point was not decided, no great stress can be laid on this ruling. On the whole, however, it appears to me that the order in this case made on an application presented the next day after the conviction, was not illegal on the ground stated in the reference.

As regards the second ground, it is clear that the law has provided in paragraph 2 of the section an express remedy for the third parties dispossessed without right, and the intervenor Visaji must be left to his remedy.

While I do not think that the order of the Third Class Magistrate can be set aside on the grounds set forth in the reference, I feel satisfied that the order is illegal on two other grounds, which affect its merits. The section evidently contemplates (1) that the offence of which the accused is convicted must be an offence attended by criminal force, and (2) that the Court must be satisfied that the dispossession was due to the use of such force. Neither of these conditions are satisfied in the present case. The offence charged was criminal trespass, which is defined in s. 441 of the Indian Penal Code. Criminal force is defined in s. 350, Indian Penal Code. Criminal force is not a necessary element or ingredient of criminal trespass, though when the trespass is committed with an intent to annoy or insult or intimidate, there may be such an ingredient. In the present case, the illegal entry on the land, according to the complainant himself, took place in July, 1897, when Ravlo is alleged to have sown it with rice. Complainant went to the place [501] towards the close of September, and Ravlo refused to vacate or pass a *kabulayat*, and pushed out complainant. Complainant did not bring any charge for this assault, but complained of the trespass which took place some months before. Under these circumstances, it is clear that the offence complained of was not attended by criminal force, nor did the use of such force cause the dispossession. The decision in *Mohunt Luchmi Dass* v. *Pallat Lall* (2) shows clearly that the actual use of criminal force leading to the dispossession complained of, is a necessary condition, and it is only where this is the case that an order under s. 522 can be passed. The decision in *Ram Chandra Boral* v. *Jityandria* (1) shows clearly that the words "Offence attended by criminal force" mean an offence of which criminal force is an ingredient. Mere show of criminal force will not suffice to satisfy the requirements of the section. There must be actual use of force, and of criminal force resulting in the dispossession. Both these necessary ingredients are wanting in the present case, and on this ground I must hold that the order about restoration of possession made by the Third Class Magistrate was without jurisdiction, and must be set aside.

The order about the crops was also clearly illegal, as these crops were not property in respect of which the offence was committed, nor were these crops property used in the commission of the offence. The Magistrate could not, therefore, deal with them under s. 517, nor could he deal with them, as he professed to deal, under ss. 523 and 524, as they were not property referred to in s. 51, or alleged or suspected to be stolen. As a Third Class Magistrate, he had, further, no authority to act under s. 524 in

(1) 25 C. 434.

(2) 23 W. R. Cr. R. 54.

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23 B. 494.

directing that the crops should be sold and the proceeds should be credited to Government.

Under these circumstances I would reverse both the order about the possession of the land and the disposal of the crops.

Order reversed.

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[502] APPELLATE CIVIL.

Before Sir L. A. Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

KESU SHIVARAM MARWADI (*Plaintiff*) *v.* GENU BABAJI POWAR (*Defendant*).* [17th November, 1898.]

Civil Procedure Code (Act XIV of 1882), s. 257-A—Execution of decree—Agreement between a judgment creditor and a person other than the judgment-debtor—Postponement of of execution.

The provisions of s. 257A of the Civil Procedure Code (Act XIV of 1882) do not include within their scope an agreement between a judgment-creditor and a person other than the judgment-debtor, whereby such person, in consideration of the postponement of the execution of the decree against the judgment-debtor, undertakes to pay to the judgment-creditor a certain sum of money. Such agreements are, therefore, enforceable although made without the sanction of the Court.

[**Diss.**, 3 O.C. 165 (167); **Appl.**, 35 C. 970 (875) = 7 C.L.J. 543 = 12 C.W.N. 674; **R.**, 28 B. 383 = 6 Bom. L.R. 344 (346); 5 Ind. Cas. 814 = 16 P.R. 1910 = 62 P.L.R. 1910 = 18 P.W.R. 1910; 8 Ind. Cas. 415 = 8 M.L.T. 326.]

REFERENCE by Rao Saheb Raghavendra Ramchandra Gangoli, Subordinate Judge of Khed in the Poona District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

Kesu Shivram obtained a decree against Krishnaji bin Hari and applied to the Subordinate Judge for execution. When the bailiff of the Court went to attach Krishnaji's property, one Genu Babaji, at Krishnaji's request, gave a "*havala*" or oral undertaking to Kesu Shivram (the judgment creditor) that he would pay him Rs. 10 within six months from the 4th August, 1891, in consideration of his not attaching the property (and the property accordingly was not then attached).

This undertaking was not brought to the notice of the Court, nor was it sanctioned by it.

Genu failed to pay the Rs. 10 and Kesu brought this suit against him to recover it with interest from the 4th February, 1892, up to the 1st March, 1898.

The Subordinate Judge on the authority of *Vishnu* v. *Herpatel* (1) held that the *havala* was an agreement to give time for the satisfaction of the decree, and having been made without the sanction of the Court which passed the decree was void under s. 257 A of the Code of Civil Procedure (Act XIV of 1882).

[503] It was contended on behalf of the plaintiff that s. 257 A applied only to agreements between the parties to the suit or decree, and not to this case in which the agreement was made with a third person. The

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* Civil Reference No. 8 of 1898.

(1) 12 B. 499.

Subordinate Judge, having regard to the fact that the rulings in *Ramji* v. *Mohamed* (1), *Swamirao* v. *Kashinath* (2) and *Bank of Bengal* v. *Vyabhoy Gangji* (3) not being expressly dissented from in *Heera Nema* v. *Pestonji* (4) referred the following points to the High Court for decision :—

"1. Is the *havala* or oral agreement in this case enforceable under s. 257 A of the Code of Civil Procedure, having regard to the recent ruling of the Honourable High Court of Bombay in *Heera Nema* v. *Pestonji* (4) ?

"2. Is the plaintiff entitled to claim interest by way of damages for breach of any such agreement ?

"3. Is an agreement made by a third person at the request of a judgment-debtor for satisfaction of a judgment-debt enforceable, when, in pursuance of such agreement, time is given to such third person to pay the whole or any part of the judgment-debt ?

"4. Is it necessary to bring any such agreement within the purview of the first part of s. 257-A that it should provide better terms for the decree-holder than the decree gives him ?"

The opinion of the Subordinate Judge on the above points was in the negative.

Balaji A. Bhagavat (amicus curiæ), for the plaintiff.—Section 257 A applies only to agreements between parties to a suit or decree—*Ramji* v. *Mahomed Walli* (1) ; *Harakchand* v. *Totaram* (5). The agreement here is not between judgment-creditor and judgment-debtor, but between the judgment-creditor and a third person. It does not, therefore, fall within the purview of s. 257 A. The section is not applicable to third parties, because it relates to proceedings in execution. Where third parties are concerned, the Legislature has made a distinct provision. To allow third parties to certify, would amount to adding **[504]** them as parties to a decree. The last clause of the section assumes that the judgment-debtor must always be a party to the agreement. It provides that the surplus, if any, should be recovered by the judgment-debtor. This shows that a third person can neither come in under the section, nor can be affected by it.

Chintamani A. Rele (*amicus curiæ*) for the defendant.—The wording of the section is general. It says "every agreement to give time, &c." It, therefore, includes an agreement between a judgment-creditor and a third person. It should not be limited in application to agreements between judgment-creditors and judgment-debtors only—*Vishnu* v. *Hur Patel* (6) ; *Heera Nema* v. *Pestonji Dossabhoy* (4).

The section is not limited in its application to execution proceedings only : it is applied to suits also. The object of the section is to avoid delay in execution of decrees and to afford protection to judgment-debtors. Both the objects would be defeated if the agreement in question is held enforceable. A judgment-debtor, instead of being protected from pressure, will be oppressed both by the judgment-creditor and the third person.

The last clause of the section should be read with the second clause and not with the first clause, because the first clause deals only with agreements to give time for the satisfaction of the judgment-debt, while the second and third clauses deal with agreements for the satisfaction of a judgment-debt.

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(1) 13 B. 671. (2) 15 B. 419. (3) 16 B. 618.
(4) 22 B. 693. (5) P. J., (1889), p. 377. (6) 12 B. 499.

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The following authorities were also cited in argument:—*Adveappa* v. *Ahmed Saheb* (1); *Hukum Chund* v. *Taharunnessa Bibi* (2); *Dan Bahadur* v. *Anandi Prasad* (3).

JUDGMENT.

PER CURIAM.—The principal question involved in this reference is whether the provisions of s. 257 A of the Civil Procedure Code include within their scope an agreement between a judgment-creditor and a person other than the judgment-debtor, whereby such person, in consideration of the postponement of execution of the decree against the judgment-debtor, undertakes to pay to the judgment-creditor a certain sum of money. In coming [505] to a decision on this point, we have experienced considerable difficulty. Had the matter been *res integra*, the objections to limiting the meaning of the words "every agreement to give time for the satisfaction of a judgment-debtor" so as to exclude agreements of the kind above described might have seemed insuperable, for it might fairly have been contended that such transactions came within the terms of the section and that it was by no means certain that they did not fall equally within its intention. But the case of *Harakchand* v. *Totaram* (4) is an express authority for holding that where one of the parties to the agreement is not a party to the decree, s. 257A cannot be applied. The decision in *Vishnu* v. *Hur Patel* (5) leads, it is true, to a contrary conclusion, but with this exception the tendency of all the cases on the subject, to which we have been referred, supports the dictum in *Ramji* v. *Mahomed Walli* (6) that s. 257 A applies only between the parties to the decree.

In these circumstances we do not feel that we should be justified in departing from the current of decisions expressing the views of a series of Judges during a considerable period. Transactions may have been entered into on the faith of these decisions, and we think it would be unfortunate if we were compelled now to hold that they were wrong. But this seems unnecessary. The last clause of the section which assumes that the judgment-debtor must always be a party to the agreement, indicates the class of agreement to which the section refers. One of the objects of the section probably was to protect the judgment-debtor from undue pressure, but it seems less likely that such pressure could be successfully exerted on persons not subject to the decree. We must, therefore, answer the first question in the affirmative, holding that the *havala* or oral agreement in this case is enforceable notwithstanding the provisions of s. 257-A of the Civil Procedure Code.

The second question does not admit of a categorical answer. There being no agreement to pay interest, and no demand of payment apparently having been made in writing under Act XXXII of 1839, no interest is due. If the plaintiff proves [506] damages for breach of contract, such compensation as appears just can be awarded.

The third and fourth questions do not appear necessary for the determination of this suit.

Order accordingly.

(1) P.J. (1891), p. 40.
(2) 16 C. 504.
(3) 18 A. 435.
(4) P.J. (1889), p. 377.
(5) 12 B. 499.
(6) 13 B. 671.

23 B. 506.

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APPELLATE CIVIL.

APPELLATE CIVIL.

23 B. 506.

Before Sir L. A. Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

NARAYAN HARI DEVAL AND OTHERS (*Original Defendants*), *Applicants* v. KESHAV SHIVRAM DEVAL (*Original Plaintiff*), *Opponent.**

[22nd November, 1898.]

Water—Water-course—Riparian owners, rights of—Mamlatdar—Jurisdiction—Mamlatdars' Act (Bom. Act III of 1876), *s.* 4.

The law as to riparian owners is the same in India as in England, and is stated in illustration (*h*) of s. 7 of the Easements Act (V of 1882). Each proprietor has a right to a reasonable use of the water as it passes his land, but, in the absence of some special custom, he has no right to dam it back, or exhaust it, so as to deprive other riparian owners of like use.

What would constitute an unreasonable diversion of water such as to disturb the use of the lower riparian owners, is a question of fact which the Legislature has given a Mamlatdar jurisdiction to decide.

[F., 25 B. 395 (404) (F.B.)]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb M. S. Vinekar, Mamlatdar of Alibag in the Thana District, in a summary suit under the Mamlatdars' Act (Bom. Act III of 1876).

Suit for injunction. The plaintiff alleged that he was entitled to the use of water which flowed to his rice land through a natural water-course and that the defendants had dug a trench by means of which they diverted the water to their own land.

The defendants pleaded that the plaintiff had no right to the water, and they denied that the Mamlatdar had jurisdiction to hear the suit.

The Mamlatdar found that the plaintiff had enjoyed the use of water flowing through the water-course as alleged; that the defendants had obstructed him in such enjoyment; and that their obstruction had commenced within six months before the suit was filed. He, therefore, allowed the claim and granted the injunction.

[507] The defendants applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling on the plaintiff to show cause why the decision of the Mamlatdar should not be set aside.

Vinayak V. Ranade appeared for the applicants (defendants) in support of the rule.—The Mamlatdar found that the water flowed through a natural water-course. We are entitled to obtain as much water from the water-course as we require for our use. The question as to what quantity of water is reasonable for our use cannot be decided by the Mamlatdar under his summary jurisdiction—*Babaji Ramji* v. *Babaji Devji* (1).

Vasudeo G. Bhandarkar for the opponent (plaintiff) showed cause.

JUDGMENT.

PER CURIAM.—This suit was brought in the Mamlatdar's Court by the plaintiff to obtain an injunction requiring the defendants to refrain from causing, or attempting to cause, further disturbance or obstruction

* Application No. 168 under extraordinary jurisdiction.

(1) 23 B. 47.

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28 B. 506.

in the use of water from a certain water-course. The Mamlatdar found that the plaintiff had been in the habit of using, for the irrigation of his land, the water which came by a natural water-course across the defendants' land, and that the defendants had disturbed his enjoyment of this use by digging a trench whereby the greater part of the water was diverted on to their own land. The Mamlatdar, therefore, gave the injunction sought in terms similar to those contained in sch. C to the Act. The defendants have now applied to this Court alleging a want of jurisdiction in the Mamlatdar's Court. It, therefore, becomes necessary to examine s. 4 of the Act and the law with regard to water-courses as it affects the rights of riparian proprietors.

The material portions of the section are as follows:—

The Court shall also have power . . . when any person is disturbed or obstructed, or when an attempt has been made to disturb or obstruct any person . . . in the use of water . . . from any water-course , . . . to issue an injunction to the person causing, or who has attempted to cause such obstruction or disturbance requiring him to refrain from causing or attempting to cause any such further disturbance or obstruction.

[508] The issues which the Mamlatdar in such a case is required to frame are:—

1. Whether the plaintiff is actually in enjoyment of the use claimed?
2. Whether the defendants are disturbing or obstructing or have attempted to disturb or obstruct him in such enjoyment?
3. Whether such disturbance or obstruction or such attempted disturbance or obstruction first commenced within six months before the suit was filed?

Now, there is nothing in the section to restrict the word "water-course" to artificial channels. If such restriction had been intended, it would doubtless have been expressed; but no reason is apparent why it should have been so intended. The Mamlatdar has found that this channel was a water-course. The water doubtless flowed intermittently, but when the rains came, it flowed in a defined channel or course. It thus fulfilled the definition of a natural stream given in the explanation of s. 7 of the Easements Act. "A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of the land or under ground, which flows by the operation of nature only, and in a natural and known course." It is impossible to say that the channel of such a stream is not a water-course.

The law in regard to riparian proprietors is the same in India as in England, and is stated in illustration (*h*) of the same section. Each proprietor has a right to a reasonable use of the water as it passes his land, but in the absence of some special custom or easement, he has no right to dam it back or exhaust it so as to deprive other riparian owners of like use. This is explained by Chief Justice Westropp in *The First Assistant Collector of Nasik* v. *Shamji Dasrath* (1) as follows:—"All the occupants of land on the banks being equally entitled, each occupant, or set of occupants, is bound to use his right so as not materially to interfere with an equally beneficial enjoyment of it by other occupants."

Here, the Mamlatdar, after visiting the spot and taking the evidence of the parties, has found that as a fact the plaintiff was in the habit of using the water of this stream for irrigation, and **[509]** that quite recently

(1) 7 B. 209 (212).

the defendants by draining it off have deprived him of nearly the whole of it. The defendants, it is true, were entitled, like the plaintiff, to use the water reasonably for purposes of irrigation ; but they were not entitled to exhaust it so as to deprive the plaintiff of his fair share. If they did so, we think their act would constitute a disturbance of the plaintiff's use notwithstanding that their operations were wholly conducted within the limits of their own land. The plaintiff's use would be as effectually disturbed by the act of a neighbour in preventing the water from reaching him, as it would be if that neighbour came on to his land and carried it off in buckets.

What would constitute an unreasonable diversion of the water, such as to disturb the use of the lower riparian owner, would be a question of fact for the decision of the Mamlatdar according to the circumstances of the case. The question might be a difficult one depending on the due apportionment of the water ; but we think it is one which the Legislature has given the Mamlatdar jurisdiction to decide, thinking possibly that for water disputes a speedier remedy than the ordinary Courts can afford is often desirable in the interests of agriculture and for the preservation of the peace. The party dissatisfied with the decision can seek redress by a regular suit in the Civil Court.

The learned pleader for the applicants pressed us in argument with the decision of this Court in *Babaji Ramji* v. *Babaji Devji* (1), but that was a peculiar case in which the parties relied, not so much on their general rights as riparian owners, as on some custom by which each owner in turn had dammed and impounded the water. We do not think that we can accept it as an authority governing the present case. The rule must be discharged with costs.

Rule discharged.

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23 B. 510=1 Bom. L. R. 267.

[510] ORIGINAL CIVIL.

Before Mr. Justice Fulton.

MERWANJI MANCHERJI CAMA AND ANOTHER (*Plaintiffs*) *v.* SYED SIRDAR ALI KHAN (*Defendant*).* [7th March, 1899.]

Landlord and tenant—Lease—Covenant for quiet enjoyment—Covenant implied—Interruption of tenant's enjoyment by order of plague officials—Suit for rent.

A lessor sued to recover from his lessee rent for fifteen months from 1st August, 1897, to 31st October, 1898, under an agreement for lease for ten years dated 1st September, 1890, *i.e.*, prior to the application of the Transfer of Property Act (IV of 1882) to Bombay. The defendant contended that in the agreement there was an implied covenant for quiet enjoyment, and that as he had been compelled by the plague authorities to vacate the premises from 5th February 1898, to 1st April 1898, there had been a breach of the covenant. He claimed, therefore, to deduct the rent for that period or to be allowed it as a counter-claim as damages for disturbance.

Held, (giving judgment for plaintiff) that even assuming that, in the agreement for the lease, a covenant for quiet enjoyment was to be implied, such a covenant could only be one for the quiet enjoyment by the defendant so long as it was lawful for him to enjoy the property. No guarantee against the acts of Legislature could be read into the implied covenant for quiet enjoyment.

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* Suit No. 685 of 1898.

(1) 23 B. 47.

1899

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ORIGINAL CIVIL.

23 B. 510= 1 Bom. L.R. 267.

SUIT to recover rent. The plaintiff claimed Rs. 3,225 as rent due to him for certain stables under an agreement for a lease dated 1st September, 1890.

The said agreement was executed to the defendant's father, who died in May, 1896. It was an agreement for a term of ten years from the 1st October, 1890, and the monthly rent was Rs. 215; the lessee also to pay Rs. 6 per month municipal taxes.

The defendant was the executor of the lessee (his father), and he had paid the rent subsequently to his father's death down to 31st July, 1897.

The plaintiff now claimed the sum of Rs. 3,225, rent due for fifteen months from 1st August, 1897, to 31st October, 1898.

The defendant pleaded that there was an implied covenant for quiet enjoyment, and that notwithstanding that covenant his (the defendant's) enjoyment of the property had been interrupted from **[511]** the 5th February, 1898, to the 1st April, 1898, during which period he had been obliged to vacate the premises under orders received from the district plague officer. On the 31st August, 1898, he was again obliged to vacate under orders from the same authority, and he had been prohibited from allowing the premises to be used as the residence of his horse-keepers.

He contended that by reason of such interruption of enjoyment, from 5th February, 1898, to 1st April, 1898, he was not liable for the rent for that period. He further contended that since the plague authorities had now prohibited the use of the premises as a habitation for his grooms it had become unlawful for the plaintiff to maintain the defendant in the enjoyment of them in the manner intended at the date of the lease, and that, therefore, the whole lease was void, and that he was not liable for any rent after the 31st August, 1898.

He further counter-claimed for the sum of Rs. 383-14-10 as damages for disturbance from 6th February to 31st March, at the rate of Rs. 215 a month, and further damages at the same rate from 31st August, 1898, until judgment. He also counter-claimed for the sum expended by him in renting land and erecting other stables thereon for use during the period of interruption.

He brought into Court the sum of Rs. 2,403-8-3, being the rent due for the time mentioned in the plaint, exclusive of the period of the alleged interruption.

At the hearing the following issues were raised :—

(1) Whether, having regard to the interruptions referred to in the written statement, defendant is liable to pay rent and taxes for the periods mentioned.

(2) Whether by reason of the prohibition, by the proper authorities, of the use of the property for the habitation of the defendant's horse-keepers, the lease became void as stated in the 4th paragraph of the written statement ?

(3) Whether, in the event of the 1st issue being answered in favour of the plaintiff, the defendant is entitled to recover from the plaintiff damages for the disturbance of his enjoyment, at the rate of Rs. 215 per mensem, during the period of such disturbance ?

(4) Whether the defendant is entitled to recover from the plaintiff a sum of Rs. 793-7-6, being the expenses incurred by the defendant in consequence of the interruptions ?

[512] (5) Whether the plaintiff is entitled to recover any and what sum in excess of the amount brought into Court by the defendant on the 16th February ?

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Vicaji, for plaintiffs.—There was no formal lease of the premises. They were let merely under articles of agreement for a lease. There is no covenant for quiet enjoyment. The agreement was made before the Transfer of Property Act (IV of 1882) was applied to Bombay and long before the plague appeared in Bombay. He referred to *Bombay and Persia Steam Navigation Company* v. *Rubattino Company* (1); *Newby* v. *Sharpe* (2).

Raikes, for defendant.—A covenant for quiet enjoyment is implied—Woodfall Landlord and Tenant (14th Ed.), p. 695; *Rassam* v. *Douzelle* (3); *Lali Konwar* v. *Carter* (4); Contract Act (IX of 1872), s. 56.

JUDGMENT.

FULTON, J.—In this case the plaintiff has sued to recover rent due from the defendant under a lease for ten years, dated the first September, 1890.

The defence is that, as the defendant was obliged to vacate the premises under notices from the plague authorities, he is not liable for the rent for the periods mentioned in the written statement, or in the alternative is entitled to certain sums as damages for disturbance of his enjoyment.

The material facts having been admitted, the following issues were raised: (His Lordship stated the issues.)

My finding on the 1st issue is in the affirmative; on the 2nd, 3rd and 4th issues in the negative; and on the 5th in the affirmative, *viz.*, that plaintiff is entitled to recover the whole amount claimed.

The lease is anterior to the introduction into Bombay of the Transfer of Property Act, but assuming that it contains an implied contract for quiet enjoyment, it seems necessarily to follow that the contract is merely for the quiet enjoyment of the property by the tenant so long as it is lawful for him so to enjoy it. It cannot be a contract for the tenant's quiet enjoyment of the property contrary to law. Such a contract if stated in express terms would clearly be void. It would [513] be equally void if the intention could be implied. Consequently, I think that, when under the provisions of Act III of 1897 it became unlawful for the tenant to occupy the premises in the manner contemplated by the lease, there was no breach of the lessor's contract for quiet enjoyment. There being then no breach by the lessor, there is no ground on which the lessee can either be relieved of the rent which he agreed to pay or be awarded damages against the lessor. The lease doubtless might have provided that, in the events which have happened, the tenancy should come to an end, but those events were not foreseen, and were, therefore, not provided for. The case of *Newby* v. *Sharpe* (2) is in point. Of course, that was a case where the conditions had been expressed, but I cannot read into the implied condition for quiet enjoyment a guarantee against acts of the Legislature. No authority was cited for such a construction of the lease.

Decree for plaintiff for sum claimed and costs, and interest on judgment at 6 per cent.

Decree for plaintiff.

Attorneys for the plaintiff:—Mr. *K. D. Shroff.*
Attorneys for the defendants:—Messrs. *Crawford, Brown & Co.*

(1) 14 B. 147. (2) 8 Ch. D. 39. (3) 23 W.R. 121. (4) 25 W.R. 492.

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APPEL-
LATE
CIVIL.

23 B. 513.

23 B. 513.

APPELLATE CIVIL.

Before Sir L. A. Kershaw, Kt., Chief Justice, and Mr. Justice Fulton.

PARVATI (*Original Plaintiff*), *Appellant v.* GANPATI ROKDAJI NAIK AND OTHERS (*Original Defendants*), *Respondents.**

[8th December, 1898.]

Limitation Act (XV of 1877), s. 5—Appeal not presented in time—Sufficient cause for delay—Discretion of Judge—Second appeal—Civil Procedure Code (Act XIV of 1882), s. 584—Exercise of discretion not to be interfered with.

Where an appeal has been dismissed as barred by limitation, the lower Court holding that there was no sufficient cause for not presenting it within the prescribed time, the High Court can only interfere in second appeal if that decision [514] is contrary to law, that is, if the lower Court has exercised its discretion capriciously or arbitrarily or without proper legal material to support its decision.

[Appr., 25 M. 166 (180) = 11 M.L.J. 406 (410); R., 31 B. 33 (36) = 8 Bom. L.R. 858 ; 5 Bom. L.R. 956 (964).]

SECOND appeal from the decision of J. B. Alcock, District Judge of Nasik, dismissing an appeal against the decree of Rao Saheb D. G. Gharpure, Subordinate Judge of Malegaon.

The plaintiff sued to recover possession of certain land from which she alleged she had been unlawfully ousted by the defendant. The Subordinate Judge allowed the claim with respect to a moiety of the land, and on the 10th January, 1896, passed a decree accordingly.

The plaintiff appealed.

At the hearing of the appeal it appeared that the appeal was presented on the 24th February, 1896, that is, after the period of thirty days allowed for appeal had expired (see Limitation Act (XV of 1877), art. 152). It was urged in excuse that the plaintiff lived in a village in the Nandgaon Taluka, at which there was no post office. She had, however, received information on the 17th January of the judgment which had been delivered on the 10th. She applied for copies of the judgment, &c., on the 1st February, and they were ready on the 10th February. Under these circumstances the Judge held that there was no sufficient cause for the delay, and he dismissed the appeal as barred by limitation. In his judgment he said :—

"Judgment was delivered on the 10th January, 1896. Appellant's pleader sent her intimation of this by post on the 13th January ; she lives in a village in the Nandgaon District where there is no post office. The letter was sent to her by a round-about route and she did not get it till the 17th January. Still there was plenty of time to get the necessary copies and file an appeal within time. The application for copies, however, was not made till the 1st February. The copies were ready on the 10th February. There seems no reason why the appeal should not have been in time except want of due diligence."

Daji Abaji Khare, for the appellant (plaintiff).—The lower Court was wrong in rejecting the appeal. It had a discretion to admit it—Limitation Act (XV of 1877), s. 5. We submit that, having regard to the circumstances, that discretion was not properly exercised. The plaintiff is

* Second Appeal No. 924 of 1897.

an illiterate woman. A considerable part of the thirty days allowed for appeal had expired before she received intimation of the judgment. Communication [515] with the village in which she lives is difficult, there being no post office there. She took immediate steps to file an appeal, but there was unavoidable delay. It is clear she acted *bona fide* throughout. We submit that the appeal ought to have been allowed.

Mahadev B. Chaubal, for the respondents (defendants).—This is a second appeal, and in second appeal this Court cannot interfere with the order of the lower Court, except on a point of law—Civil Procedure Code (Act XIV of 1882), s. 584. The question before the lower Court was whether, under s. 5 of the Limitation Act (XV of 1877), there was sufficient cause to excuse the delay in filing the appeal. That was a matter for the discretion of the lower Court, and in the exercise of that discretion it held, on the facts before it, that there was no sufficient cause for the delay. That is not a question of law, and there is, therefore, no ground for a second appeal to this Court. The exercise of his discretion by a Judge will not be interfered with by the High Court in second appeal.

The following authorities were cited in argument:—*Dadabhai* v. *Maneksha* (1); *Balkrishna Keshav* v. *Gangabai* (2); *Damodar Ganesh* v. *Ganesh Ramchandra* (3); *Ranchodji* v. *Lallu* (4); *Fatima Begam* v. *Hansi* (5); *Mowree Bewa* v. *Soorundarnath* (6); *Surbhai Dayalji* v. *Raghunathji Vesanji* (7); *Bai Devkore* v. *Lalchand* (8).

JUDGMENT.

PER CURIAM.—This case comes before us under s. 584 of the Civil Procedure Code, which gives the right of appeal from appellate decrees on the grounds stated therein. The only ground on which appellant can come here is that set out in cl. (*a*) "the decision being contrary to some specified law or usage having the force of law." The decision was under s. 5 of the Limitation Act (XV of 1877). The time for appeal was thirty days *plus* the days required for obtaining copies. The time could be extended if the Judge was satisfied that there was sufficient cause for not presenting the appeal within the prescribed time. On reading the affidavit and hearing arguments, [516] the Judge was not satisfied that there was sufficient cause. We can only interfere if this decision was contrary to law.

The Judge had a discretion to decide on the application, and it becomes necessary to enquire (1) what is the meaning and extent of such discretion, and (2) under what circumstances it can be said to be illegally exercised. In *Sharp* v. *Wakefield* (9) Lord Halsbury, L. C., observed:

"An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion—*Rooke's Case* (10); according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself—*Wilson* v. *Rastall* (11). So in *Reg.* v. *Boteler* (12), where justices thought

(1) 21 B. 552. (2) P. J. (1896), p. 617. (3) P. J. (1897), p. 214.
(4) 6 B. 304. (5) 9 A. 244. (6) 10 W.R. 178.
(7) 10 B.H.C.R. 397. (8) 19 B. 790. (9) (1891) A.C. 173 (179).
(10) 5 Rep. 100, *a*. (11) 4 T.R. 757. (12) 33 L.J.M.C. 101.

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proper not to enforce the law because they considered that the Act in question was unjust in principle, the Court of Queen's Bench compelled them by a peremptory order to do the act which nevertheless the statute had said was in their discretion to do or leave undone. So, again, in the case of overseers who were required by 3 and 4 Vict., c. 61, to certify whether applicants for beer licenses were real residents and rate-payers of the parish, it was held that they were not entitled to refuse the certificate on the ground that, in their opinion, there were already too many public houses, or that the bear shop was not required. So a discretion which empowered justices to grant licenses to inn-keepers as in the exercise of their discretion they deemed proper would not be exercised by coming to a general resolution to refuse a license to everybody who would not consent to take out an excise license for the sale of spirits—*Reg* v. *Sylvester* (1)."

The general result of the cases is stated by Wills, J., in *Sharpe* v. *Wakefield* (2) as follows :—

"So far it is, I think, impossible to contend that there was * * * * * * * any limitation upon the absolute discretion of the justices, when applied to for a new license, to grant or refuse it upon any grounds which to them seem fit grounds to act upon, provided that there is a real judgment exercised in respect of the individual case. I mean to exclude, for instance, a case in which the ground of refusal had absolutely nothing to do with the question in hand, as for instance where the justices refused the license because the applicant had not taken out a spirit license —*Reg* v. *Sylvester*, (1) or **[517]** where they had laid down a general rule that they would grant no more licenses in the locality—*Reg.* v. *Justices of Walsall* (3). In such cases, there is really no exercise of discretion at all, and it is very much as if the license had been refused because the applicant wore a blue coat or a white hat. But where it cannot be shown that no real discretion has been exercised, the applicant has, in case of refusal, no other resort, and must submit to his fate."

Applying this principle we have to consider whether in the present case we are satisfied that the Judge has exercised no real discretion. If he had evidence before him, which would fairly warrant a reasonable man in his position coming to the conclusion at which he arrived, it cannot be contended that he exercised no real discretion. In such case, there would be no question of law involved, but he would be deciding a question of fact on reasonable and proper grounds which would not entitle this Court to interfere. It has even been decided in such a case that the mere fact that the Court above would have come to a different conclusion is no ground for interference—*Ranchodji* v. *Lallu* (4) and *Fatima Begam* v. *Hansi* (5). The effect of the decision of this Court in Special Appeal No. 325 of 1872 (*Surbhai Dayalji* v. *Raghunathji Vasanji and others* (6)) was similar. In that case Melvill and West, JJ., observe—

"We are of opinion, however, that we have power to interfere when such discretion is exercised without any proper legal material to support it. In the present case, the reason given by the District Court for the admission of the appeal, is one which, in our opinion, is not a legal or valid reason, and we must, therefore, treat the admission of the appeal as an

(1) 31 L. J. M. C. 93 ; 2 B. & S. 322.
(2) (1888) 21 Q.B. Div. 66 (80).
(3) 3 C.L.R. 100.
(4) 6 B. 304.
(5) 9 A. 244.
(6) 10 B.H.C.R. 397.

error in law. This view is in accordance with that taken by the Calcutta High Court in *Mowree Bewa* v. *Soorundarnath Roy* (1)."

With regard to the decisions in *Balkrishna Keshav Khare* v. *Gangabai* (2); and *Damodar Ganesh Joshi* v. *Ganesh Ramchandra Kanitkar and another* (3), we think it probable that the learned Judges who decided those cases were of opinion that on the facts no real judicial discretion had been exercised. We were specially pressed with the latter of those two decisions, but we think it must have been decided on the same principle. In the present case it seems to us impossible to argue that the Judge [518] capriciously or arbitrarily, or not in accordance with the rules of reason or justice; or that he came to his decision without any proper legal material to support it, or that his discretion was not exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself, or that there was in fact no real judgment exercised in the matter. It seems to us that he had ample material before him to find as he did, and that he has exercised a judicial discretion and a real judgment in this matter. We must, therefore, confirm the decree of the lower appellate Court with costs.

Decree confirmed.

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28 B. 518=1 Bom. L.R. 19.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Plaintiff*), *Appellant v.* SITARAM SHIVRAM AND OTHERS (*Original Defendants*), *Respondents.** [9th January, 1899.]

Trees—Right to cut trees—Khoti khasgi *land in the Ratnagiri District—Dunlop's proclamation—Construction—Crown grant—Right to rescind.*

Defendants were *khots* of the village of Ojharkhol in the Ratnagiri District, of which a certain plot (Survey No. 22) was their *khoti khasgi* land. In 1894 they cut down a large number of teak trees growing on this land. Thereupon the Secretary of State for India in Council sued to recover their value, alleging that they were the property of Government.

Defendants pleaded that they were the absolute owners of the trees, and relied in support of their title on a proclamation issued by Government in 1824, known as Mr. Dunlop's proclamation. This proclamation had been subsequently rescinded by Government in 1851. The material part of Mr. Dunlop's proclamation was in the following terms:—

"Upon the teak and other trees that may be on any person's land, Government has no design. He whose trees may now exist, or he whose trees may hereafter grow, may make such use of them as he pleases. Government will not offer the slightest obstruction."

Held, that this proclamation was not a mere promise, but an actual grant or gift of the teak trees to the persons on whose lands they were then actually growing, or might thereafter grow, and that the gift could not be revoked.

[519] *Held*, also, that by reason of this proclamation Government had no right to the teak trees growing on the land in question.

APPEAL from M. P. Khareghat, Acting District Judge of Ratnagiri. In this case the Secretary of State for India in Council sued to recover

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* Appeal No. 100 of 1897.

(1) 10 W.R. 178. (2) P.J. (1896), p. 617. (3) P.J. (1897), p. 214.

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the value of about seventy teak trees standing in Survey No. 52 in the village of Ojharkhol cut down by defendants in December, 1894, without the permission of Government. The plaintiff alleged that Government was the owner of the trees.

Defendants pleaded that they were *khots* of the village; that the land in which the trees were grown was their *khoti khasgi* land; that they were the absolute owners of the trees under a proclamation issued by Government in 1824, commonly known as Dunlop's proclamation, and that they had a right to deal with the trees as they liked.

"Mr. Dunlop's proclamation was to the following effect:—

"Whereas the Government has observed that as the former Government used to take the teak, blackwood and other good timber grown on the lands situate in the aforesaid zilla (Ratnagiri) belonging to any person whatever, the people did not take the trouble of (raising such timber trees); and (whereas the Government) thinks that it would be to the advantage of all, if from this day forth teak, blackwood, and any other kind of good timber trees were raised in the country, it is proclaimed to all the people that the Government has no intention (eye) towards the trees that may be growing on the lands of any person whatever situate beyond the frontiers of the jungles preserved by Government . . . . that those who may own and may grow hereafter (such trees), may deal with them in any manner they like; and that no obstruction whatever will be made by Government (to their so doing)."

This proclamation was rescinded by a subsequent proclamation in 1851.

The District Judge was of opinion that the right to the trees, having been surrendered by Government under Mr. Dunlop's proclamation, could not be resumed except under an Act of the Legislature. He, therefore, dismissed the suit.

Against this decision the plaintiff appealed to the High Court.

Lang, Advocate-General (with him Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader), for appellant.

Daji Abaji Khare (with *M. R. Bodas*), for respondents.

[520] The following authorities were referred to in argument:—*The Collector of Ratnagiri* v. *Vyankatrav* (1); *The Collector of Ratnagiri* v. *Antaji* (2); *In re Antaji Keshav Tambe* (3); *The Collector of Ratnagiri* v. *Raghunathrav* (4); *Nagardas* v. *The Conservator of Forests* (5).

JUDGMENT.

PARSONS, J.—The point that arises for our decision in this appeal is whether the defendants are the owners of the teak trees in Survey No. 52. The defendants are the khots of the village of Ojharkhol, and Survey No. 52 is admittedly their khasgi land, that is to say, it is for all practical purposes their own property and would remain theirs so long as they paid the Government assessment upon it even if the khotship were resumed by Government. It is also admitted that the proclamation of Government commonly known as Dunlop's proclamation applied to the lands of the village of Ojharkhol.

It was, however, argued by the learned Advocate-General on behalf of the plaintiff, (1) that the effect of the proclamation was not to give

(1) 8 B.H.C.R. A.C.J. 1. (2) 12 B. 534. (3) 18 B. 670.
(4) P. J. (1875), p. 324. (5) 4 B. 264.

the trees to the owner of the lands it referred to, but was merely a declaration of the intention of Government amounting to a promise which could be revoked at any time unless the owner could show that he had changed his position on the strength of the promise; and (2) that whatever was promised under the proclamation was revoked in 1851.

There is no doubt of the truth of the second part of the argument. Clause 4 of the proclamation of 1851 is as follows :—" The Right Hon'ble the Governor in Council is pleased to declare that the proclamation of 1823 (sic) is rescinded, and that the Government resumes, in regard to forest, all the seigniorial rights which it possessed previous to 1823." It is only necessary, therefore, to consider the first part of the argument.

Dunlop's proclamation has been before this Court on several occasions, and, therefore, it is not necessary now to quote it in full. It will be found in print in the cases of *The Collector of Ratnagiri* v. *Vyankatrav* (1), *The Collector of Ratnagiri* v. **[521]** *Antaji Lakshman* (2) and *Re Antaji Keshav Tambe* (3). In the latter case will also be found the letter of Mr. Dunlop to Government in which he formulates his propositions. I will only quote in addition a paragraph from the letter of Government (No. 1630 of the 1st November, 1823) written in reply to that letter. It is paragraph 4 and runs as follows :—

" The Hon'ble the Governor in Council approving of the suggestions contained in the 28th paragraph authorises you to issue a proclamation surrendering all claims to teak or other valuable wood beyond the limits of the three forests of Band Toodil and Venhere in the Suverndrug Taluka and of Mhan near Malvan."

In the face of these letters and of the terms of the proclamation itself it seems clear that the argument fails. The proclamation was not a mere promise that the Government then made, but an actual grant or gift of the teak trees to the persons on whose lands they were then actually growing or might thereafter grow. The actual words of it are these: "*Jyache jagyawar sagwan wagaire jhade asatil, tyawar sarkarcha irada nahi, jyachi jhade asatil ti va pude karatil ti tyane apale khushis yeil tashi vahivat karavi; sarkaranton adthala kahi jara honar nahi*;" and I translate them thus: 'Upon the teak and other trees that may be on any person's land Government has no design (*irada* may also be used to mean 'claim' 'right,' or 'title,'—see Molesworth's Dictionary). He whose trees may now exist and he whose trees may hereafter grow should make such use of them as he pleases. Government will not offer the slightest obstruction." This construction of the proclamation as a grant was evidently not disputed in the case of *The Collector of Ratnagiri* v. *Vyankatrav* (1), and although the learned Chief Justice who delivered the judgment of the Court said that the decision must be held to be limited to the particular case before him, the ruling of the Court is important since in two points it governs the present case, *viz.*, (1) in deciding that the khot is the proprietor of his khasgi land, and (2) in deciding that gift, if made by the proclamation, could not be revoked without the consent of the donee. I purposely omit the mention made in it of khoti nisbat **[522]** land, for it, though used apparently in the judgment as synonymous with khoti khasgi land, is really a term of wider comprehension including that land and much other land also. In the case, however, of *Re Antaji Keshav Tambe* (3) the construction that I have placed on the proclamation was expressly affirmed. In it Telang, J., says of Dunlop's proclamation

(1) 8 B.H.C.R. A C. J. 1. (2) 12 B. 534. (3) 18 B. 670.

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that by virtue of it " the trees then growing and thereafter to be planted on the land became the landholder's property free from any right on the part of Government," and Fulton, J., holds that "Dunlop's proclamation did grant the right to teak and other forest trees in the khasgi lands held by vatandar khots."

The decisions in which it has been held that the teak trees were not the property of the khots, are plainly distinguishable. They are all cases in which the trees stood on waste or forest lands and were claimed by the khots as khots (see *The Collector of Ratnagiri* v. *Ragunathrao* (1), *Nagardas* v. *The Conservator of Forests* (2), *The Collector of Ratnagiri* v. *Antaji Lakshman* (3)). For such a claim to be successful it has been held that it would be necessary to prove a grant of the soil to the khots. In the case of khasgi lands, however, proprietary title in them is proved by the very term itself, for they are lands which belong to the khot as having been acquired by him either by his own expenditure of money in bringing them into cultivation, or by lapse or forfeiture from those who originally owned them or by purchase. His ownership of these lands in no wise depends upon his tenure of the khotship, for, as I have before remarked, were the khotship abolished, he would continue to hold them and would then become an occupant of them as defined in the Land Revenue Code. The District Judge, therefore, was quite right in his decision, and his decree is confirmed with costs.

In appeal No. 99 the decree is also confirmed with costs.

RANADE, J.—In these appeals, which were heard together, the only question to be considered is whether Government, which was plaintiff in both cases, was the sole owner of the teak trees in dispute. The trees were admittedly cut by the respondent-defendants, who [523] are khots of the villages in which the thikans where the trees grew were situated. It was further admitted in the argument by the learned Advocate-General, who appeared for the appellant, that these thikans were khoti khasgis, and that the proclamation of Mr. Dunlop applied to the two villages to which the thikans belong.

It was, however, contended that the proclamation did not make the defendant-khots owners of the teak trees, and did not deprive Government of its rights to the same. The proclamation, it was urged, was only a promise, and, until it could be shown that the promise had been acted upon, Government had a right to withdraw and cancel the proclamation, as, in fact, it did in 1851.

The question at issue is thus narrowed to the inquiry as to the nature and extent of the respondent-defendants' interest in the teak trees growing in khoti khasgi lands in villages included in the proclamation of 1823. Khoti khasgi lands have been thus defined in Mr. Justice Candy's Book on Khoti Tenure. 'All land in a khoti village, which is not dhara, must be khoti.' The khoti lands, which are cultivated by the khot himself, or by means of hired labourers, and called 'khoti khasgi,' and the rest is 'khoti nisbat,' which may be sublet to permanent tenants or to recent cultivators. This Court has in *The Collector of Ratnagiri* v. *Vyankatrav* (4) held that, in respect of trees growing in khoti khasgi or khoti nisbat lands, the khot was a proprietor, and not a mere farmer of the revenue. In that case, the dispute also related to trees cut down by the khots in the private khoti lands of a village included in the proclamation of Mr. Dunlop issued in 1823, and it was held that Government could not rescind or withdraw the

(1) P. J. (1875), p. 324.
(2) 4 B. 264.
(3) 12 B. 534 (541).
(4) 8 B. H. C. R. A.C.J. 1.

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grant made by it in this proclamation. Though the ruling in *Re Antaji Keshav Tambe* (1) was made in a criminal case, Mr. Justice Telang's judgment proceeds chiefly upon the nature of a khot's interest in khoti khasgi lands, which interest, he observes, was of a proprietary character, and entitled to the protection of the Dunlop proclamation, which made the trees then growing, and thereafter grown in private lands, the sole property of the person who grows them. The argument that the khot was not a proprietor of the soil was pressed in that case chiefly on the authority of *The Collector of Ratnagiri* v. *Raghunathrao* (2) and [524] *Nagardas* v. *The Conservator of Forests*(3), but was disposed of by the observation that Westropp, C. J., distinctly refrained from expressing any opinion on the general rights of the khots, and Sir Charles Sargent preferred to follow in *The Collector of Ratnagiri* v. *Antaji Lakshman*(4) the ruling in *The Collector of Ratnagiri* v. *Vyankatrav*(5) noted above. These decisions cover the present dispute. The decision in *The Collector of Ratnagiri* v. *Antaji Lakshman* relates to the khot's alleged rights over forest land attached to the village. Forest lands were expressly excluded from the protection of the proclamation, and there is, therefore, no analogy between such forest lands and khoti khasgi lands in which the trees in dispute grow. The decisions in *Nagardas* v. *The Conservator of Forests*(3) and *Moro* v. *Narayan*(6) no doubt lay down broadly the position that the khots are not proprietors of the soil, but, as observed by Mr. Justice Telang in *Re Antaji Keshav Tambe* (1) and by Sargent, C. J., in *The Collector of Ratnagiri* v. *Antaji* (4), in regard to the ruling in *Nagardas* v. *The Conservator of Forests* (*supra*), that the decisions should not be carried beyond the point actually decided in these cases. On the whole, we feel satisfied that the District Judge was right in holding that the respondent-khots were entitled to claim a proprietary right in the trees growing in their Khoti khasgi lands, and that the seigniorial rights of Government to teak trees were relinquished in 1823, and that relinguishment could not be rescinded by any subsequent proclamation of 1851 or notification of 1885.

We must, therefore, confirm the decrees and reject the appeals with costs.

Decree confirmed.

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23 B. 525=1 Bom. L. R. 5.

[525] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

SAGAJI AND ANOTHER (*Original Plaintiffs*), *Appellants v.* NAMDEV (*Original Defendant*), *Respondent.** [11th January, 1899.]

Vendor and purchaser—Contract of sale—Non-payment of purchase-money—Suit for possession by vendee who has not paid the purchase-money—Remedy of vendor—Limitation—Limitation Act (XV of 1877), sch. II, art. 47.

The plaintiffs owned certain land on which the defendant, with the plaintiffs' leave, built a house. Disputes arose between plaintiffs and defendant, and in

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* Second Appeal No. 273 of 1898.

(1) 18 B. 670. (2) P. J. (1975), p. 324. (3) 4 B. 264.
(4) 12 B. 534 (549). (5) 8 B.H.C.R. A.C.J. 1. (6) 11 B. 680.

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23 B. 525 = 1 Bom. L.R. 5.

February, 1893, the defendant obtained an order from the Mamlatdar in a possessory suit against the plaintiffs directing the plaintiffs to give up possession of the property to him. In August, 1893, an agreement was made between them, in pursuance of which the defendant executed a rent-note to the plaintiffs promising to give up the property to the plaintiffs at the end of four months on payment by the plaintiffs of Rs. 100. On the 25th November, 1896, the plaintiffs brought this suit for possession, alleging that the defendant refused to give up the property. The District Judge dismissed the suit, finding that the plaintiffs had not paid the Rs. 100, and holding that the defendant was, therefore, justified in putting an end to the contract contained in the rent-note. He further held that the suit was barred by limitation, not having been brought within three years from the date of the Mamlatdar's order of 28th February, 1893. See Limitation Act (XV of 1877), sch. II, art. 47.

Held (reversing the decree) that the evidence showed the transaction to be a sale of the property by the defendant to the plaintiffs for Rs. 100, possession being given to the plaintiffs under the lease for four months; that the sale was a completed transaction although the Rs. 100 had not been paid; and that the only remedy of the defendant was to sue for the amount.

Held, also, that the contract between the parties dissolved the order of the Mamlatdar in the possessory suit and rendered it unnecessary for the plaintiffs to sue to set it aside. The present suit, which was based on the contract of sale, was, therefore, not barred by art. 47 of the Limitation Act.

[F., 5 A.L.J. 96 (98) = 30 A. 125 = 28 A.W.N. 38; **Appl.,** 4 C.L.J. 334 (336); 7 Ind. Cas. 541 = 6 N.L.R. 98 (101). **R.,** 36 M. 8 = 10 Ind. Cas. 546 = 21 M. L. J. 800 = 10 M.L.T. 51 = (1911) 2 M.W.N. 6; 4 L.B.R. 369 (371); 16 M.L.J. 524 (525); 1 N.L.R. 146 (147); 23 T.L.R. 150 (156).**]**

SECOND appeal from the decision of C. H. Jopp, District Judge of Ahmednagar, reversing the decree of the Subordinate Judge of Nevasa.

Suit for possession of a piece of land with a house standing upon it. The plaintiffs alleged that the land was their ancestral property, which the defendant and his father before him had occupied as tenants-at-will.

[526] It appeared that the defendant, with the plaintiffs' leave, built the house on the land in question. Disputes had arisen between them, and on the 28th February, 1893, the defendant had obtained an order from the Mamlatdar in a possessory suit for the possession of the house and the open space in front of it.

On the 30th August, 1893, the parties settled their disputes, the defendant then executing a rent-note to the plaintiffs, agreeing to give up possession of the property at the end of four months on payment by the plaintiffs of Rs. 100.

The plaintiffs brought this suit on the 25th November, 1896, alleging that the defendant had refused to give up the property as agreed upon.

The defendant pleaded (*inter alia*) that the property was his, and that the plaintiff had not paid him the Rs. 100, and that the rent-note had been executed by him under coercion. He further contended that the suit was barred by limitation, not having been brought within three years from the date of the Mamlatdar's order of the 28th February, 1893. See Limitation Act (XV of 1877), sch. II, art. 47.

The Subordinate Judge found that the land belonged to the plaintiffs, but the building belonged to the defendant, and that the defendant had agreed to part with the building for Rs. 100. He held that the plaintiffs were entitled to possession on payment of Rs. 100 to the defendant and passed a decree accordingly.

The defendant appealed. The Judge reversed the decree finding that the plaintiffs had not paid the Rs. 100 and holding that the contract of sale was, therefore, at an end. He also held that the suit was barred by limitation. In his judgment he said :—

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"It is not seriously denied that the land in dispute originally belonged to the plaintiffs, and that it was occupied by the defendant with plaintiffs' license, and that defendant, with plaintiffs' permission, built the house on the land. Plaintiffs have, therefore, proved that the ground in dispute with the site on which the house stands, but not the house, belonged to them. On 28th February, 1893, defendant obtained an order in a possessory suit before the Mamlatdar (suit No. 2 of 1893) for possession of the house and the open space in front of it from the plaintiffs. On September 1st, 1893, plaintiff's claim for the rest of the land in dispute was dismissed by the Mamlatdar, plaintiff withdrawing his claim (suit No. 50 of 1893). The present suit was instituted on November 25th, 1896, and defendant's pleader contends that the claim is time-barred, as plaintiffs did [527] not sue to set aside the Mamlatdar's order within three years. Plaintiff's pleader urges that the limitation is saved, as defendant passed a rent-note to plaintiffs for the house and property in dispute on August 30th, 1893, thus acknowledging plaintiffs' title to the whole of the property and rendering it unnecessary for plaintiffs to sue to set aside the orders of the Mamlatdar. Witnesses Nos. 36, 38 and 52 prove that this rent-note was executed by defendant in consequence of an agreement between him and plaintiffs that defendant should give up all his rights in the property, including the house, and should pass the rent-note in consideration of a sum of Rs. 99 or Rs. 100 to be paid by plaintiffs. I agree, however, with the Subordinate Judge that the evidence of plaintiffs' witnesses as to the fact of the payment of this sum by plaintiffs is too contradictory to be believed. It is not, therefore, proved that plaintiffs paid the sum of Rs. 99 or Rs. 100 to defendant according to the agreement between the parties when the rent-note was passed. Plaintiff has, therefore, refused to perform his part of the contract. The defendant was justified in putting an end to the contract, and the rent-note is void. The limitation is not, therefore, saved, as plaintiffs' pleader contends. Plaintiffs' claim is time-barred, and plaintiffs are not entitled to any relief in this suit."

Plaintiffs preferred a second appeal.

Narayan G. Chandavarkar, for the appellants (plaintiffs).

Rao Saheb *Ghanasham N. Nadkarni*, for the respondent (defendant).

JUDGMENT.

PARSONS, J.—The District Judge has not fully comprehended the effect of non-payment of purchase-money upon a contract of sale. In the present case, it is proved that the defendant sold the land to the plaintiffs for the sum of Rs. 100 and delivered possession thereof by passing a lease for it to the plaintiffs. The sale, therefore, was a completed transaction even though the 100 rupees were not paid, and the only remedy of the defendant was to sue for the amount. This contract between the parties dissolved the order of the Mamlatdar in the possessory suit and rendered it unnecessary for the plaintiffs to sue to set it aside. We cannot, therefore, hold that the present suit (based on the contract of sale and the lease) is time-barred by reason of not being brought within three years of the date of the said order of the Mamlatdar.

We, therefore, reverse the decree of the lower appellate Court and restore that of the Court of first instance.

Decree reversed.

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23 B. 528 = 1 Bom. L.R. 12.

23 B. 528=1 Bom. L. R. 12.

[528] CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Ranade.

THE MUNICIPALITY OF BOMBAY *v.* AHMEDBHOY HABIBBHOY.*
[12th January, 1899.]

Municipality—Bombay Municipal Act (Bom. Act III of 1888), *s.* 249†—"*Employed*" *—Meaning of the word—Discretion vested in the Municipal Commissioner.*

The word "employed" in s. 249 of the Bombay Municipal Act (Bom. Act III of 1888) refers to employment of any kind or for any length of time.

REFERENCE by Khan Bahadur P. H. Dastur, Third Presidency Magistrate, under s. 432 of the Criminal Procedure Code (Act V of 1898).

The material portion of the reference was as follows:—

"Mr. Ahmedbhoy Habibbhoy is the mortgagee in possession of premises situate at Colaba and used as godowns for the storage of cotton. Formerly there was a mill in this building, and it had some privies attached thereto for the use of the mill hands. Subsequently, however, when the premises were destroyed by fire and rebuilt as godowns, these privies were closed and have always remained so up to this day. On the 17th September, 1898, the Municipal Commissioner gave Mr. Ahmedbhoy a notice, under s. 249 of the City of Bombay Municipal Act, to repair the existing privies so as to make them available for the use of persons employed upon the premises. This has not been done. And Mr. Ahmedbhoy is, therefore, charged under s. 471 of the Municipal Act for failure to comply with the said notice.

"The evidence in the case shows that these buildings consist of two blocks, the new and the old, each containing several compartments let out to merchants separately for the storage of their cotton. No men are employed there permanently or for the whole day; but whenever cotton is to be moved in or out of [529] the godowns, some labourers and cartmen are engaged for the work and remain on the premises only as long as is necessary to finish their work. This naturally depends upon the quantity of cotton to be weighed and the number of bales to be delivered, but it does not seem that any batch of labourers has remained in the building longer than a few hours at a time.

* * * *

"The number of men employed in the godown is very fluctuating. Sometimes there are as many as 51, 68, 72, and 91 persons engaged in work, while on other days there are none at all, or only a very few—1, 6, 7 and 9.

"This being the case, the question is, whether the Municipal Commissioner can compel the owner of the premises to provide privy accommodation in the building?

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* Criminal Reference, No. 128 of 1898.

† Section 249 provides as follows:—"Where it appears to the Commissioner that any premises are intended to be used as a market, railway station, dock, wharf or other place of public resort or as a place in which persons exceeding twenty in number are employed in any manufacture, trade or business, or as workmen or labourers, the Commissioner may, by written notice, require the owner or occupier of the said premises to construct a sufficient number of water closets or latrines, or privies and urinals, for the separate use of each sex."

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"It is urged on behalf of the defence that the words 'are employed' in s. 249 of the Municipal Act refer to a permanent and regular employment of the men and not to a temporary and occasional employment, as is admittedly the case here. I have, however, given my reasons in the judgment for holding the contrary opinion, and think that the section applies to all premises where more than twenty persons are engaged in any kind of work or for any length of time. If there is a discretion in the matter, it is with the Municipal Commissioner and not with this Court. Mr. Ahmedbhoy was, therefore, bound to comply with the notice.

"As, however, an authoritative decision in this matter is very desirable, I beg to refer for the opinion of the High Court the following point:—

"What is the meaning of the words 'are employed' appearing in the section?"

The reference was heard by a Division Bench (Parsons and Ranade, JJ.).

Branson, for Ahmedbhoy Habibbhoy.

There was no appearance for the Municipality.

JUDGMENT.

PARSONS, J.—The Magistrate has asked of this Court the following question:—"What is the meaning of the words 'are employed' appearing in s. 249 of the Bombay Municipal **[530]** Act?" He thinks that the words refer to employment of any kind or for any length of time. I agree with him. It is the obvious meaning of these words in the section, the object of which was to empower the Municipal Commissioner to require privy accommodation to be provided for places in which persons exceeding twenty in number are employed as workmen or labourers. Neither the kind or duration of the employment is defined, and they, therefore, are immaterial. The number only of the employes is stated, and it alone will be the test of application. The Magistrate is, therefore, right in his opinion that the section applies to all premises. Where more than twenty persons are employed as workmen or labourers in any kind of work, or for any length of time, it is not for the Court to lay down nice distinctions as to the number of hours in the day or of days in the year which constitute employment necessitating privy accommodation. The Legislature has left that to the discretion of the Municipal Commissioner, and has empowered him, whenever he finds that persons exceeding twenty in number are employed as workmen or labourers on any premises, to require the owner thereof to provide necessary accommodation for them. At the same time, as the reference is rather vague and does not include what seems to be the real dispute in the case, I will express the further opinion that it would be a perfect answer to the requisition were the owner on its receipt to close the premises or to cease employing therein more than twenty workmen or labourers. The case has not been argued before us on behalf of the Municipality, and I reserve to myself the right of reconsideration, but, as at present advised, I think the owner would only be guilty of an offence under the section if after such requisition he failed to comply with it, and if more than twenty such persons were found to be employed without the required accommodation being provided for them. There are no materials before me to show how far this opinion applies to the present case.

RANADE, J.—The point referred for the opinion of this Court relates to the construction of s. 249 of the Bombay Act III of 1888, which empowers the Commissioner to require the owners of places in which

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persons exceeding twenty in number are employed as labourers or workmen in any manufacture, trade [531] or business, to provide privies. The word "employed" used in this section is obviously used in its ordinary sense, *i.e.*, caused to be engaged in doing some service. There is nothing in the section which shows that the words were intended to signify the nature of the employment, as being from day to day, or occasional, or regular all the year round. The same word occurs in the two following sections in connection with buildings in which any person may be, or may be intended to be, employed in any manufacture, trade or business without any limit as to numbers. Actual employment is not essential in these two sections, and it is enough if the building is intended for such employment. In s. 249 actual employment in numbers exceeding twenty is an essential condition to empower the Municipal Commissioner to require the owner to provide for the convenience of persons so employed. The real difficulty in the application of the section lies in the fact that the number of persons employed in the building in dispute varies at different periods from five to fifty. The section, however, gives a discretion on this point to the Commissioner, and is not, like s. 248, imperative in its direction. That discretion has to be carefully exercised by him, but the discretion is his, and cannot be called in question in a Court of law. Mr. Scott, in his edition of the Act, refers to the case of *Hargreaves* v. *Taylor* (1), when this last position was laid down in respect of a corresponding provision of the English Act. We think the Magistrate has correctly construed the section.

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23 B. 531 = 1 Bom. L. R. 33.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

NARAYAN (*Original Applicant*), *Appellant* v. RASULKHAN (*Original Opponent*), *Respondent.** [17th January, 1899.]

Limitation—Limitation Act (XV of 1877), s. 14—Decree—Execution by Collector—Application to Collector to set aside sale—Civil Procedure Code (Act XIV of 1882), ss. 244, 310-A, 311 and 320.

A decree passed against the applicant Narayan was transferred for execution to the Collector under s. 320 of the Civil Procedure Code (Act XIV of 1882). On [532] the 8th May, 1897, the Collector in execution sold certain property belonging to the applicant, which was purchased by the respondents. On the 17th May, 1897, the applicant applied to the Collector to set aside the sale on the ground of alleged irregularities, and the Collector having referred the matter to the Mamlatdar for report, forwarded the record to the Court on 13th July, 1897. On the 6th August, 1897, the applicant, fearing that he had not applied to the proper Court, applied to the Subordinate Judge to set aside the sale, framing his application both under s. 310-A and s. 311 of the Civil Procedure Code (Act XIV of 1882). He contended that, under s. 14 of the Limitation Act (XV of 1877) his application was not barred.

Held, that the application was barred by limitation. Under the rules made by the Government of Bombay under s. 320 of the Civil Procedure Code (Act XIV of 1882) the Collector had no jurisdiction. There was, therefore, no *bona fide* mistake of jurisdiction such as would justify the Court in excluding the time occupied in applying to the Collector from the period of limitation.

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* Second Appeal No. 513 of 1898.

(1) (1863) 3 B. and S. 613.

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23 B. 531 = 1 Bom. L.R. 33.

Under the rules made by the Local Government of the Bombay Presidency, a Collector has not the power of the Court, under s. 311 of the Civil Procedure Code (Act XIV of 1882), to set aside a sale.

No second appeal lies from an order made under s. 311 of the Civil Procedure Code (Act XIV of 1882).

[D., 7 Bom.L.R. 263 (265).]

SECOND appeal from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Satara with appellate powers, reversing the order of Rao Saheb Ramchandra Daji Nagarkar, Subordinate Judge of Wai.

On the 8th May, 1897, certain property belonging to the applicant Narayan was sold in execution of a decree against him by the Collector to whom the decree had been transferred for execution under s. 320 of the Civil Procedure Code (Act XIV of 1882), and was purchased by the opponent Rasulkhan.

On the 17th May, the applicant applied to the Collector, under s. 311 of the Civil Procedure Code, to set aside the sale, alleging that it had taken place at the chavdi instead of on the spot, and that the land had in consequence been sold at an undervalue. The Collector forwarded the application to the Mamlatdar for investigation, and on the 20th July, 1897, the Mamlatdar reported that the land had been sold at an undervalue. The Collector sent the proceedings to the Court, and they were filed on 30th July, 1897.

[533] Subsequently, *viz.*, on the 6th August, 1897, the applicant, fearing that his previous application had not been to the proper Court, applied to the Subordinate Judge to set aside the sale on the above grounds, and prayed that under s. 14 of the Limitation Act (XV of 1877), the time occupied in prosecuting his application to the Collector should be deducted in computing the period of limitation for making the present application to the Court. He stated that he was ready and willing to pay the money due under the decree, and prayed for an order under s. 310-A of the Civil Procedure Code.

The opponent being served with a notice to show cause why the sale should not be set aside, denied that the land had been sold at an undervalue, pleaded limitatian, and objected that no order could be passed under s. 310-A.

The Subordinate Judge set aside the sale.

On appeal, the Judge reversed the order, holding that the time spent in making the application to the Collector could not be deducted, and that, therefore, the present application was barred by limitation.

In his judgment he said :—

"The judgment debtor, whose property has been sold at an undervalue, applied, quite in time, to the Collector to whom the execution proceedings had been transferred, under s. 320 of the Code, to set aside the sale. That officer, instead of telling the applicant that he (applicant) should go to the Court, referred the application to the Mamlatdar for report, and this consumed nearly two months. The application made to the Court is clearly beyond time. The sale took place on 8th May and the application was made on 6th August. Section 14 of the Limitation Act does not, in my opinion, apply, because the Collector is not a Court within the meaning of that section."

The applicant preferred a second appeal.

Sadashiv R. Bakhle, for appellant :—The application to the Collector was under s. 311 of the Civil Procedure Code. That application should

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be treated as an application to the Court, although it was made to the wrong officer of the Court. The Collector is an officer of the Court. Ordinarily such applications are made to the Nazir.

But, further, we contend that the application was rightly made to the Collector executing the decree—*Keshabdeo* v. **[534]** *Radhe Prasad* (1). This application is made under both s. 310-A and s. 311 of the Code.

Kaji Kabiruddin with *Gangaram B. Rele*, for the respondent (opponent) :—The Collector merely executes the decree in his capacity as a ministerial officer of the Court. The Collector himself is not a Court—*Ganpatram* v. *Isaac Adamji* (2) ; *Bai Amthi* v. *Madhav* (3) ; *Mahadaji* v. *Hari* (4) ; *Lallu Trikam* v. *Bhavla Mithia* (5).

Further, the reliefs claimed under the application to the Collector, under s. 311, were different from that now asked for under s. 310A. Therefore, the applicant cannot get the benefit of s. 14 of the Limitation Act.

JUDGMENT.

PARSONS, J.—We see no reason to doubt the correctness of the decisions of this Court in the cases of *Ganpatram* v. *Isaac Admaji*(2) and *Bai Amthi* v. *Madhav* (3). The case of *Keshabdeo* v. *Radhe Prasad*(1) is cited as being opposed to these decisions, but we cannot say whether it is so or not, as we have not before us the rules framed by the Local Government of the North-Western Provinces under s. 320 of the Code of Civil Procedure. It is sufficient for us to say that the rules made by the Local Government of this Presidency do not confer on the Collector the power of the Court under s. 311, and that s. 320 by itself confers no such power. Possibly an application made to the Collector and by him forwarded on to the Court might be held to have been made to an officer of the Court, so that limitation might be counted from the date of presentation to the Collector, but upon that point it is unnecessary to pronounce a decision since the appellant has in these proceedings relied, not upon the application he made to the Collector, but upon the one that he made to the Court on the 6th August, which is based on other grounds and contains additional prayers of relief. We confirm the order of the lower appellate Court with costs.

RANADE, J.—Taking the application of 6th August, 1897, made by the appellant to the Wai Court as an application under s. 311, it is plain that no second appeal lies from the order **[535]** of the lower appellate Court. It was, however, contended that the application contained also a prayer under s. 310-A, and that in such applications an appeal lies from orders passed thereon as from an order under s. 244. On reading the application in the present case, however, it is found that there was only an offer to pay, but no actual deposit of purchase-money, and, further, as the prayer to set aside the sale was joined with the other prayer, such an application cannot be entertained under the proviso to s. 310-A. No second appeal lay, therefore, in this case.

On the merits also it is quite clear that the application of 6th August, 1897, was made more than thirty days after the sale took place. The applicant's pleader sought to bring the application within time by reason of the prior application made to the Collector on 17th May, 1897, within nine days from the auction sale. He contended that such

(1) 11 A. 94.
(2) 15 B. 322.
(3) 15 B. 694.
(4) 7 B. 332.
(5) 11 B. 478.

applications under s. 311 can only be made to the Collector, and cited *Keshabdeo* v. *Radhe Prasad* (1) as an authority for this position. That decision, as also the cases referred to therein, obviously have reference to the rules made by the North-Western Provinces Government under s. 320. The rules made by the Local Government here under the same section give no power to the Collector to dispose of such applications, and this Court has decided in the cases of *Ganpatram* v. *Isaac Adamji* (2) and *Bai Amthi* v. *Madhav* (3) that the Collector has no jurisdiction. Besides, the application of 6th August was not a continuation of the application to the Collector. There was, therefore, no *bona fide* mistake of jurisdiction which alone might, under certain circumstances, be pleaded under the Limitation Act as an excuse for excluding the time so taken up from being reckoned. For these reasons, the order passed by the lower appellate Court seems to be correct, and we dismiss the appeal.

Order confirmed.

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23 B. 536 = 1 Bom. L.R. 36.

[536] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BHAVANISHANKAR (*Original Applicant*), *Appellant* v. NARANSHANKAR (*Original Opponent*), *Respondent.** [18th January, 1899.]

Res judicata—*Suit by C for mesne profits as devisee of land under will of A—Will held valid and C's claim allowed—Application by C as legal representative of A for execution of decree obtained by A—Question of validity of will again raised—Civil Procedure Code (Act XIV of* 1882), s. 244.

A obtained a decree against B for possession of certain land, and then died. Thereupon C applied for execution of the decree as A's legal representative, relying upon a will made by A in his favour. At the same time, C filed a suit to recover Rs. 140 as mesne profits of the land. The execution proceedings were stayed till after the disposal of the suit for mesne profits. In this suit, B contended that the will in question was not executed by A, and that A was not of sound disposing mind at the time of the alleged execution of the will. The Subordinate Judge found on both these points against B and passed a decree for mesne profits. This decree was upheld, on appeal, by the District Judge.

After the decision of this suit, the Subordinate Judge took up C's application for execution of the original decree obtained by A. This application was resisted by B on the same grounds on which he had defended the suit for mesne profits. He impeached the validity of the will on the grounds of non-execution by, and unsoundness of mind of, the testator. The Subordinate Judge held that the matter was *res judicata*; he, therefore, overruled this objection, and ordered execution to issue. The District Judge held that as the suit for mesne profits was in the nature of Small Cause suit, in which there was no second appeal, the decision passed in that suit did not operate as *res judicata* in the present execution proceedings. He, therefore, reversed the Subordinate Judge's order and remanded the case for a fresh decision.

Held, reversing the remand order, that the question whether C was entitled to execute the decree as A's representative fell within the last clause of s. 244 of the Code of Civil Procedure (Act XIV of 1882). The Subordinate Judge, who had raised an issue as to the validity of the will relied upon by C in the suit for mesne profits, was entitled to act upon his determination of that issue in the execution proceedings.

SECOND appeal from the decision of E. H. Moscardi, District Judge of Surat.

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* Second Appeal No. 528 of 1898.

(1) 11 A. 94. (2) 15 B. 322. (3) 15 B. 694.

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23 B. 536 = 1 Bom. L.R. 36.

One Bai Parvati obtained a decree for possession of certain land. The decree did not award mesne profits from the date of the suit till delivery of possession.

[537] Bai Parvati died shortly after this decree, leaving a will by which she bequeathed to one Bhavanishankar Jekrishna all her rights under the decree.

On the strength of this will, Bhavanishankar filed a *darkhast* for the execution of the decree, and at the same time filed a suit to recover Rs. 140 on account of mesne profits.

The *darkhast* and the suit were filed on the same day—1st March, 1897.

The execution proceedings were stayed till after the suit for mesne profits should be decided.

In this suit the chief questions at issue between the parties were (1) whether Bai Parvati had executed the will relied upon by the plaintiff, and (2) whether she was of sound disposing mind at the time of execution of the will.

The Subordinate Judge found both these issues in Bhavanishankar's favour, and awarded him mesne profits as claimed. This decree was upheld, on appeal, by the District Judge.

After this decision, the application for execution came on before the Subordinate Judge.

The judgment-debtors resisted the *darkhast* on the same grounds as those on which they had already defended the suit for mesne profits; as before, contending that Bai Parvati had not duly executed the will, and that she was not of sound disposing mind at the time of execution.

The Subordinate Judge held that on both these points the decision in the suit for mesne profits operated as *res judicata*. He, therefore, granted the application and ordered execution to proceed.

On appeal the District Judge held that the matter was not *res judicata*. He, therefore, reversed the Subordinate Judge's order and remanded the *darkhast* for a fresh decision on the merits. His reasons were as follows:—

"In *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (I. L. R., 23 Cal. 885) it was decided that no second appeal lies from a suit for mesne profits where the value of the subject-matter in dispute is less than Rs. 500, because **[538]** such a suit is cognizable by a Court of Small Causes, and in *Govind bin Lakshmanshet Anjorlekar* v. *Dhondbarav bin Ganbarav Tambye* (I. L. R., 15 Bom. 104) it was held that decisions in previous suits, which were in the nature of Small Cause suits and in which there was no right of second appeal, did not operate as *res judicata* in cases in which a second appeal lay. In this case a second appeal lies, and consequently the findings in the suit for mesne profits are not *res judicata* in the present *darkhast*."

Against this decision Bhavanishankar appealed to the High Court.

Ganpat S. Rao, for appellant.

Manekshah Jehangirshah, for respondent.

JUDGMENT.

PARSONS, J.—We think that the point at issue falls within the words of the last clause of s. 244 "determined by a separate suit" and that the Subordinate Judge, who had stayed the execution proceedings pending a suit between the same parties in which an issue had been raised as to the validity of the will under which the applicant claimed,

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23 B. 536=1 Bom. L.R. 36.

and which the opponents disputed on the ground of non-execution by, and unsoundness of mind of, the testatrix, was entitled to act upon his determination of that issue in the execution proceedings. It follows, therefore, that the District Judge, who himself confirmed, on appeal, the finding as to the validity of the will, should not have reversed the order and remanded the *darkhast* for a fresh decision. He could and should have acted in the execution proceedings upon the determination he had come to upon the same point in the suit.

We reverse the order made by the lower appellate Court and restore that of the Court of first instance, with costs in this and the lower appellate Court on the opponents.

Order reversed.

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23 B. 539=1 Bom.L.R. 53.

[539] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

LASTINGS (*Original Plaintiff*), *Appellant v.* GONSALVES AND OTHERS (*Original Defendants Nos.* 1-3, 5, 6, 10-22 *and* 7-9), *Respondents.**

[18th January, 1899.]

Religion—Native Christians—Change of religion—Law applicable to Converts—Succession—Inheritance.

Where, in consequence of the conversion of a person from one form of religion to another, the question arises as to the law to be applied to such person, that question is to be determined not by ascertaining the law which was applicable to such person prior to the conversion, but by ascertaining the law or custom of the class to which such person attached himself after conversion and by which he preferred that his succession should be governed.

[R., 12 C.L.J. 459=15 C.W.N. 158=8 Ind. Cas. 41; Expl., 31 C. 11 (18) (P.C.); D., 40 C. 407=16 C.L.J. 311=17 C.W.N. 102=17 Ind. Cas. 257.]

APPEAL from the decision of Rao Bahadur G. V. Limaye, First Class Subordinate Judge of Belgaum.

In this suit the plaintiff (Letitia Lastings), who was a member of a Native Christian family resident at Belgaum, claimed a one-third share of certain bungalows situate at Belgaum, which had belonged to her father, D. F. Gonsalves, who died in 1855. She alleged that the property had been left undisposed of by his will, and she claimed that, as heirs of her father, she and her two brothers (defendants Nos. 1 and 2) were entitled in equal shares. The plaint stated the cause of action to have arisen in 1893, when the plaintiff first became aware of her rights and demanded her share, and it was apparently assumed that the law applicable to the case was the Indian Succession Act (X of 1865).

At the hearing, the Subordinate Judge framed issues of which the fifth was as follows:

"5. Is the plaintiff entitled to any and what share in the properties in dispute?"

No evidence was given of the status of the plaintiff and her family, and on this issue the Subordinate Judge accordingly dismissed the suit, holding that it lay upon the plaintiff to show by what law her family

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* Appeal No. 56 of 1898.

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23 B. 539 = 1 Bom. L.R. 53.

was governed at the time of her father's death in 1855, and under which she claimed a share in his estate. He was of opinion that as it certainly was not the Succession Act (X of 1865), which was not passed until 1865, the presumption [540] was that the law applicable was the law applicable to the family before conversion to Christianity. As there was no evidence upon this point, he dismissed the plaintiff's claim. In his judgment he said:—

"Issue 5. The plaintiff, who is admittedly a descendant of a Native Christian family, claims as one of the heirs of her deceased father, D. F. Gonsalves, a certain share in his property, alleging that the same is intestate, inasmuch as the disposition made by the deceased by his will is confined to the income of the property and does not extend to the property itself: *vide* Ex. 82. Assuming that her father died intestate, the first question, which is essential to the determination of her right of succession, is, by what law the family was governed in 1855. The parties presumably appear to have been under a misconception on this point since they relied solely on the Indian Succession Act in support of their respective contentions. That Act certainly is not applicable, as the succession opened long before its enactment. The pleadings do not show what the respective allegations of the parties are as to the law applicable to the family of the deceased in regard to succession; and the plaintiff made no attempt to show that the family is governed by any particular law or usage entitling her to a share along with her brothers. Her pleader only contented himself by stating that the English law was not applicable to the case. On the other hand, it is not the defendants' contention that the case is governed by that law. The presumption, then, is that the law applicable is the law which was applicable before the conversion to Christianity. It is to be regretted that there are no materials in the case, like those in the Thana Case (see Printed Judgments for 1894, p. 328), which was originally decided by me, for determining from what caste or religion the conversion took place. Hence it is impossible to arrive at a conclusion on the question above alluded to. I, therefore, feel constrained to hold that the plaintiff has failed to show that she is entitled to any share in her deceased father's estate. I find on the 5th issue in the negative absolutely. This finding renders it unnecessary to find on the remaining issues. I reject the claim with costs."

The plaintiff appealed.

Sadashiv R. Bakhle, for the appellant (plaintiff):—No issue was raised as to the law applicable to the plaintiff's family, and, therefore, no evidence was given on the point. He referred to *Bai Baiji* v. *Bai Santok* (1); *Barlow* v. *Orde* (2).

Ratanji R. Desai, for respondent (defendant No. 2):—The family is Native Christian and, therefore, English law is applicable—*Lopes* v. *Lopes* (3). The Native Christians at Belgaum were originally [541] Madras Hindus—"Belgaum Gazetteer," pp. 226-227. Possibly the plaintiff's father was a Portuguese. Either Hindu law or English law must be applied, and in neither case can the plaintiff succeed. The decree of the Judge is, therefore, substantially correct.

Kola with *B. B. Boyce*, for respondents Nos. 6 and 7 (defendants Nos. 10 and 21):—We purchased portions of the property from defendant No. 2, and support his case.

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(1) 20 B. 53. (2) 13 M.I.A. 277. (3) 5 B.H.C.R.O.C.J. 172.

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JUDGMENT.

PARSONS, J.—The Subordinate Judge dismissed this suit upon a preliminary point, which was not specifically raised by any issue, and upon which, therefore, no evidence was given by the parties. Moreover, the reason given for the dismissal is wrong. The parties are Native Christians. The presumption drawn by the Subordinate Judge was that the law applicable to them was the law by which their family was governed before its conversion to Christianity, and because it was not shown from what religion it was converted to Christianity, the Subordinate Judge considered this to be fatal to the plaintiff's case, which he accordingly dismissed. We think that this is a clear error. The law prior to conversion is a point on which it might not be necessary to give any evidence at all, because as laid down in *Bai Baiji* v. *Bai Santok* (1), citing *Abraham* v. *Abraham* (2), the convert may, by his course of conduct after conversion, show by what law he intended to be governed as to these matters.

The *ratio decidendi* is laid down in *Barlow* v. *Orde* (3), where their Lordships of the Privy Council say :

"The construction and effect of the will, therefore, must depend on the law of the domicile, if that can be ascertained At the time of the Colonel's death there was no *lex loci* of the province in which he was domiciled, and the law applicable to the succession of any individual depended on his personal *status*, which again mainly depended on his religion. Thus the succession of a Hindu would, as a general rule, fall to be regulated by Hindu law, and of a Mahomedan by Mahomedan law, and of an East Indian Christian by English law; but in every case. for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual, and to the usages of the class or family to which he belonged. If no specific rule could be ascertained to be **[542]** applicable to the case, then the Judges administering justice in the province were to act 'according to justice, equity, and good conscience."

This, no doubt, was said as to a particular province, but the principle holds good equally as well in respect of this part of India : see *Jalbhai* v. *Louis Manoel* (4).

In the present case no proper opportunity was given to the parties to adduce any evidence on these points, nor has the Judge considered the evidence that there is on the record,—for instance, there is the will (Ex. 62) made by the deceased, the language, wording and nature of which cannot be ignored. We, therefore, reverse his decree and remand the case for a fresh inquiry and decision after raising the proper issues and taking evidence. Costs to be costs in the cause.

RANADE, J.—This case has not been satisfactorily disposed of in the Court below. The principal parties to the suit are non-European Christians, the claim being brought by a sister against her two brothers and persons claiming under them for her one-third share of her father's property. The plaint stated that the plaintiff's father had made a will in 1852, and that he died in 1855. This will disposed of the rents, but not of the properties themselves. Plaintiff's mother kept back this will, and, before her death in 1886, made a fresh will inconsistent with her husband's will, and the defendants Nos. 3 and 4 took out probate of this second will, and all the defendants were in possession of the whole estate under this second will. The claim for a third share was made

(1) 20 B. 53.
(2) 9 M.I.A. 195.
(3) 13 M.I.A. 277.
(4) 19 B. 680.

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23 B. 539 = Bom. L.R. 53.

apparently under Act X of 1865, which provides that daughters and sons shall share equally in intestate succession. Defendant No. 1 did not object to the claim, but defendant No. 2 contended that his father's will disposed not only of the rents, but also gave full power to his widow to dispose by will the estate left by him, and that the second will disposed of the estate accordingly.

The first question in the case was as to the status of the parties, and the law which governed the devolution of property in intestate succession. The lower Court laid down no issue on this point. It only remarked that neither English law nor Act X of 1865 was applicable to the case, and that the law which applied to the parties before their conversion should govern the dispute. **[543]** As plaintiff failed to show to what caste or religion the family belonged before conversion, the lower Court dismissed the suit.

The appellant's pleader very properly took exception to this summary procedure which disposed of the case on a point on which no issue had been raised. The lower Court, moreover, was in error in the view it has expressed about the law which governed such cases. There is no doubt that Act X of 1865 does not govern the case, as the appellant's father died in 1855, and s. 331 expressly comes in the way of all retrospective extension of the Act. As the parties are Native Christians residing at Belgaum outside the Town and Island of Bombay, the ruling in *Lopes* v. *Lopes*(1), which applied English law to Portuguese inhabitants of Bombay, does not govern this case. If they are East Indian Christians, the English law will govern their succession disputes—*Barlow* v. *Orde* (2). If they are converted Native Christians, then they must be governed by the law to which they and their family have attached themselves. The rules of Hindu law, if they were Hindu converts, will not apply as a matter of course. The convert may renounce the law by which he was bound, or, if he think fit, he may abide by the old law. His course of conduct after conversion by attaching himself to a class which has a personal law of its own, or by personally observing such usage or custom, must determine the question of what law he has preferred to attach himself to. This was the principle laid down in *Abraham* v. *Abraham* (3) and has been followed in this Court in a series of decisions—*Jalbhai* v. *Louis Manoel* (4): *Bai Baiji* v. *Bai Santok* (5). It is thus clear that the question at issue does not depend upon the consideration of the law prior to conversion, but on the law or custom of the class to which the parties attached themselves after conversion, and by which they preferred that their succession should be governed. This case must, therefore, be remanded back to the lower Court, which should frame an express issue on this point, and after receiving evidence on the same decide the case on the merits.

Decree reversed and case remanded.

(1) 5 B.H.C.R. O.C.J. 172. (2) 13 W.R. (P.C.) 41. (3) 9 M.I.A. 195.
(4) 19 B. 680. (5) 20 B. 53.

23 B. 544 (P.C).=3 C.W.N. 186=26 I.A. 32=7 Sar. P.C.J. 451.

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23 B. 544 (P.C.)=3 C.W.N. 186=26 I.A. 32=7 Sar. P.C.J. 451.

[544] PRIVY COUNCIL.

PRESENT:

Lords Ashbourne, Hobhouse and Macnaghten, and Sir R. Couch.

[*On appeal from the High Court at Bombay.*]

BHAGWANDAS MITHARAM (*Defendant* No. 2), *Appellant v.* RIVETT-CARNAC (*Plaintiff* No. 2), *Respondent.*

[15th November and 10th December, 1898.]

Partnership—Death of partner—Subsequent recovery of assets by surviving partner—Suit by administrator of deceased partner against surviving partner for recovered assets—Suit for partnership account—Limitation Act (XV of 1877), ss 7 and 17.

In 1889, one Hemabai, a widow and partner in a firm carrying on business in partnership with Goculdas and Bhagwandas (defendants Nos. 1 and 2) in Sind and at Behrin in the Persian Gulf, died, and the partnership was then dissolved. She had no children, but it was alleged that she had adopted one Purshotam, the brother of the second defendant. On the 13th February, 1890, the guardian of one Kissondas, a minor (her husband's nephew), applied to the High Court of Bombay for letters of administration to her estate, alleging that Kissondas was her heir and next of kin. A caveat was filed by her father and others, in which they denied that Kissondas was her heir, and alleged that Purshotam had performed her funeral ceremonies. The matter came on as a suit on the 19th February, 1894, when an order was made without prejudice to any of the questions raised by the issues, dismissing the application and ordering letters of administration to Hemabai's estate to issue to the Administrator General of Bombay. Letters of administration were accordingly granted to him on the 30th March, 1894.

In the meantime, however, *viz.*, on the 12th April, 1893, Bhagwandas (defendant No. 2) had filed three suits in the High Court of Bombay, in the name of himself and Goculdas (defendant No. 1), as surviving partners of Hemabai's firm, to recover certain debts due to that firm. Disputes subsequently arose between Bhagwandas and Goculdas, and, by a consent order of the 22nd July, 1893, it was ordered that any money recovered in the said three suits should be paid over to a receiver (defendant No. 3) to be held by him until further order. On the 1st August, 1893, consent decrees were passed in the above three suits for a total sum of Rs. 28,335, which was forthwith handed over to the receiver.

On the 22nd April, 1894, this suit was filed by the Administrator General of Bombay as administrator of Hemabai appointed as above stated. He claimed to recover the whole sum paid to the receiver, alleging that the first and second defendants as her partners were largely indebted to the firm, and that the money really belonged to her estate. He prayed that the receiver might be directed to pay over the money to him, and, if necessary, the partnership accounts should be taken. The second defendant (*inter alia*) pleaded that the suit was one for [545] partnership accounts, and as such was barred by limitation, and also that the High Court of Bombay had no jurisdiction to try it.

Held, affirming the decision of the High Court of Bombay, that this suit was not barred by time; the latter Court having decided on the ground that the Administrator-General having been the only person capable of suing within the meaning of s. 17 of Act XV of 1877 (Limitation) that section operated to allow the period of art. 106 to be computed from the issue of administration of this estate.

A decree was made for a general partnership account to establish what was due to the estate of the deceased in respect of her share in the partnership, and of any money of hers employed in the business continued by the survivors.

[R., 25 M. 26 (29); 9 C.W.N. 537 (542).]

APPEAL from a decree (13th August, 1895) of the appellate High Court, varying a decree (19th November, 1894) of the High Court in the Original Jurisdiction.

The proceedings in this suit prior to this appeal are reported in *Rivett-Carnac* v. *Goculdas Sobhan Mull, Bhugwandas Mitharam and Limji*

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DEC. 10.
PRIVY COUNCIL.
23 B. 544 (P.C.) = 3 C.W.N. 186 = 26 I.A. 32 = 7 Sar. P.C.J. 451.

Navroji Banaji (1), where the judgments of the Court of Original Jurisdiction and of the appellate High Court are given at length. And there the facts of the case are all stated, as well as in the judgment on this appeal.

This suit was brought on the 22nd April, 1894, by the Administrator-General of Bombay, who obtained, on the 30th March, 1894, administration of the estate of a widow, Hemabai, deceased on the 1st September, 1889, then being in partnership with the first and second defendants in a business carried on at Karachi and Behrin in the Persian Gulf. The claim was for Rs. 28,335 in the hands of the third defendant, the receiver appointed to have charge of that money, which had been paid in discharge of decrees obtained by the first and second, as surviving partners, against debtors to the firm in which the deceased had been a partner, that firm having been continued by the survivors.

The plaint stated that the whole of the capital was supplied by Hemabai's late husband, who died in 1884, leaving her as his heiress; and alleged that the first defendant was a working partner, with whom Hemabai carried on the business, and that they had admitted the second defendant Bhagwandas, who also supplied no capital: that, at her death, the first and second were each **[546]** indebted to the partnership, and had nothing to receive therefrom, as would appear on taking the accounts, if found necessary to be taken.

The prayer for relief was (*a*) "that it may be declared that the said moneys in the hands of the receiver belong to the estate of Hemabai and that the plaintiff is entitled to the same; (*b*) that, if necessary for the purposes of this suit, the account of the partnership, between Hemabai and the first and second defendants, may be taken."

Bhagwandas Mitharam alone defended, alleging that the accounts of the partnership had never been taken, and that the right to an account was now barred under art. 106 of Act XV of 1877. The money now claimed would have come in as an outstanding debt to the partners. He also counter-claimed a share in Rs. 5,292, a debt due to the firm, but paid by the debtor to the plaintiff.

Goculdas assented to the share of Hemabai being taken by her representative.

The principal questions raised at first, and again on this appeal, were, (1) whether after the dissolution of a firm by the death of a partner, and the continuance of its business by the survivors, assets consisting of debts due to the late firm could, when realized by the survivors, be apportioned to the representative of the deceased, as belonging to her estate, without an account being taken of the partnership; (2) whether such an account having been a necessity, and being now barred by art. 106, as the defence insisted, the suit must be dismissed.

The first Court (Candy, J.) was of opinion that the claim to a general account of the partnership business was barred by time; but that, without it, the estate of the deceased was entitled to a share of the assets in charge of the receiver proportionate to what had been her share in the business, and to a similar share in the sum paid to the plaintiff in his character as her administrator.

From this decree the Administrator General appealed, alleging, as before, that Hemabai's estate was entitled to the whole of those **[547]** assets. The defendant thereupon filed cross-objections to the effect that the suit ought to have been dismissed entirely.

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The appellate High Court (Farran, C. J., and Starling, J.) decided that a general account was not barred by time. Inasmuch as the Administrator General had been the only person not under a disability to sue, or the only person, in the words of s. 17, "capable of suing," the time of limitation must be reckoned from when administration of the estate was delivered to him, who represented the interests of the minor heir, against whom no time had run.

The grant of leave to sue under cl. 12 of the Letters Patent was sufficient to give the jurisdiction which had been exercised, the money sought to be awarded being in the receiver's hands. The technical objections failed, and there was no defence upon the merits that could possibly stand. The High Court, therefore, varied the decree of the Court below and decreed in the terms of (*a*) and (*b*) in the plaint. The effect of the appellate Court's decree was that the plaintiff was entitled to the sum that he had already received.

The defendant No. 2 appealed.

Crackanthorpe, Q. C., and *J. D. Mayne*, for the appellant.—The suit was such as to necessarily involve that no decree for the division of the assets among the parties could be made without the general accounts of the partnership having been taken. The original Court was wrong in ordering distribution of the shares in the assets while the state of those accounts was neither admitted nor ascertained. The liabilities of the firm had to be considered. So far as to the necessity of an account. But in regard to art. 106, and s. 17 of the Limitation Act, there had been no solution of the question whether an account was not now barred by time. It had not been determined whether there had not been a legal representative of Hemabai all the while.

Jardine, Q. C., and *J. H. A. Branson*, for the respondent.—The decree of the appellate High Court was substantially right and the appeal should be dismissed. But the Administrator General did not oppose the taking the account which in effect was decreed. It was insisted, however, that it would appear, as the fact was, **[548]** that all the existing capital of the firm belonged to Hemabai's estate.

Counsel for the appellant did not reply.

JUDGMENT.

Their Lordships' judgment was afterwards, on 10th December, read by

LORD MACNAGHTEN.—It appears that one Hemanmal carried on business with the defendant Goculdas in Sind and in the Persian Gulf until his death in 1884. He left a widow named Hemabai but no issue. After his death the business was continued by Goculdas and Hemabai. On the 7th of August, 1889, the appellant Bhagwandas was admitted into the firm, and a partnership agreement of that date was made between the three—Hemabai, Goculdas and Bhagwandas. Hemabai was admittedly the moneyed partner if not the owner of the business. She died on the 1st of September, 1889. On her death the partnership was dissolved. But the affairs of the partnership were not wound up, and apparently her moneys were retained by the surviving partners and employed in the business.

In 1890 an application for letters of administration was made on behalf of one Kissondas, then about ten years old, claiming to be the heir. But the application was resisted by Bhagwandas, who alleged that

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Kissondas was not heir and alleged also that Hemabai left a will. The case came before the Court. No will was forthcoming, nor was it suggested then that there was a nearer heir. The Court, however, directed that the Administrator General should take out administration without prejudice to any question, and made provision for the costs of all parties.

In the meantime, Goculdas and Bhagwandas as surviving partners took proceedings in Bombay to recover certain debts, or the balance of certain debts, owing to the business. Ultimately the amount claimed, which came to about Rs. 28,000, was paid to a receiver appointed by the Court. On the 30th of March, 1894, the Administrator General took out representation to Hemabai, and in April following he brought this suit against Goculdas and Bhagwandas claiming (*a*) to have the whole amount in the receiver's hands paid to him in his representative character, alleging that Goculdas and Bhagwandas had nothing to receive, but were in fact debtors to the partnership and (*b*) if necessary to have the **[549]** accounts of the partnership taken. He also asked for such further relief as the circumstances might require. Goculdas did not resist the plaintiff's claim. Bhagwandas set up every possible defence. He submitted that the Court in Bombay had no jurisdiction in the matter. He relied on the law of limitation and he alleged, what was perfectly true, that the accounts of the partnership had never been taken. By a supplemental defence he insisted that the plaintiff was bound to account to Goculdas and himself for their shares in a sum of Rs. 5,292 which admittedly had been recovered from a debtor to the partnership by the plaintiff himself since the institution of the suit.

Candy, J., before whom the case came in the first instance, gave effect, in a great measure, to the points raised by way of defence on behalf of Bhagwandas. He held that the Court had jurisdiction only in regard to the assets recovered in Bombay. He also held that the plaintiff's right to a general account was barred by limitation, and in the result he ordered the costs of all parties to be paid out of the fund in the hands of the receiver, and divided the balance of that fund, as well as the moneys recovered by the plaintiff, between the plaintiff and Bhagwandas, giving to the latter the proportionate share to which he would have been entitled under the partnership agreement if the assets in dispute had been profits of the partnership business.

The learned Judges of the High Court on appeal held that the jurisdiction of the Court was not limited to the assets recovered in Bombay. It was not disputed at the bar that the judgment of the Appeal Court was right so far. Then they held that the suit was not barred by limitation. They considered—and their Lordships agree in their view—that on the materials before the Court it must be taken that the Administrator General is suing on behalf of the infant heir. As far as the evidence goes, the opposition on the part of Bhagwandas in the probate suit was a mere pretence put forward in order to defeat or delay the infant's right to an account against Hemabai's surviving partners. The Appeal Court ordered Bhagwandas to pay all the costs, and adjudged to the plaintiff the whole fund in the hands of the receiver.

[550] Although their Lordships agree with the Appeal Court in the main, they are unable to find sufficient evidence to justify the decree in the form in which it was drawn up. In his pleadings Bhagwandas insisted that an order in the plaintiff's favour ought not to be made without taking the accounts. And that was his principal contention before their Lordships. Nor does it appear that he ever receded from that position.

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To a certain extent, indeed, it was common ground that the accounts must be taken. One of the plaintiff's reasons, in his memorandum of appeal from the judgment of the lower Court was "that the plaintiff was entitled to insist on the partnership account being taken before the second defendant"—that is Bhagwandas—"could be allowed any share in the moneys recovered by the plaintiff." And it would appear, from the language of the judgment delivered by the Chief Justice, that it was intended that provision should be made for taking the accounts, unless they were waived by Bhagwandas. His conclusion was that the decree of the lower Court "must be varied by making a decree in terms of paragraphs (*a*) and (*b*) of the plaint." Now paragraph (*b*) asked for an account, while paragraph (*a*) asked for payment without an account. There is nothing to show how it was that the decree came to be drawn up in its present form. Probably both parties are to blame for the error and for the expense which has resulted from it.

It seems to their Lordships that the proper order will be to direct an account to be taken of the partnership dealings and transactions, to enquire what was due to the estate of Hemabai in respect of her share at the time of her death, and how the amount due to her estate has been dealt with, and, if it appears that such amount, or any part thereof, has been employed in the business continued by the surviving partners, to direct the accounts of such business to be taken. Further consideration and costs must be reserved.

This order will enable the Administrator General to make such claim as he may be advised in respect of interest or profits since Hemabai's death. Bhagwandas must pay the plaintiff's costs up to and including the hearing by the lower Court. Each party must bear his own costs here and in the Appeal Court.

[551] Their Lordships will, therefore, humbly advise Her Majesty that an order be made to that effect.

Appeal allowed. Decree amended.

Solicitors for the appellant:—Messrs. *Lattey and Hart.*
Solicitors for the respondent:—Messrs. *Payne and Lattey.*

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Before Mr. Justice Tyabji; and on appeal before Mr. Justice Candy and Mr. Justice Starling.

RALLI BROTHERS, (*Plaintiffs*) *v.* CHABILDAS LALLUBHAI AND OTHERS, (*Defendants*).* [3rd and 7th March, 1899.]

Ship—Charter-party—Bill of lading—Freight—Rate of freight in charter-party—Contract by sub-charterer with shipper for freight at lower rate—Refusal by captain to sign bills of lading at lower rate than rate in charter-party—Payment by shipper of difference under protest.

On 3rd March, 1898, Karamsi Dharsi & Co., a firm of freight jobbers in Bombay, contracted to provide the plaintiffs with freight for 3,000 tons of cargo to Liverpool at 16*s.* 6*d.* per ton in a steamer to be subsequently named, and on the same day handed to the plaintiffs three shipping orders addressed to the

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captain of the ship, the name of which was to be afterwards inserted. In these shipping orders the higher and lower rate clause was as follows :—"Bill of lading if required at lower or higher rate, difference payable here as customary." This clause the plaintiffs struck out from each of the shipping orders according to their usual practice. On 11th May, 1898, the defendants chartered the steamship "Paddington" of which they were also the owners' agents in Bombay, and on the 12th May assigned a half share of their interest under the charter-party to Karamsi Dharsi & Co. By the charter-party a full and complete cargo was to be loaded, and the freight was to be £1-10 per ton. The captain, however, was authorized to sign clean bills of lading at any rate of freight required by the charterers without prejudice to the charter-party, but at not less than the chartered rate, unless the difference was paid in cash before sailing.

Karamsi Dharsi & Co. having thus sub-chartered the "Paddington" declared that steamer to the plaintiffs for 2,747 tons of cargo under their contract of the 3rd March, 1898, and the name of the steamer was then entered in the shipping orders for that amount of cargo. The plaintiffs thereupon commenced to load a cargo of wheat. By the 21st June, 2,100 tons had been put on board; mate's receipts were given to the plaintiffs and bills of lading were prepared by them, stating the rate of freight to be 16*s*. 6*d*. per ton as per the shipping orders, and were [552] presented for signature to the captain. He refused to sign them unless the difference between 16*s*. 6*d*, and the chartered rate, *viz*., £1-10, was paid to him as provided in the charter-party. The plaintiffs thereupon refused to ship any more cargo and demanded the return of the cargo already shipped on board the "Paddington." On the 24th June the "Paddington" sailed from Bombay, the captain having previously authorized the defendants to sign bills of lading for him after his departure provided they were in accordance with the charter-party. After some delay the plaintiffs on the 29th June accepted bills of lading for the 2,100 tons at £1-10 and paid under protest the difference between that rate and their contract rate (16*s*. 6*d*.) and certain other sums for which the defendants as agents of the owners claimed a lien. The plaintiffs now sued to recover from the defendants the amount so paid under protest. The defendants contended that as agents for owners they were justified in refusing to give bills of lading until the sums due and for which they claimed a lien were paid.

Held, that the defendants had no lien for the sums paid and that the plaintiffs were entitled to recover the amount claimed.

Per CANDY, J.—The plaintiffs were entitled upon demand to have the said 2,100 tons redelivered to them by the captain. On 29th June the plaintiffs were entitled to clean bills of lading at 30*s*. and the sum paid by them under protest in order to obtain such bills of lading was recoverable by them. Under the circumstances defendants had no lien for freight and demurrage.

Per STARLING, J.—The captain was justified in refusing to redeliver the said 2,100 tons. The plaintiffs were entitled to clean bills of lading at 30*s*, and there was no lien for freight and demurrage in respect of which the plaintiffs had paid under protest the sum claimed by defendants.

SUIT by the plaintiffs as shippers of cargo to recover from the defendants, who were charterers of the S.S. "Paddington" and also agents of the owners, the sum of Rs. 7,973-10-5, the equivalent of £523-5-5 alleged to be freight overpaid under protest to the defendants.

The firm of Karamsi Dharsi & Co. carried on the business of freight jobbers in Bombay, and on the 3rd March, 1898, they contracted to provide the plaintiffs' firm with freight for 3,000 tons of cargo (June shipment) from Bombay to Liverpool or other specified ports at 16*s*. 6*d*. per ton in a steamer to be afterwards named. On that day they handed to the plaintiffs three shipping orders for 1,000 tons each, in the usual form, addressed to the commanding officer of the ship (name of ship to be afterwards inserted). In these orders the higher and lower rate clause in the following form, "Bill of lading if required at [553] lower or higher rate, difference payable here as customary." was deleted according to the usual practice of the plaintiffs' firm. On the 30th April, 1898, the plaintiffs declared the port of Liverpool as the port of discharge for the 3,000 tons of cargo.

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On the 11th May the defendants, who traded under the name of Mackintosh & Co., chartered the steam-ship "Paddington" of which they were also the owners' agents in Bombay. The following are the portions of the charter-party material to this report:—

"The said steamer . . . shall, after discharge of her inward cargo . . . . load at Bombay from charterers or their agents as customary, but always afloat, a full and complete cargo . . . and being so loaded shall therewith proceed . . . to Liverpool, &c., as ordered on signing bills of lading or so near thereto as she may safely get and there deliver the same always afloat *on being paid freight at the rate of* £1·10·0, *one pound ten shillings per ton.*

"The captain to sign clean eastern trade bills of lading at any rate of freight required by the charterers or their agents without prejudice to the charter-party, but at not less than the average chartered rate, unless the difference is paid in cash before sailing, at the current rate of exchange without discount.

"Ten days on demurrage over and above said lying days to be allowed the charterers at four pence per net register ton per day, to be paid by them to the master, day by day in cash, at the expiration of which time steamer to sail full or not full, charterers paying dead freight at the above rate.

"On arrival at port of destination the cargo to be discharged without delay, and according to the custom of the port, but not less than 24 hours to be allowed from time of reporting at the customs house before unloading shall commence, and the delivery to be made on payment of freight and lodgment of bills of lading in accordance with the endorsements thereon, or against the consignee's sub-orders for any portion of such bills of lading duly lodged.

"The captain to have lien on the cargo for all freight, dead freight and demurrage, and for any other lawful claim against the freighter.

"Charterers or their agents to have the option of underletting the vessel in whole or in part.

"Charterers' or their agents' liability to cease on completion of shipment, provided the cargo is worth the freight, dead freight and demurrage, if any."

The defendants having thus chartered the "Paddington," afterwards (on 12th May) agreed that Karamsi Dharsi & Co. should take an equal interest in the charter-party with themselves. Karamsi Dharsi & Co. thus became sub-charterers of the ship under the above charter party. On the 13th June [554] they declared the S.S. "Padding on" to the plaintiffs for 2,747 tons of cargo under their contract of the 3rd March, 1898. The name of the ship was thereupon entered in the shipping orders above mentioned for that amount of cargo. For the remaining 253 tons (of the 3,000 tons contracted for by the above contract) another ship was declared.

Karamsi Dharsi & Co., thereupon, as part charterers of the S. S. "Paddington," were liable under the charter-party to pay to the owners freight at the rate of 30*s.* a ton while they had contracted to give the plaintiffs (Ralli Brothers) 2,747 tons at 16*s.* 6*d.* per ton and (the difference of rate clause being struck out as above stated) to give them clean bills of lading at this rate for their goods. The charter-party authorized the captain to sign clean bills of lading at any rate required by the charterers, provided the difference (if any) between such rate and the chartered rate (*i.e.*, 30*s*) were paid in cash before sailing.

On the 13th June, 1898, the plaintiffs informed Karamsi Dharsi & Co. that their cargo would be wheat and was ready for shipping, and on

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the following day (the 14th) the shipping commenced. It was completed on the 23rd June.

Evidence was given at the hearing that the practice in the port of Bombay was that when the cargo was brought to the Dock for shipping, it and the various documents relating to it, including the shipping orders, were taken charge of by the export cargo receiver, one of the officers employed by the Port Trustees. When the ship was ready for loading, the receiver showed the shipping order and other documents to the chief officer of the ship, who, if the documents were in order, received the cargo on board. The documents, including the shipping orders, were generally left open on the table of the receiver in order that parties concerned might refer to them. When all the cargo was shipped, the shipping orders were handed over to the captain.

The Court was of opinion that this practice was followed in the case of S. S. "Paddington," and that the attention of the captain or of the agents of the ship (the defendants) was not specially directed by the plaintiffs to the terms of the shipping orders, nor could it be said with certainty that the captain of the "Paddington" [555] was or had become aware of the terms of the shipping orders at the time the plaintiffs' goods were actually taken on board.

On the 21st June, 1898, the plaintiffs' wheat to the amount of 2,100 tons had been put on board; mate's receipts were given to the plaintiffs, and bills of lading were prepared by them at the rate of 16*s.* 6*d.* as mentioned in the shipping orders, and were presented to the captain for signature. He, however, refused to sign them unless the difference between 16*s.* 6*d.* and the chartered rate (£1-10-0) were paid to him as provided in the charter-party. The plaintiffs refused to pay the difference, having contracted with Karamsi Dharsi & Co. for clean bills of lading at 16*s.* 6*d.* per ton.

On the same day (21st June) the defendants gave notice to Karamsi Dharsi & Co., that the lay days according to the charter-party would expire on the next day (the 22nd), and that the steamer would be in demurrage, which would be claimed against them, and on the 22nd they gave the following notice:—

"22*nd June* 1898.

"Messrs. KARAMSI DHARSI & CO.,
"Bombay.

"DEAR SIRS,
"S. S. 'Paddington.'

"We are informed that there is a quantity of cargo for shipment by this steamer in the shed and that the shipper has refused to allow the loading of same to be proceeded with. The steamer will be on demurrage and we hold both you and the cargo responsible for freight, dead freight and demurrage.

"Yours faithfully,
"(Sd.) JAMES MACKINTOSH & CO."

On the 22nd June, 1898, the plaintiffs wrote the following letter to Karamsi Dharsi & Co.:—

"22*nd June* 1898.

"Messrs. KARAMSI DHARSI & CO.,
"Bombay.

"DEAR SIRS,—We beg to inform you that bills of lading of our goods shipped by the 'Paddington' have been returned to us with a request

from the agents that we should pay the difference between bills of lading rate 16*s.* 6*d.* and 30*s.* alleged to be the rate at which the steamer was chartered, otherwise the agents refuse to sign the bills of lading.

[556] "We shall, therefore, thank you to pay the difference to the agents, Messrs. James Mackintosh & Co., or to make any arrangement that may be necessary to get our bills of lading signed as per our engagements with you, as our cargo has been already shipped in accordance with your declaration. Kindly declare us another steamer for the balance unshipped of our cargo, and please note that we have stopped shipping by the 'Paddington' until the matter is settled.

"Yours faithfully,
"*per pro.* RALLI BROTHERS,
"(Sd.) C. G. GIRO."

Karamsi Dharsi & Co. were in pecuniary difficulties at this time, which led to their filing their petition in the Insolvency Court on the 27th June. They did not reply to the above letter, a copy of which was sent by the plaintiffs to the defendants with the following letter marked urgent :—

"*Bombay*, 22*nd June* 1898.

"Messrs. JAMES MACKINTOSH & Co.,
"Bombay.

"DEAR SIRS,—We beg to inform you that our three sets of bills of lading for 16,760 bags of wheat shipped per steamer 'Paddington' have been presented for captain's signature which you have refused. The bills of lading are filled up at 16*s.* 6*d.* per ton, the original rate at which we engaged 2,747 tons from Messrs. Karamsi Dharsi & Co.

"We shall thank you to sign our bills of lading, and we enclose herewith copy of the letter we have written to Messrs. Karamsi Dharsi & Co.

"Yours faithfully,
"*per pro.* RALLI BROTHERS,
"(Sd.) C. G. GIRO."

On the same day the plaintiffs wrote to the defendants requesting them to have the cargo discharged if no bills of lading could be signed.

"*Bombay*, 22*nd June* 1898.

"Messrs. JAMES MACKINTOSH & Co.,
"Bombay.

"DEAR SIRS,—Referring to our letter of date, if you are not prepared to sign bills of lading at the rate agreed upon with Messrs. Karamsi Dharsi & Co., kindly have the cargo discharged and we shall make the other arrangements as regards our engagements with Messrs. Karamsi Dharsi & Co.

"Yours faithfully,
"*per pro.* RALLI BROTHERS,
"(Sd.) C. G. GIRO."

[557] The plaintiffs thereupon refused to allow any more of their cargo to be put on board the "Paddington."

On the same day the defendants wrote to Karamsi Dharsi & Co. as follows :—

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"Messrs. KARAMSI DHARSI & Co.,
"Bombay.

"DEAR SIRS,
"S. S. 'Paddington.'

"Your cargo is not yet completed. The ship is on demurrage and we hold you responsible for same.

"Yours faithfully,
"(Sd.) JAMES MACKINTOSH & Co.

"*Bombay 22nd June*, 1898."

To the above two letters of the plaintiffs, dated the 22nd June, the defendants replied on the 23rd June as follows :—

"Messrs. RALLI BROTHERS,
"Bombay.

"DEAR SIRS,
"S. S. 'Paddington.'

"Your letter of yesterday evening and this morning to hand.

"As it is the captain who has refused to sign the bills of lading and not ourselves, please address your communications to him.

"Yours faithfully,
"(Sd.) JAMES MACKINTOSH & Co."

The plaintiffs then sent the following letter to the captain :—

"*Bombay 23rd June*, 1898.

"Captain JENKINS,
"S S. 'Paddington.'

"DEAR SIR,—Against a S/order which we had from Messrs. Karamsi Dharsi & Co., for 2788 tons at 16*s*. 6*d*. by your steamer we have shipped 2,100 tons. We sent the bills of lading yesterday for the quantity shipped to the agents of your steamer, Messrs. James Mackintosh & Co., for your signature, who informed us that you refused to sign them except at 30*s*., which is alleged to be the rate of the charter of the 'Paddington,' unless we pay the difference between 16*s*. 6*d*. and 30*s*. in cash here.

"As we have no agreement to pay anything more than 16*s*. 6*d*. we shall thank you either to sign the bills of lading at that rate or to discharge the cargo, and we shall make other arrangements with Messrs. Karamsi Dharsi & Co.

[558] "We have informed Messrs. Karamsi Dharsi & Co., that we decline to ship by your steamer any further quantity against his above order with us, unless you agree to take it and sign bills of lading at our engagement rate with him of 16*s*. 6*d*.

"We gave all these particulars to your agents, Messrs. James Mackintosh & Co., yesterday, but in reply they have referred us to you.

"Yours faithfully,
"*per pro.* RALLI BROTHERS,
"(Sd.) C. G. GIRO."

Messrs. Smetham, Bland and Noble, for the captain, replied as follows :—

"Messrs. RALLI BROTHERS,
"Bombay.

"DEAR SIRS,—Our client, Captain Jenkins of the S. S. 'Paddington,' has placed in our hands your letter to him of date with instructions to reply thereto.

"According to our client's charter-party the captain is to sign clean eastern trade bills of lading at any rate of freight required by the charterers or their agents without prejudice to the charter-party, but at not less than the average chartered rate (in this case £1-10-0 per ton) unless the difference is paid in cash before sailing.

"Our client will accordingly sign the bills of lading at any rate you wish if you pay him the difference between such rate and £1-10 0 in cash.

"If, however, you refuse to pay such difference, our client must decline to sign the bills.

"As the cargo has been shipped on board under the charter, our client cannot allow the same to be unshipped."

The plaintiffs through their solicitors, Messrs. Craigie, Lynch and Owen, sent the following letter to the captain's solicitor on the 24th June:—

"Your letter of the 23rd instant to Messrs. Ralli Brothers has been placed in our hands.

"Our clients' goods were not shipped under the charter as you allege in the last paragraph of your letter. They were shipped under three shipping orders granted to our clients by Messrs. Karamsi Dharsi & Co.

"These shipping orders were presented to the captain or the officer in charge at the time when the goods were sent on board, and it was under the authority of these documents or of one or more of them that the goods were received on board. The shipping orders expressly state that the rate of freight is 16*s.* 6*d.*, and, moreover, a clause which provides as follows:—'Bills of lading if required at lower or higher rate difference payable here as customary' has been struck out [559] in each of them in accordance with the practice of Messrs. Ralli Brothers, who for some time past have always refused to engage freight subject to this clause.

"Your client, therefore, had full notice of the terms on which our clients shipped the goods, and by receiving the goods on board he led our clients to believe that bills of lading for the goods at the rate of 16*s.* 6*d.*, would be signed when the goods had been shipped, but when the bills of lading were presented for signature the agents refused to sign except at 30*s.*, stating that that was the rate in the charter-party.

"Our clients thereupon required redelivery of their goods, which you have now refused to give.

"Our clients have nothing to do with the charter-party, which they have never seen, and as your client has refused to give them re-delivery, and insists on carrying the goods, he must carry them at the rate mentioned in the shipping orders, under the authority of which the goods were both sent and received on board, and we, therefore, call upon him to sign bills of lading at the rate mentioned in the shipping orders, *viz.*, 16*s.* 6*d.*

"Your client has no claim against ours for the difference in the rate mentioned in the shipping orders and that fixed by the charter-party. His remedy for such difference is clearly against the charterer to whom our clients refer him.

"We shall be obliged if you could send us the charter-party for inspection. We will undertake to return it in the course of the day."

The captain's solicitors (Messrs. Smetham, Bland and Noble) wrote as follows on the next day (25th June):—

"We did not receive your letter of the 24th instant in time to communicate with our client and reply thereto yesterday.

"Captain Jenkins states that the goods in question were sent on board under shipping orders granted by the charterers or their agents, and that they were accordingly shipped under the terms of the charter.

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"If the charterers or their agents have made any contract with your clients which they have failed to carry out, your clients have their remedy against such parties and our client must refer your clients to them.

"We regret we have no copy of the charter-party with us, but doubtless your clients can get a copy thereof from the charterers."

On the same day the plaintiffs' solicitors rep lied.

" We are in receipt of your letter of to-day.

" Your client altogether evades the fact that the rate of freight which our clients had engaged to pay was mentioned in the shipping orders, and therefore, your client had full notice of it, but he raised no objection to that rate, and received the goods on board, which amounted to an engagement on his part to carry them at that rate, and further, even supposing, for the sake of argument, **[560]** that his conduct did not amount to an engagement to carry the goods at that rate, he certainly had no right to refuse to redeliver the goods when our clients demanded redelivery of them, and having insisted upon carrying the goods, he is now bound to carry them at 16*s.* 6*d.*, and we give your client notice through you that, if he should refuse to give delivery of the goods on payment of that sum, our clients will hold both him and the owners responsible for all the consequences, and in order that your client may have full knowledge of the consequences, we beg to inform you that our clients have sold these goods in Europe for delivery within a fixed time, and if by reason of your client's conduct they should not be able to fulfil their contracts with their purchasers and the purchasers should cancel those contracts, our clients will hold your client responsible for the difference between the price at which they may be able to resell the goods and the price at which they have already contracted to sell them, which is likely to be very considerable, and it would be as well for your client to consider whether it is worth his while to run the risk of incurring this liability.

" Yours truly,

"(Sd.) CRAIGIE, LYNCH & OWEN."

On the evening of the 24th June the S. S. "Paddington" left Bombay, the captain having neither given back the goods to the plaintiffs nor signed bills of lading at 16*s.* 6*d.* Before sailing he wrote the following letter to the defendants :—

" *Bombay, 24th June*, 1898.

" Messrs. JAMES MACKINTOSH & Co.

" GENTLEMEN,—I have to request you to sign the remaining bills of lading for my steamer, the 'Paddington,' after my departure, provided they are in accordance with charter-party and with the mate's receipts, and I hereby give you this authority to sign for me, and agree to acknowledge such bills of lading on presentation.

" Yours faithfully,

" DAVID JENKINS,

" Master, S. S. 'Paddington.' "

Special Instructions.

" Send all shipping documents to my owners, Messrs. E. Thos. Radcliffe & Co., Cardiff.

" Pay all bills signed by me and adjust accounts with owners, sending copy account to me.

" D. JENKINS.

" *P.S.*—Sign Ralli's bills of lading at the chartered rate of £1-10-0 per ton.

" D. J. "

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[561] And the defendants gave him the following :—

"Captain JENKINS,

"S. S. 'Paddington.'

"DEAR SIR,—As requested by you we hereby admit that the above steamer has been two days on demurrage, for which we are responsible to your owners.

"Yours faithfully,

"JAMES MACKINTOSH & Co.

"*Bombay*, 24*th June* 1898."

The following extract from a letter dated 25th June, 1898, written by the defendants in Bombay to their London Office, was put in :—

"Paddington."—"As you can well imagine, we are in an awful mess with this steamer. We had to accept as low as 18*s*. 9*d*. to complete our portion of the cargo. As regards Dharsi's share, he had declared 2,750 tons to Rallis, of which 2,100 tons were already on board when the first bill of lading was presented for captain's signature at 16*s*. 6*d*. Dharsi's difficulties being generally known at the same time we refused to allow the bill of lading to be signed under steamer's chartered rate 30*s*. Rallis always delete the 'higher or lower bill of lading rate' clause in shipping orders, so they refused to alter it, and as Dharsi could not pay us the difference we still refused to sign, with the result that Rallis stopped shipping the balance of their cargo. The steamer being already on demurrage we had to relet immediately on Karamsi Dharsi & Co.'s account at 18*s*. 3*d*. Meanwhile Rallis wrote stating their contract was for bill of lading at 16*s*. 6*d*., and, if they could not obtain this, they demanded the cargo back again. Of course they threatened to stop the steamer and so forth, but we hurried up matters and got her away the same night, so they can either fill up their bill of lading now at 30*s*. or do without them. In the meantime, having given our name as charterers we are responsible to owners for our own losses, Dharsi's and two days' demurrage, but we shall be leaving you to settle the latter question with them, as we have no doubt that under the particularly hard circumstances of the case they will very considerably reduce the figure."

The ship having sailed, Messrs. Smetham, Bland and Noble informed the plaintiffs' solicitors that they no longer represented Captain Jenkins. The plaintiffs' solicitors on the 27th June, 1898, addressed a letter to the defendants. After recapitulating the facts, the letter proceeded :—

"As the captain has left Bombay without leaving instructions with his solicitors, our clients now instruct us to address you.

"We have, therefore, to draw your attention to the facts which we have stated.

"Our clients contend that the receipt of the goods on board with full notice of the terms on which they were sent on board, added to the fact that the [562] clause relating to bills of lading at lower or higher rates had been struck out of the shipping orders, amounted to an engagement on the part of the captain, and through him of the owners, to carry the goods at the rate mentioned in the shipping orders, and that our clients are entitled to require, as they do now require, that bills of lading at the rate mentioned in the shipping orders should be signed and delivered to them.

"We accordingly herewith tender the bills of lading to you for signature, and we also send the mate's receipts for the 2,100 tons which have been shipped, which will be delivered to you in exchange for bill of lading signed by you at the rate of 16*s*. 6*d*., and we will thank you to sign

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the same accordingly and to hand them to the bearer, Nussurwanji Pallonji, our clerk.

"They further contend that, even if there was no engagement to carry the goods at the rate of the shipping orders, our clients were certainly by the conduct of the captain led to believe that they would be so carried, and that when they found that the captain refused to carry them at that rate, they were entitled to demand redelivery of their goods, and as this has been refused, and the captain has insisted on carrying the goods, he is bound to carry them at 16*s*. 6*d*.

"We have, therefore, to give the owners and likewise the captain notice, through you, that if delivery of the goods is refused at port of destination on payment or tender of freight at the rate mentioned in the shipping orders, our clients will hold both the owners and the captain responsible for all the consequences, and in order that both the owners and the captain may have full knowledge of the consequences, we now inform you that our clients have sold these goods in Europe for delivery within a fixed time, and if by reason of the conduct of the owners or the captain our clients should not be able to fulfil their contracts, with their purchasers and the purchasers should cancel their contracts, our clients will hold both the owners and the captain responsible for the difference between the price at which they may be able to resell the goods and the price at which they have already contracted to sell them, which is likely to be very considerable, and also for all other loss, damages, costs and expenses to which they may be put."

On the 28th June the defendants replied as follows:—

"DEAR SIRS,—In reply to your letter of this date we have merely to say that we have nothing to do with any arrangements your clients, Messrs. Ralli Brothers, made with Messrs, Karamsi Dharsi & Co.

"We are simply exercising the owners' lien as per their charter-party on the cargo for freight, dead freight and demurrage.

"Yours faithfully,

"(Sd.) JAMES MACKINTOSH & Co."

In consequence of the dispute as to the 2,100 tons, the plaintiffs had (as above stated) refused to ship any more cargo on board **[563]** the S.S. "Paddington" under the shipping orders which they had obtained from Karamsi Dharsi & Co. They, however, made a separate contract on 23rd June, 1898, with the defendants for 650 tons on the S. S. "Paddington" at 18*s*. 3*d*. per ton, expressly stipulating that the difference between that rate and the charter-party rate of 30*s* should be paid by the defendants and that the bill of lading should be filled up at 30*s*. They duly received a shipping order from the defendants containing these terms and under it shipped 646 tons, and were paid by the defendants in cash Rs. 5,598-9-0 as the equivalent of £379-11-10, being the difference between the freight at 18*s*. 3*d*. per ton and 30*s*. as in the shipping order.

It was of great importance to the plaintiffs to obtain bills of lading for the 2,100 tons which had been taken away in the "Paddington," and they, therefore, eventually agreed to take *under protest* bills of lading at 30*s*. and to pay a sum of £300 for freight, dead freight, and demurrage. This sum, however, included a claim in respect of another steamer, the "Lavernock," as well as the claim in respect of the "Paddington." On the 28th June they sent the following letter to the defendants:—

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"DEAR SIRS,

"S. S. 'Paddington.'

"Referring to previous communications with you, we now beg to say that we are willing to accept bills of lading signed with the rate of freight at 30*s.* per ton under protest, we reserving to ourselves the right to recover the difference between the above rate and the rate at which we engaged freight, *viz.*, 16*s.* 6*d.* per ton and without prejudice to any of our rights against anyone whomsoever.

"Yours faithfully,
"*per pro.* RALLI BROTHERS,
"(Sd.) C. G. GIRO."

On the following day the defendants sent the plaintiffs' account showing £523-5-5 due by the plaintiffs. In this account they charged the plaintiffs with £4,280-16-8 which was the total amount of Karamsi Dharsi's half share in the charter-party, and they then gave the plaintiffs credit for £3,840-18-7, which was the total amount of freight paid in respect of the shipping orders granted by or on behalf of Karamsi Dharsi & Co., which gave a balance of £439-18-1, to which was added £83-7-4 for **[564]** two days' demurrage, making up the total amount to £523-5 5. The lower Court found that this account was correct as between the defendants as charterers and Karamsi Dharsi & Co. as sub-charterers from them, but that the items claimed could not be claimed by the defendants as agents for the owners against the plaintiffs.

On receipt of the letter and account the plaintiffs wrote: —

"*Bombay*, 29*th June*, 1898.

"DEAR SIRS,—We beg to acknowledge the receipt of your letter of this date handing us copy account per S. S. 'Paddington' and showing the sum of £523-5-5 alleged to be due by us and asking us to send you our cheque for the equivalent, and in reply thereto we beg to send herewith our cheque No. C. 613198 for Rs. 7,973-10 5, being the equivalent of the abovementioned sum at 1/3¾ exchange, and we shall be obliged if you will acknowledge the receipt of it.

"In sending you this cheque you will please understand that we must not be taken as admitting that any portion of it is due by us. *We pay the same under protest* in order to get our bills of lading signed, and it is paid without prejudice to our right to recover either the whole or any part of it from anyone whomsoever.

"We are, dear Sirs,
"Yours faithfully,
"(Sd.) C. G. GIRO."

The plaintiffs now sued to recover this sum of £523-5-5. In their plaint they said:—

"(2) The plaintiffs paid the said sum of Rs. 7.973-10-5 to the defendants on the said date under protest in order to obtain from the defendants signed bills of lading in respect of 2,100 tons of cargo shipped by the plaintiffs per S. S. 'Paddington' from Bombay to Liverpool. The defendants, who were agents in Bombay of the said vessel and also charterers thereof at an average rate of freight of £1-10 0 per ton for the said voyage, refused to give the plaintiffs the said bills of lading unless the plaintiffs would pay the defendants the said sum of £523-5-5, and the plaintiffs say that such refusal on the defendants' part was wrongful and unjustifiable,

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and that the defendants are liable to repay the said sum with interest to the plaintiffs."

The defendants in their written statement contended that the sum claimed was paid to them as agents for the owners; that under the charter-party the owners had a lien on the 2,100 tons for freight and demurrage, and that as agents for the owners they were justified in refusing to give bills of lading until the sum claimed had been paid. They further contended [565] that the plaintiffs' cause of action was against Karamsi Dharsi & Co. and not against themselves.

Lang (Advocate-General) and *Macpherson*, for the plaintiffs.

Scott and *Lowndes*, for the defendants.

TYABJI, J.—(After stating the facts continued):—The real question, therefore, before me is whether the plaintiffs are now entitled to recover from the defendants the amount which they were compelled to pay to the defendants on the 29th June, 1898.

Now a consideration of the foregoing facts and circumstances and the oral and documentary evidence in the case has forced upon my mind the following conclusions, namely:—

(1) That the plaintiffs obtained from Karamsi Dharsi & Co. their shipping orders according to their usual practice, and that they never intended to accept bills of lading at any other rate than 16*s*. 6*d*.

(2) That they sent their cargo to the dock and ultimately on board the steamer, under the belief that they would obtain bills of lading at 16*s*. 6*d*., and that any arrangements that might be necessary for that purpose would be made by Karamsi Dharsi & Co., either with the defendants as charterers or as agents, or with the captain.

(3) That, up to the point when bills of lading were first refused, the plaintiffs entertained that same intention and continued under the same impression, and that they never changed their intention except under protest.

(4) That the plaintiffs were aware of the existence of some charter-party, although they had not actually seen it and had no express notice of its existence, and that, therefore, they had constructive notice of its contents.

(5) That, on the other hand, the captain received the plaintiff's goods on board, in the usual way, and under the terms of the charter-party, without having any express notice of the plaintiffs' intention.

(6) That, at the same time, the plaintiffs' shipping orders were sent to the Port Trust Officers in the usual way, and that they were open for the inspection of the captain and his officers [566] and agents if they desired to see them, and that, therefore, they had constructive notice of their contents.

(7) That under the charter-party it was open to the captain to sign bill of lading at 16*s*. 6*d*. on receiving in cash the difference between that rate and the charter-party rate of 30*s*. per ton, but that he was not bound to sign bill of lading at less than 30*s*. without being paid such difference in cash.

(8) That the plaintiffs never agreed to pay the difference themselves, and that the captain, on the other hand, had never agreed to sign bill of lading except under the terms of the charter-party (and that, therefore, the plaintiffs and the captain were never *ad idem* during the shipment of the goods).

(9) That there being no contract or privity between the plaintiffs and the captain, the latter had no right to compel the plaintiffs to ship their

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cargo under the charter-party, and that he was bound either to return the goods to the plaintiffs or to carry them at 16*s.* 6*d.*

(10) That, therefore, the action of the captain in this case was wrongful and that the owners had no lien on the plaintiffs' cargo in the manner insisted upon by the defendants, as the goods were never really shipped under the charter-party.

My conclusion that the captain was bound either to return the cargo or to carry it at 16*s.* 6*d.* seems to me to follow irresistibly from general principles.

Admittedly, and according to defendants' own contention before me, there was no contract or privity between the plaintiffs and the captain. On what ground, then, could the captain be justified in forcibly retaining the goods against the plaintiffs' wish? But this conclusion is amply borne out by the decisions of the English Courts (*vide Peek* v. *Larsen* (1); *The Stornoway* (2); *Armstrong* v. *Allan* (3); Leake on Contracts (3rd Ed.), pp. 1027 and 1024; Kay's Shipmasters and Seamen (2nd Ed.), ss. 302, 305 and 307; *Tharsis Sulphur, &c., Co.* v. *Culliford* (4).)

It was, however, contended by Mr. Lowndes that as the plaintiffs knew that there was a charter-party they must be taken to [567] have shipped the goods under the charter-party and subject to its provisions, and he cited a number of cases to show that the captain was the agent of the owners, that he had no authority to vary the terms of the charter-party, and that a shipper who ships with notice of the charter-party is bound by its terms. It seems to me, however, that all these cases are inapplicable to the circumstances of the present case, and I do not, therefore, think it necessary to discuss them. It is sufficient to say that there is no authority in support of the startling proposition that mere notice of the charter-party—without more—is sufficient to bind the intending shipper to all its terms. On examination of the authorities, it will be found that in order to bind the shipper there must either be an express or implied contract, or else circumstances and conduct on the part of the shipper which operate as an estoppel against him (see *Wagstaff* v. *Anderson* (5); Scrutton's Charter-parties (3rd Ed.), pp. 41-49, s. 42, p. 266; Carver on Carriage by Sea (2nd Ed.), ss. 42, 44; ss. 675 and 676; Abbott on Shipping (13th Ed.), pp. 262, 263, 265, 266; *Pearson* v. *Goschen* (6); *Grant* v. *Norway* (7); *Cox* v. *Bruce* (8); *Kay* v. *Field* (9); *Jones* v. *Hough* (10); *Hayn* v. *Culliford* (11); *Small* v. *Moates* (12); *The St. Cloud* (13); *Schuster* v. *McKellar* (14); Kay's Shipmasters and Seamen (2nd Ed.), ss. 304, 306, 330; Maude and Pollock's Merchant Shipping (4th Ed.), Vol. I, p. 340; 1 Parsons on Shipping, Vol. I, p. 306.

In the present case not only is there no evidence to show any acquiescence on the part of the plaintiffs, but there is direct and conclusive evidence to the contrary. The plaintiffs from the first declined to have anything to do with any shipping order under which they might be called upon to pay more than the rates which they had agreed to. The moment they discovered that they might be called upon to pay more, they at once asked the captain and the agents either to return the goods or to sign the

(1) (1871) L.R. 12 Eq. 378.
(2) (1882) 51 L J. (Adm.) 27.
(3) (1892) 8 Times L.R. 613.
(4) (1873) 22 W. R. 46.
(5) (1880) 5 C.P.D. 171 (177).
(6) (1864) 33 L.J. (C.P.) 265 (270).
(7) (1851) 20 L. J. (C.P.) 93.
(8) (1886) 18 Q.B.D. 147.
(9) (1882) 4 Asp. (N. S), 526.
(10) (1879) 5 Ex. D. 115 (120, 129).
(11) (1878) 3 C.P.D. 410 (416).
(12) (1833) 9 Bing. 574 (590).
(13) (1863) 1 Br. & Lush. 4 (15).
(14) (1857) 7 Ell. and B. 704.

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bill of lading at 16*s.* 6*d.* There is, therefore, no pretence for saying [568] that the plaintiffs ever agreed to pay more, and it is impossible to point to a single act on their part which could be held as amounting to an estoppel precluding them from contending that they never shipped under the charter-party and are not, therefore, bound by its terms. What did the captain do in consequence of anything said or done by the plaintiffs, which he would not have otherwise done? It is not even pretended that the plaintiffs' goods were put at the bottom of the hold and could not, therefore, have been easily taken out again. I am, therefore, of opinion that there was no estoppel against the plaintiffs under s. 115, Evidence Act (I of 1872).

But it was further contended for the defendants that as the money was exacted from the plaintiffs by the defendants, not in their personal capacity, but as agents for the owners, therefore the plaintiffs have no right to sue the defendants, but must enforce their claims, if any, against the owners. I am, however, of opinion that this contention is not well founded, for the following reasons:—

(1) Although the defendants professed to act as agents they were really acting for themselves. They took advantage of their dual position and enforced their own claim as charterers against Karamsi Dharsi & Co. under the guise of enforcing the owners' lien against the cargo.

(2) The defendants have never accounted to the owners for the moneys recovered from plaintiffs according to their account (Ex. 6). They have treated all the moneys recovered from plaintiffs as moneys due to themselves as charterers. The account they rendered to the owners was not on the footing of the account (Ex. 6) at all, but on the footing of moneys due from themselves as charterers to the owners. In fact, the defendants treated the moneys received from the plaintiffs as their own, precisely in the same way as the other moneys received by them as charterers. The mere fact that the sum of £437 9-11, for which the defendants accounted to the owners (Ex. 15), is partially made up of some items which are common both to Ex. 6 and Ex. 15, is not sufficient to support the defendants' contention, inasmuch as the footing on which they were arrived at was entirely and essentially different. The resemblance [569] between the items is merely superficial and disappears on closer examination.

(3) As the moneys exacted from the plaintiffs were really and primarily due to the owners from the defendants themselves under the charter-party, it follows that they must be treated as moneys paid for the use and benefit of the defendants, and are, therefore, recoverable from the defendants personally. (*Vide* I Bullen and Leake, pp. 278-281, and the cases collected there.)

But it was argued that whatever might have been the original liability of the defendants to the owners, it had ceased before the payment was made, under the operation of the cesser clause in the charter-party. This clause runs as follows:—"Charterers or their agents to have the option of under letting the vessel in whole or in part. Charterers' or their agents' liability to cease on completion of shipment, provided the cargo is worth the freight, dead freight and demurrage, if any."

Now in this case there is no evidence to show that the ship was completely loaded. On the contrary, if Mr. Hussey's evidence is to be believed, the captain expressly declared in Mr. Wilson's own presence, on the day of sailing, that the cargo was short by 80 to 100 tons. It is true that no complaint has been made by the owners about any short cargo; but as the defendants seek to escape from an admitted liability,

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I cannot look upon mere negative evidence of that kind as sufficient to exonerate them.

The defendants' contention that "completion of shipment" means the complete loading of any portion of the cargo, no matter how small, seems to me entirely untenable. I think that expression must be on the complete shipment of the entire cargo according to the charter-party. In my opinion, therefore, in order to escape from their liability by virtue of the cesser clause, it was necessary for the defendants not only to prove that the cargo was worth the freight, dead freight and demurrage, but that it had taken up the whole of the available space in the ship as provided in the charter-party.

But further, having regard to the dual position of the defendants, it does not, in my opinion, lie in the defendants' mouth to allege, under the circumstances of this case, that their liability [570] had ceased and thus to transfer it to the cargo. Defendants as charterers were bound to pay the difference or demurrage in cash before the ship sailed. They did so in some cases. They undertook to do so in other cases (*vide* Exs. A 12 and A 14), and it does not lie in their mouths to say that they as agents did not enforce the payments from themselves as charterers, and that, therefore, they are discharged from all liability as charterers.

As a matter of fact, in their account with the owners (Exs. Nos. 14 and 15), they treat themselves as liable to the owners, and it never occurred to them, till the hearing before me, to allege that their liability as charterers had in any way terminated under the cesser clause. (See Mr. Wilson's evidence in cross-examination). This contention is, therefore, purely an after-thought and is, in my opinion, without any solid foundation. In this view of the case the authorities cited by Mr. Lowndes as to the meaning and operation of the cesser clause are inapplicable to the present case (*vide Bannister* v. *Breslauer* (1) : *Francesco* v. *Massey* (2) ; *Kish* v. *Cory* (3) ; *Sanguinetti* v. *The Pacific Steam Company* (4).)

Having regard to the conclusions at which I have arrived on the other parts of the case, it seems to me unnecessary to express any opinion on various points discussed at the bar, such as the liability of the plaintiffs' cargo to pay freight, dead freight, demurrage and any other lawful claim against the freighter, in respect of other people's cargo, whether the captain could enforce the lien on the plaintiffs' cargo before their arrival at Liverpool,—whether the moneys exacted from plaintiffs under VI could be properly considered as freight, dead freight, and demurrage (see *Gardener* v. *Trechmann* (5)). These questions have for my present purpose become merely of academic interest, and I do not propose to discuss them. I mainly rest my decision on the ground that the defendants were wrong in not delivering back the cargo and that, therefore, the plaintiffs were entitled to have it carried at 16*s*. 6*d*. per ton, and that all the moneys exacted from them in excess of the amount due at that rate must be refunded to them.

[571] I will now proceed to record my findings upon the issues.

(2) In the negative. The defendants purported to exercise, but did not *bona fide* exercise, the owners' alleged lien for the benefit of the owners. They exercised it for their own benefit.

(3) The plaintiffs paid the £523-5 5 nominally to the defendants as agents for the owners, but really for the defendants' benefit. The

(1) (1867) L.R. 2 C P. 497.
(2) (1873) L R. 8 Ex. 101.
(3) (1875) L R. 10 Q B. 553.
(4) (1877) 2 Q.B.D. 238, (249).
(5) (1884) 15 Q.B.D. 154, (159).

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defendants have accounted to the owners for the sum of £437-9-11, but not specifically or really as part of the £523-5-5 recovered from the plaintiffs. (His Lordship stated his findings on the other issues and continued :—)

And I pass a decree for the plaintiffs for the sum of Rs. 7,973-10-5, being the equivalent of £523-5-5, with interest thereon at the rate of 9 per cent. per annum from 29th June, 1898, till this day, less the sum of Rs. 37-2-6, being the equivalent of £2-8-2 and interest thereon brought into Court, and less the further sum of Rs. 508-7-1, being the equivalent of £33-7-4 refunded to the plaintiffs on 10th September, 1898, (and interest on the two last mentioned sums from the dates of their respective payments) and costs. Further interest on judgment at 6 per cent. per annum till payment.

This decree is without prejudice to the right of the plaintiffs (if any) to recover the difference between the amount of the freight on 2,100-5,555 tons at the rate of 16*s.* 6*d.* per ton and 30*s.* per ton by virtue of the plaintiffs' protest.

Against this decree the defendants appealed.

Lowndes (*Scott* with him), for the appellants (defendants).—The money which the plaintiffs now seek to recover was paid to the defendants as agents of the owners by reason of the lien which the owners had on the plaintiffs' 2,100 tons of cargo for the unpaid balance of freight due to the owners under the charter-party at 30*s.* per ton and for demurrage. The plaintiffs have now brought this suit against the defendants in their personal capacity to recover this money. The main question is, was there a lien on the 2,100 tons? The plaintiffs contend there was not, alleging that their goods were not shipped under the **[572]** charter-party which gave the lien, but under the shipping orders obtained by them from Karamsi Dharsi & Co. We say that the plaintiffs knew there was a charter-party and must, therefore, be taken to have known that the goods could only be taken on board on the terms and conditions contained in it —*Peek* v. *Larsen* (1); Abbott on Shipping (13th Ed.), pp. 265-6; *The Stornoway* (2); *Kay* v. *Field* (3); *Jones* v. *Hough* (4); *Hayn* v. *Culliford* (5); *Small* v. *Moates* (6); Kay's Law of Shipmasters and Seamen, ss. 302, 304, 305 and 307: Maude and Pollock, Vol. I, p. 340; Scrutton on Charter-party, pp. 41-42; Carver's Carriage by Sea, pp. 97, 689; *Shand* v. *Sanderson* (7); *Armstrong* v. *Allan* (8); *Fry* v. *Chartered Mercantile Bank of India, &c.* (9); *Pearson* v. *Goschen* (10); *The St. Cloud* (11).

From the fact that shipping orders at the rate of 16*s.* 6*d*, per ton had been given to the plaintiffs, it does not follow that they tendered their goods for shipment at that rate. See Abbott on Shipping, pp. 262 to 264; Carver's Carriage by Sea, ss. 41, 44; Scrutton on Charter-party, p. 49; *Grant* v. *Norway* (12); *Cox* v. *Bruce* (13); *Pearson* v. *Goschen* (10).

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(1) (1871) L.R. 12 Eq. 378.
(2) (1882) 51 L.J. (Adm.) 27.
(3) (1882) 4 Asp. (N.S.) 526.
(4) (1879) 5 Ex. D. 115 (129).
(5) (1878) 3 C.P.D. 410.
(6) (1833) 9 Bing. 574.
(7) (1859) 28 L.J. (Ex.) 278 = 4 H. and N. 381.
(8) (1892) 8 Times L.R. 613.
(9) (1866) L.R. 1 C.P. 689.
(10) (1864) 33 L.J. (C.P.) 265 = 17 C.B. (N.S.) 352.
(11) (1863) 8 Law T. Rep. 54.
(12) (1851) 20 L.J. (C.P.) 93.
(13) (1886) 18 Q.B.D. 147.

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The right to lien was never waived—Scrutton on Charter-party, s. 153, p. 277; Abbott on Shipping, p. 266. The defendants exercised the owners' lien and paid the money over to the owners. The charterers and the cargo were both liable to the owners, and the defendants as owners' agents realized the sum due from the cargo. The money was really due by Karamsi Dharsi & Co. to the defendants under the sub-charter and to the plaintiffs under the contract made by them for shipping. Whoever has to pay in this suit will recover it from Karamsi Dharsi & Co.

The lower Court held that the defendants as charterers were primarily liable. That is not so. See cesser clause in charter-party. As to the meaning of cargo, see *Bannister* v. *Breslauer* (1); **[573]** *Gray* v. *Carr* (2); *French* v. *Gerber* (3); *Sanguinetti* v. *Pacific Steam Co.* (4).

The lower Court had no power to reserve a right to the plaintiffs to claim difference between 16*s.* 6*d.* and 30*s.* by separate suit.

They also cited *Christie* v. *Lewis* (5); *Porteus* v. *Watney* (6).

Macpherson with *Lang* (Advocate-General), for respondents (plaintiffs). —The defendants are sued in their dual capacity as agents of owners and as charterers. The plaintiffs shipped the goods in question and the defendants claim as agents for owners to have the lien upon them which is given by the charter-party. But the plaintiffs did not ship under the charter-party. Notice of a charter-party no doubt shows that a shipper intends to be bound by the rate mentioned in it, but this inference may be rebutted—Abbott on Shipping, pp. 260—266; *Shand* v. *Sanderson* (7); *Peek* v. *Larsen* (8).

We were no doubt put upon enquiry, and the result of the enquiry was that the plaintiffs struck out the clause in the charter-party—Kay on Shipmasters and Seamen, s. 306, p. 209; *Gardner* v. *Trechmann* (9); Carver on Carriers by Sea, s. 676, p. 680; *Watkins* v. *Rymill* (10).

JUDGMENT.

CANDY, J.—It is unnecessary to recapitulate the introductory facts, which are lucidly set out in the judgment of the Division Court.

On the preliminary point (that on the allegations in the 3rd paragraph of the plaint being given up the claim was at once demurrable), I have no doubt. The disputes between the parties were clearly set out in the issues. Mr. Justice Tyabji ruled that the case should proceed without prejudice to the right of defendants to apply for adjournment for further evidence if necessary. No evidence has been shut out, and it is quite impossible for the Court now to refuse to decide the case on the merits.

[574] The 2nd paragraph of the plaint recites that the defendants refused to give the plaintiffs the bill of lading unless the sum of £523-5-5 was paid, and the plaintiffs say that such refusal was wrongful and not justifiable. That is the main question. Was the refusal, under the circumstances stated, wrongful? The answer to that question depends upon the finding on the 14th issue, *viz.*, "Whether the plaintiffs upon learning that bills of lading would not be signed for the 2,100 tons at 16*s.* 6*d.* were not entitled upon demand to have the said 2,100 tons re-delivered to them by the captain?"

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(1) (1867) L.R. 2 C. P. 497.
(2) (1871) L.R. 6 Q. B. 522.
(3) (1876) 1 C. P. D. 737.
(4) (1877) 2 Q B.D. 238.
(5) (1821) 2 Br. and B. 410 (441).
(6) (1878) 3 Q.B.D. 534 (538).
(7) (1859) 4 H. and N. 381.
(8) (1871) L.R. 12 Eq. 378.
(9) (1884) 15 Q.B.D. 154.
(10) (1883) 10 Q.B.D. 178.

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In arriving at a finding on this issue I have consulted the various authorities and cases quoted at the bar; but I do not think it necessary to burden this judgment with a resumè of them. It seems to me that the task imposed upon the Court is to find some legal principle upon which the decision must rest. The facts of this case do not exactly tally with the facts of any reported case, and it would be only waste of time to distinguish this or that case from the present one.

Now what were the relations between the parties when plaintiffs sent their wheat on board? First there was the contract of the charter-party between defendants and the owners of the S.S. "Paddington." Then there was a contract between plaintiffs and Karamsi Dharsi & Co. that the la ter would have the plaintiffs' wheat conveyed to Liverpool in the S.S. "Paddington" at 16*s.* 6*d.* a ton, and plaintiffs had deleted in the memoranda of the agreement (the shipping orders) the "lower or higher rate" clause. Karamsi Dharsi & Co. had agreed to this deletion. No doubt plaintiffs knew, when they sent the wheat on board, that the ship was a chartered ship, and they must be taken to have known the charter rate (30*s.*), and the other clauses in the charter-party, which was in the usual form. Therefore they must be taken to have known that there was the customary clause that the captain was to sign clean bill of lading at any rate of freight required by the charterers or their agents, without prejudice to the charter, but at not less than the average chartered rate, unless the difference was paid in cash before sailing. Therefore they are entitled to take advantage of that clause. As a fact, they had not seen the charter-party when [575] they sent their wheat on board, and they and their solicitors contended that the goods were not shipped under the charter-party, but that the captain by receiving the goods under the shipping orders had entered into an engagement to carry the goods at the rate inserted in the shipping orders—contentions which are not sound.

But when it is found that the plaintiffs are legally affected with notice of the charter-party, then it would be inequitable to disallow them the benefit of any clause in the charter-party. Their wheat having been sent on board under shipping orders signed by the sub-charterers (which fact was known to the captain), they were entitled to clean bills of lading at 16*s.* 6*d.*, the difference between 16*s.* 6*d.* and 30*s.* being paid in cash before sailing Of course, if Karamsi Dharsi & Co. had not been in pecuniary difficulties, they would have paid or caused to be paid this difference, and the clean bills of lading with 16*s.* 6*d.* inserted would have been given to plaintiffs as they demanded. But Karamsi Dharsi & Co could not pay. What then happened? Defendants, who were in the dual position of charterers, and so liable to the owners under the contract contained in the charter-party, and also agents for the owners, refused to let the captain sign the bills of lading under the chartered rate (see their letter *supra*). Then at once plaintiffs demanded their wheat back again. The cap ain refused, and left Bombay with the wheat on board, no bills of lading for it having been then signed.

Were the plaintiffs entitled to thus demand their cargo back? Mr. Lowndes points to the extreme inconvenience which would be caused by shippers, after shipping goods for eight days, demanding the goods back because the charterer would not fulfil his contract with them and procure bills of lading at his contract rate. True, but it would be also inconvenient for shippers, if they after receiving notice from the sub-charterer that the ship was ready to receive the goods which he (the sub-charterer) had contracted with the shippers should be conveyed at 16*s.* 6*d.* must first

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go to the sub-charterer and satisfy themselves what is the chartered rate, and whether the sub-charterer can give security for the due payment before the ship sails of the difference between the contract and the chartered rate. It is not a question of balance of inconvenience: **[576]** the question is whether the shipper, being taken to have known of all the clauses in the charter-party, must be assumed by sending his goods on board to have contracted with the owners to be bound by all the terms of the charter-party as to chartered rate, owners' lien, &c.,—if the sub-charterer who contracted with him fails to perform his contract, *viz.*, to procure for him clean bills of lading at a lower rate than the chartered rate, by paying the difference according to one of the clauses in the charter-party. I entirely agree with Mr. Lowndes that plaintiffs could only require the charterers (including the sub-charterer) to obtain for them bills of lading *according to the charter*. But the charter-party provided for plaintiffs obtaining just what they wanted. It cannot be pretended that until a bill of lading is signed there is any *express* contract between the shippers and the ship. Is there an implied one,—implied from the fact that the shippers sent the goods on board in accordance with the order given by the charterers? Surely their conduct raises no implication: they acted strictly in accordance with the mercantile usage of the port. They sent the goods with the shipping orders to the Port Trust officials, and from that time everything was done according to the rules. Directly they heard that there would be a difficulty about procuring bills of lading at a lower rate than the chartered rate, which was permissible according to a special clause in the charter-party, they stopped shipping and demanded their goods back. And what did the charterer do? He said in effect: "True, as charterer I am responsible to the owners of the ship; true, my partner in the charter will not pay the difference in rates and so procure the bills of lading as demanded: nor will I: nor will I let the captain sign for less than the charter rate, but I will hurry up matters and get the steamer off with the shippers' goods on board, and then they must take bills of lading with 30*s.* rate inserted or do without them." I confess, on a view of the equities of the case, there can be little or no doubt. The crux of the whole matter seems to me to lie in this, that notice of the charter-party, which is the foundation of defendants' argument, makes no difference in the present case, because the charter-party empowers the captain to sign bills of lading at any rate of freight. That was the argument of Mr. Blackburn **[577]** (as he then was) when as counsel in *Shand* v. *Sanderson* (1) he succeeded in his demurrer. Of course, plaintiffs must be taken to have shipped under the charter-party: they must, therefore, be taken to have shipped under that clause. If they had notice, actually or impliedly, that there was no such clause in the charter-party, the case might be different. It was the charterers who prevented that clause being acted on. But that clause is for the benefit of the charterers, so that they may carry out their contract with the shippers of goods. Surely, if they prevent its being acted on, the shippers may demand back their goods. Otherwise charterers may induce shippers to send their goods on board a ship in the belief that the clause will be acted on, and then may refuse to let it be acted on, and thus compel the shippers to accept bills of lading at a higher rate than what they contracted for. Mr. Lowndes in his able argument naturally relied on the judgment of the Master of Rolls, Lord Romilly, in *Peek* v. *Larsen* (2); and

(1) (1859) 4 H. and N. 381.

(2) (1871) L. R. 12 Eq. 378.

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no doubt there are expressions in that judgment which taken by themselves may be used as a foundation for the argument that in the present case the plaintiffs were not entitled to demand their cargo back. In *Peek* v. *Larsen* it was held that the shippers were so entitled. Lord Romilly said: "The case depends upon this:—Had the plaintiffs, the shippers, notice of this charter-party, or was it their bounden duty to inquire whether there was a charter-party or not? I fully admit that every person is bound by the contents of a charter-party of which he has notice." And so it is contended that, as the shippers in the present case had notice of the charter-party, therefore they were bound to accept bills of lading with the chartered rate, and not their contract rate, inserted; and on the charterers refusing to allow the captain to give bills of lading at less than the chartered rate, the shippers could not demand back their cargo. But it is more than doubtful whether Lord Romilly would have assented to such a contention. On the contrary, he said: "Why is the shipper not to be allowed to have back his goods? *He has entered into no contract.* This would be to bind him by a contract which not only he has never entered into, but which he has refused to enter into." Is not that principle applicable to the **[578]** present case? Plaintiffs were not guilty of laches; they acted strictly in accordance with the custom of the port for sending goods on board. The agents of the owners and the charterers knew that plaintiffs always delete the higher or lower rate clause in shipping orders. They knew that plaintiffs had not contracted for anything but 16*s.* 6*d.* No fresh contract was entered into. On what principle, then, were plaintiffs not entitled to have their goods back?

It is interesting to note that in *Peek* v. *Larsen*, plaintiff's counsel contended that the charter-party authorized the captain to sell bills of lading at a lower rate of freight than that reserved to the owners of the vessel, while defendants' counsel contended that the captain had no authority to sign bills of lading except on the terms of the charter-party, meaning apparently except with the chartered rate inserted. Lord Romilly did not allude to this point: it is untouched by the judgment, which rests on the principle that the shippers had entered into no contract (express or implied) which could compel them to receive bills of lading at a rate higher than their contract rate; and as they were not guilty of any laches they could ask for their goods back. As Cockburn, C. J., said in *Jones* v. *Hough*(1), the most material circumstance in *Peek* v. *Larsen* was that the shipper of the goods finding he could not get a bill of lading without reference to the terms of the charter, said: 'This is not the contract upon which I desired to enter, or upon which I shipped my goods.'

Here the most material circumstance is that the shippers, being taken to have known of the existence of the charter-party, but finding that they could not get bills of lading according to a special provision of that charter-party, and finding that the captain and charterers refused to give them bills of lading without the insertion of a rate different from their contract rate, said: "That is not the contract upon which we desired to enter or upon which we shipped our goods." Therefore, they were entitled to a return of their goods.

It must be remembered that at this stage of the case which we are considering, no bill of lading had been given. If plaintiffs had succeeded in getting from the captain bills of lading at **[579]** 16*s.* 6*d.* without the

(1) (1879), 5 Exch. D. 115 (120).

difference being paid, then since the shippers knew that neither charterer nor master had authority to bind the shipowner by granting bills of lading, unless the master at the same time received the difference between the chartered and the bill of lading freight, they would not have much reason to complain if they were held to be estopped from denying that they had shipped their cargo subject to all the terms of the charter-party. As to such a case, reference may be made to the remarks on p. 265 of Abbott on Charter-party (13th Ed.). The learned authors proceed to discuss the case of *Peek* v. *Larsen*, in which it was suggested that a shipper might, by allowing his goods to be stowed at the bottom of the hold and by not applying for his bill of lading in due course, be guilty of laches, and so be prevented from relying on the absence of notice. "But even in such a case it is difficult to see what the shipowner could do except either to give up the goods, or to carry them on the terms on which the shipper sent them, or at the current freight, *for there is no other contract on which the latter can be charged.* It is submitted, that even if a shipper before sending his goods for shipment had notice of the existence of a charter-party he would be entitled to make the same demand." The learned authors then make remarks which seem to show that there are, in their opinion, *obiter dicta* in Lord Romilly's judgment conflicting with the proposition set forth above. With great respect, I venture to think that Lord Romilly's decision rests on the principle which the learned authors maintain, *viz.*, contract. So here the question is, contract or no contract? If no contract, were plaintiffs guilty of laches? If not, why could not they ask for their goods back? Plaintiffs did not request the captain to exceed his authority. If, because the charterers would not and the sub-charterers could not arrange for him to give bills of lading under a clause in the charter-party which permitted him to give what the plaintiffs asked for, he was unable to comply with their request, then he had no course open but to return the goods. For a very similar case, a "clean receipt" being asked for, reference may be made to *Armstrong* v. *Allan* (1).

I find, then, that the captain wrongfully refused to return the goods upon plaintiff's demand. He was, therefore, a converter **[580]** of those goods. But the matter does not rest here. Plaintiffs being anxious to obtain clean bills of lading—the goods being on their way to Liverpool without any bills of lading at all—had an interview with defendants on 28th June; and defendants then said: "We will not give you clean bills of lading, even at the chartered rate, unless you give us a sum of money, say £ 520." Defendants were then affecting to exercise the owners' lien as per their charter-party for freight, dead freight and demurrage. Leaving aside for a moment the consideration of what the defendants affected to do, and what they really did do, and treating the demand as simply a demand for a sum of money, the question is, were the plaintiffs forced to give this sum of money in their desire to get possession of what they were entitled to possession of? In my opinion this question must be answered in the affirmative. The captain having wrongfully refused to give back the goods, was bound to convey them at the rate at which the sub-charterers had contracted, certainly if that was a reasonable rate; and it is not pretended that rate 16*s*. 6*d*. was not a reasonable rate. Therefore, apart from any remedy which the plaintiffs might have had for wrongful conversion, the plaintiffs were entitled

(1) (1892) 8 Times L. R. 613.

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to ask for bills of lading at 16*s.* 6*d.* To get that which was their due, or rather to get the bills of lading at 30*s.*, which was even something less than their due, plaintiffs were compelled by defendants to pay a sum of money. Therefore, they can recover back that sum of money.

But the case does not even rest here. When the captain was asked by the plaintiffs to give clean bills of lading at 16*s.* 6*d.* he replied: "No I cannot under the charter-party do that, unless the difference is paid; but I can give you clean bills of lading at 30*s.*" That was his proposal made up to the time of his sailing, but there was no acceptance on plaintiffs' part. So there was no agreement. That the captain could do what he proposed, is clear from the charter-party. His authority expressly given by the charter-party to sign clean bills of lading at less than the chartered rate, if the difference should be paid, would imply a distinct authority to give clean bills of lading at the chartered rate. This is what he offered, but the plaintiffs would not accept, and demanded their goods back. But the captain sailed **[581]** away with their goods, and one of the last things he did was to leave authority with defendants to sign bills of lading for him, and he particularly authorized them to sign plaintiffs' at 30*s.* (see A 13, p. 164). It is obvious from his conduct that he meant that defendants should sign clean bills of lading at 30*s.* Defendants clearly so understood. On the very next day (25th June) they wrote to their London agents that they had hurried the steamer off: so Rallis can either fill up their bills of lading now at 30s. *or do without them.* That was the alternative. Clean bills of lading at 30s. or no bill of lading at all. But when the interview took place on 28th, defendants went further. First they proposed that Rallis should do without any bills of lading at all. That Rallis declined and they said: "Though we are not bound to accept bills of lading at 30s. we will do so under protest." Then defendants turned round and in effect said: "It is true that the captain's express authority to us is to give you clean bills of lading at 30*s.*; that is, what he would have done and in so doing he would not have exceeded his authority. But we must protect owners' lien, &c., so we will not give you clean bills of lading even at 30*s.*, unless you give us enough moneys to reimburse us what Karamsi Dharsi & Co. owe us, and what in consequence of their default we have to make good to the owners." On these facts it can be fairly argued that Rallis were on 28th June entitled to clean bills of lading at 30*s.*, and when defendants compelled them to pay £520 odd to get what they were entitled to, defendants must refund the same. Of course I take it that the clear intention of the charter-party was that the captain should sign bills of lading as agent for the owners and not as agent for the charterer. It is obvious that in such a case he does so. See Carver's Carriage by Sea (2nd Ed)., pp. 165, 166. 170.

In this view of the case it is unnecessary to dwell at length on the arguments which were addressed to us in regard to the nature of the sum of money which defendants compelled plaintiffs to pay on the 28th June.

Defendants affected to be exercising the owner's lien on the cargo for freight, &c., as per their charter-party. The clause in the charter-party is "The captain to have a lien on the cargo **[582]** for all freight, dead freight and demurrage, and for any other lawful claim against the freighter." As this prospective lien of the captain could only arise on the arrival of the goods at Liverpool, it is difficult to see how the owners' agents could exercise it on 28th June in Bombay.

However that may be, when asked to render an account showing the sum due by plaintiffs, defendants rendered the account (Ex. 6), dated 29th June 1898, showing what Karamsi Dharsi & Co., owed to defendants in regard to the loss on the charter-party as between defendants and the owners of the ship; and when asked to explain this absurdity, they gave an explanation which admittedly was no explanation at all. Even in this account, defendants did not deal fairly with Karamsi Dharsi & Co., for they made no allowance for "pockets," an allowance which they claimed and obtained from the owners. The absurdity of the account (Ex. 6) is shown by the fact that defendants claimed to recover from plaintiffs the difference in the rate of a shipment of 646 tons which defendants had let to plaintiffs at 18*s.* 3*d.* a ton, but the bill of lading of which, at defendants' special request, plaintiffs had consented to receive with the chartered rate of 30*s.* inserted, defendants paying there and then the difference between 18*s.* 3*d.* and 30*s.* That very difference, which defendants had voluntarily paid plaintiffs on one day, defendants claimed to recover back from plaintiffs on another. However, turning for a moment to the account rendered by the defendants after the suit was filed, we find that it is made up of two items (*a*) £437-9-11 and (*b*) £83-7-4—total £520-17-3. Item (*a*) is made up thus: Defendants gave shipping orders to Meghji Vallabhdas, D. Sassoon & Co., Sanday & Co., and Latham & Co., to ship wheat (amounting altogether to about 944 tons) at rates below chartered rate (20*s.* and 18*s.* 9*d.*). According to the charter-party the difference between these rates and the chartered rate was to be paid in cash before sailing. As defendants said in their letter to the captain, A 12 (p. 163), "*we* pay the difference here." Defendants, both as agents of the owners and as charterers, and the captain all failed in their duty. The money was not paid. For Sanday's and Latham's shipments **[583]** bills of lading were given after the steamer had left. The duty imposed on defendants still remained. Now defendants say, "We had a right on 28th June to exercise the owners' lien and to compel plaintiffs to pay us that difference due on the consignments of those four shippers, for which the captain at the end of the voyage would, owing to our default, have had a lien on the goods." It is more than doubtful whether there was under those circumstances any shipowners' lien even over the goods of those four shippers for this difference in freight (see *Gardner* v. *Trechmann* (1). Certainly there could be none against plaintiffs' goods. So, too, with item (*b*). It represents demurrage, which by the terms of the charter-party was to be paid *in cash by the charterers to the master day by day*. The captain asked for it. Defendants failed in their duty and did not pay it, but they gave the captain a letter (A 14) in which they admitted that they were responsible to the owners for the same. But on 28th June defendants claimed to say that, as they had failed in their duty, they could legally compel plaintiffs to pay them what they admitted was due from them to the owners. As a matter of fact, the authority of the case last quoted shows that there was no owners' lien for the demurrage under the circumstances which happened. But, apart from that, defendants could not, in the position in which they stood, exercise, as owners' agents, a lien which might prospectively come into existence solely owing to their default as charterers.

In the view which, as shown above, I take of the case it seems to me that defendants throughout have been altogether in the wrong, and that

(1) (1884) 15 Q.B.D. 154.

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the order of the learned Judge of the Division Court, decreeing with costs the full amount claimed (*minus* the sums paid into Court), was right and should be confirmed with costs. As to the remark made by the learned Judge at the end of his judgment, and the declaration in the decree that the decree was without prejudice to the right of the plaintiffs (if any) to recover the difference between the 16*s*. 6*d*. and 30*s*. rates, it is, I think, sufficient to remark that, if the plaintiffs' alleged right legally exists, the declaration in the decree does not give it greater force, **[584]** and if it does not legally exist, the declaration in the decree will not give to it legal effect. I would, therefore, omit it from the decree.

STARLING, J.—The plaintiffs in this case, Ralli Brothers, in March, 1898, entered into a contract with Karamsi Dharsi & Co. by which they agreed to take and the latter to furnish them with 3,000 tons of freight in a first class steamer, to be thereafter named, for shipment in June to one or more of certain named ports in Europe. Subsequently the plaintiffs declared Liverpool for their option of ports and Karamsi Dharsi & Co. afterwards declared the S. S. "Paddington" as the steamer on board which they would furnish room for the plaintiffs' goods, and inserted that name in the document hereinafter referred to. This contract was made between these two parties through a broker, and on the contract being completed, shipping orders signed by Karamsi Dharsi & Co. were sent to the plaintiffs, which, besides containing the usual authority to the captain to receive the goods, also contained the terms of the contract between the plaintiffs and Karamsi Dharsi & Co.

The S. S. "Paddington" was chartered in London by the defendants' firm there, and by an agreement between Karamsi Dharsi & Co. and the defendants here it was agreed that they should be equally interested in the charter-party, and it was by virtue of this agreement that Karamsi Dharsi & Co. inserted the name of S. S. "Paddington" in the shipping orders signed by them and given to the plaintiffs. Consequently all goods shipped under those shipping orders were, as between Karamsi Dharsi & Co. and the ship, shipped in fulfilment of their obligations as part-charterers.

It also appears from the evidence that although the plaintiffs did not know the exact terms of the charter-party, they took it for granted that there was a charter-party and that it contained nothing but the usual terms, which was in fact the case.

The shipping order declared the rate of freight to be 16*s*. 6*d*. a ton, and the plaintiffs had, before they accepted the order, insisted upon the clause "Bills of lading, if required, at lower or higher rate, difference payable here as customary," being deleted. **[585]** Consequently as between them and Karamsi Dharsi & Co. they were entitled to clean bills of lading at 16*s*. 6*d*. a ton. The charter-party provided that the captain was to sign bills of lading at any rate required by the charterers, but that, if that rate was less than the average chartered rate (30*s*.), the charterer was to pay the difference before the ship sailed, and it was further provided that freight, dead freight, and demurrage was to be a lien on the cargo.

The S. S. "Paddington" was ready to take in her outward cargo just before the middle of June, of which notice was given to the plaintiffs, who, on and after the 14th June, began shipping their goods. The process of shipment is as follows:—The goods with the shipping orders are sent down to the Docks, and after certain formalities, immaterial to

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the decision of this case, the goods are lodged in one of the sheds near which the steamship is moored, and the shipping orders are kept in the shed office and are there referred to from time to time by the chief officer, who superintends the reception of goods by the ship, in order to see what goods are coming down from time to time for shipment, and they are also open to the inspection of the captain if he chooses to come and look at them, but it would appear that ordinarily he does not see them till the steamer is about to start, when they are handed over to him.

On the 22nd June it became known to all persons having any dealings with Karamsi Dharsi & Co. that that firm was insolvent and would not be able to fulfil any of its engagements. The plaintiffs, therefore, sent bills of lading for these goods already on board to the captain for his signature filled up at 16*s.* 6*d.* Under ordinary circumstances he would have signed them, and Karamsi Dharsi & Co., would have paid the difference between 16*s.* 6*d.* and 30*s.* before the ship sailed; but, as he knew that they would be unable to make such payment, he refused to sign the bills of lading, unless the plaintiffs paid the difference between 16*s.* 6*d.* and 30*s.*

I stop here to point out the rights and liabilities of all parties up to this period of time.

[586] Under the contract for freight the plaintiffs had a right to call upon Karamsi Dharsi & Co. to obtain for them clean bills of lading at 16*s.* 6*d.* and Karamsi Dharsi & Co. were bound to make such arrangements as would enable them to fulfil this contract. How this was done, was absolutely immaterial to the plaintiffs, and under ordinary circumstances they would have received their bills of lading and probably not have known by what means Karamsi Dharsi & Co. carried out their contract. To fulfil their engagements, Karamsi Dharsi & Co., chartered half the space in the S.S. "Paddington" and then authorized the plaintiffs to ship their goods in that steamer by filling in her name in the shipping order already referred to, under which the goods were shipped. As between Karamsi Dharsi & Co., and the ship, these goods were shipped in part fulfilment of ther liabilities under the charter-party; but in what position did the plaintiffs stand? The authorities cited in the course of the argument show that where a ship is held out publicly as a general ship, and a person ships goods on board of her, he is not bound by any of the terms of the charter-party, but that where he knows of a charter-party he is *prima facie* bound by its terms, though to what extent depends upon circumstances. Consequently, I am of opinion that a shipment by the plaintiffs under a shipping order signed by Karamsi Dharsi & Co., was *prima facie* a shipment under the terms of the charter-party.

But, argued Mr. Macpherson on behalf of the plaintiffs, admitting so much, the plaintiffs gave the captain notice that they were shipping under certain terms and that they offered him their goods under those terms only, and that if he refused to take them on those terms, he ought not to have accepted them, and that if he accepted them, he accepted them on those terms and no others. Now I will assume that the captain saw the shipping note, read it, and compared its terms with those of the charter-party. Taking the case most favourable for the plaintiffs, what would he find therein? That the plaintiffs insisted on having bills of lading signed at 16*s.* 6*d.* and would not have bills of lading at any other rate, paying or receiving the difference between that rate and 16*s.* 6*d.* to or from Karamsi Dharsi & Co. Turning to the charter-party, he would find that he was

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authorized [587] to sign bills of lading at 16*s.* 6*d.* and that Karamsi Dharsi & Co. would thereupon be bound to pay the difference between 16*s.* 6*d.* and 30*s.* Consequently Karamsi Dharsi & Co. being supposed at that time to be solvent, the captain's reception of the goods with knowledge of those terms would be a receipt under the charter-party, because the natural inference would be that Karamsi Dharsi & Co. intended to pay the difference, and the fact that Karamsi Dharsi & Co. subsequently became unable to fulfil their part of the contract would not alter the position of the captain with regard to goods already shipped. Consequently I hold that these goods were under all the circumstances of the case shipped under the charter party and were subject to its terms.

In case the captain refused to sign the bills of lading at 16*s.* 6*d.*, the plaintiffs demanded, in the alternative, that he should return them their goods which he refused to do, and such refusal was justifiable, seeing that the goods were shipped under the charter-party.

When the captain refused to sign bills of lading, or return their cargo, the plaintiffs ceased shipping under Karamsi Dharsi & Co.'s shipping orders, and engaged freight for the unshipped portion of their consignments from the defendants on the S. S. " Paddington " at 18*s.* 3*d.*, the bills of lading to be filled up at 30*s.* and the defendants paying the difference.

On the 24th June the steamer left Bombay with the plaintiffs' goods on board, the captain having signed no bills of lading for those shipped under Karamsi Dharsi & Co.'s shipping orders.

When the S.S. "Paddington" had started, communications continued between the plaintiffs and defendants with regard to the signing of bills of lading by the defendants, who were authorized to do that by the captain before he left, and with regard to the conditions on which they were to be signed. The defendants first suggested that the goods should go to Liverpool without bills of lading, and that they should be claimed there on the mate's receipt on payment of what might then be due to the ship. If this had been done, as will be seen from my conclusions [588] hereafter set forth, I am of opinion, the plaintiffs would have got them on payment at the rate of 30*s.* a ton, and *perhaps* the sum due for demurrage only without any claim for difference of freight, but this did not suit the plaintiffs, as they wanted clean bills of lading.

Now were the plaintiffs entitled to bills of lading at all? As I understand Mr. Lowndes' argument, he contended that there was no contract between the plaintiffs and the ship, and, consequently, they could not demand bills of lading at all; but is this so? It is quite true that, in the first instance, the contract to give bills of lading was between the ship and the charterers, but by their shipping orders they assigned portions of their right to ship goods to the merchants who had goods to ship, and it seems to me that the ship recognized the rights of the merchants as assignees by issuing to them mate's receipts in their names containing therein no mention of the charterers (see Ex. 18). Now as bills of lading are ordinarily signed and delivered on production of the mate's receipts, and it is the shippers to whom the bills of lading are necessary, it seems to me that where what may be called clean mate's receipts (*i.e.*, without any reference to any one but the shippers) are given to the shippers of goods, they have a right to demand bills of lading, subject, of course, to the charter-party, under an assignment of a portion of which they are entitled to claim them. Consequently, in my opinion, the giving of bills of lading

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by the defendants under the captain's authority was not a gratuitous act, but a duty. As to the terms upon which those were to be granted, those depended upon the rights of the ship on the one hand and the shippers on the other, and the mode in which it was arranged those rights should be adjusted and carried out. The captain before he sailed was willing to have signed bills of lading for the plaintiffs at 30*s*. and that they were, in my opinion, entitled to have demanded, but they refuse to accept them and asked for bills of lading at 16*s*. 6*d*. without any payment of difference, or a return of the cargo, to neither of which they were entitled.

When the steamer had sailed, the state of things was altered, and I do not think that then the plaintiffs were necessarily **[589]** entitled to demand clean bills of lading at 30*s*. Under the provision of the charter-party, the liability of the charterers ceased on the departure of the steamer, and, in respect of all freight, dead freight and demurrage, the ship had a lien on all cargo not covered by clean bills of lading. Accordingly the defendants claimed to hold the plaintiffs' cargo to satisfy such lien.

In their first letter on the subject, dated 28th June, 1898, the defendants write: "We are simply exercising the owners' lien as per their charter-party on the cargo for freight, dead freight and demurrage." We may leave out dead freight, as none was ever claimed. That was a perfectly justifiable position for the defendants under the circumstances to take up in form, but the validity of the claim also depended upon whether, as a matter of fact, there was any freight and demurrage in respect of which a lien could be claimed. The defendants demanded that the plaintiffs should pay them the amount in respect of which they claimed a lien, and that they would then sign bills of lading at the charter rate of 30*s*. per ton. To this the plaintiffs agreed, got their bills of lading, and paid the defendants £523-5-5 in respect of those claims. The question then arises, was there a lien for that or any sum at the time the bills of lading were demanded? If there was, then the defendants were justified in receiving and retaining that sum; if there was not, then, to the extent to which there was no lien, the plaintiffs are entitled to recover from the defendants or the ship. Now the first account of how the defendants made up their claim is contained in Ex. V, and I must say that that appears to be a not very honest attempt to get back from the plaintiffs the sum the defendants had had to pay the plaintiffs in respect of the difference of freight on that portion of their goods which was unshipped on the 22nd June. The plaintiffs disputed that account, but the defendants contended that it was quite correct, and the plaintiffs, having already under protest paid the sum demanded, had to remain silent. I need not say anything more about this account; for, when this suit was filed, the defendants or their legal advisers saw at once that it could not be relied on as the basis of their defence, and threw it overboard altogether, adopting an entirely different basis of calculation of the amount for which they claimed a lien. In the written statement, para. I, the **[590]** defendants claim a lien for £520-17-3 for freight and demurrage, and pay into Court the equivalent of £2-8-2, the difference between that sum and £523-5-5, the amount claimed in the account (Ex. 6). The sum of £520-17-3 seems to be made up of £83-7-4 demurrage claimed in V[1] and £437-9-11, difference of freight as shown in the account (Ex. 14). As regards the demurrage as between the plaintiffs and the defendants, the latter were not justified in claiming it. The charter-party provided that demurrage was to be paid day by day in cash. This was not done, but before the captain left the defendants wrote him a letter, A14, in which

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they acknowledge that they were responsible to the owners for the demurrage then due, and that letter was acknowledged by the captain. How, then, could the owners go behind the act of their agent and contend that they had a lien for demurrage? Much less could the defendants when acting ostensibly on behalf of the owner claim a lien, which the owner had not, for a sum which they themselves had personally undertaken to pay. Consequently the plaintiffs are entitled to recover the amount they paid on this account.

Then as to the £437-9-11. Looking to Exs. A^1 and A^3, I find that four large consignments were made by the S.S. "Paddington" under shipping orders given by the defendants for which bills of lading were signed at rates under 30s. Consequently a duty was under the charter-party cast upon them to pay the difference between the bill of lading freight and the chartered rate before the ship sailed. Now I think it would be a great encouragement to fraud and dishonesty if the Court were to allow the defendants (not being insolvents) as charterers to say that they will not pay themselves as ship's agents the amount which they so owe the ship, and then as ship's agents to turn round upon a shipper who had no bill of lading, and say that they claimed a lien on his goods as ship's agents for the amount so unpaid by them as charterers. My present impression is that, if it were necessary to decide this point, I should hold that the defendants as charterers (being solvent) must be taken to have paid what they owed to themselves as ship's agents before the steamer sailed. It is not, however, necessary for me to decide this point, as it seems to me that the defendants have paid what was due to the **[591]** ship. The £437-9-11 mentioned in No. 14 as the amount due to the owners is transferred to No. 15 and is there shown to be equivalent to Rs. 6,601-1-0, and by the same account it appears that the defendants had at the time of the sailing of the "Paddington" a claim against the owners of Rs. 7,513-1-9, and that they actually set off the claim of the owners against them against this claim of theirs against the owners. So that, at the time the "Paddington" started, there was nothing due in respect of freight for which the owners could claim a lien. This fact accounts for the defendants in A^8 refusing to furnish the plaintiffs with a copy of their disbursement account with the owners, although asked for it in Ex. A^7. It also shows that the statement of the defendants in Z, that they had sent the money received from the shippers by the "Paddington" and another steamer to the owners was untrue as to the "Paddington" at any rate; for No. 15 shows that nothing was sent to the owners because nothing was due, the whole of the £437-9-11 having been, as I have shown, paid by them in another way before that sum was received from the plaintiffs. Under these circumstances, it appears to me that this claim against the plaintiffs was simply an unrighteous attempt on the part of the defendants to get the payment by the plaintiffs of what they were bound to pay, and had actually in account paid, the owners. Consequently I also hold that the plaintiffs are entitled to recover from the defendants the equivalent of £437-9-11 which has undoubtedly remained in their hands from the time it was paid by the plaintiffs on the 29th June up to the present time.

It is not necessary to determine whether the plaintiffs were entitled to raise issues 11-16, because I have practically found issues 11-15 against them and issue 16 is now immaterial, because no claim is made for dead freight. It is also not necessary, in my opinion, to discuss the question at length, whether the plaint discloses any cause of action;

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because, after the conclusions I have come to in this judgment, I am of opinion that, after striking out paragraph 3, there is still a good cause of action disclosed in the plaint.

The result of this judgment is that the decree of the Court below will be confirmed so far as the amount awarded to the plaintiffs is concerned and costs, but it must be varied by striking [592] out the words "and this Court doth declare that this decree is without prejudice to the right of the plaintiffs, if any, to recover the difference between the amount of the freight on 2,100 tons at the rate of 16*s.* 6*d.* per ton and at the rate of 30*s.* per ton by virtue of their protest." If it is part of the same cause of action as that upon which this suit is founded, then the plaintiffs have relinquished it, and, under s. 43 of the Civil Procedure Code, cannot sue upon it again; if it is not, then no reservation is required, and no section of the Code has been pointed out which authorizes such a reservation. This deletion of the reservation of the plaintiffs' rights will, however, not affect them in any way, should they be advised to bring a suit in respect of the reserved matter. The appellants must pay all the costs of this appeal.

Attorneys for appellants (defendants):—Messrs. *Crawford, Brown and Co.*

Attorneys for respondents (plaintiffs) :—Messrs. *Craigie, Lynch and Owen.*

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23 B. 592 = 1 Bom. L. R. 31.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

MARUTI AND ANOTHER (*Original Defendants*), *Appellants v.* KRISHNA AND OTHERS (*Original Plaintiffs*), *Respondents.**

[17th January, 1899.]

Limitation Act (XV of 1877), art. 179—Mortgage—Redemption—Decree for redemption—No time fixed in the decree for payment—Execution—Limitation.

On the 27th June, 1885, a consent-decree was passed in a redemption suit to the following effect :—

"Plaintiffs should pay the sum of Rs. 733 to the defendants within a month of this date ; in case they do not pay the money, then in the year in the month of Chaitra in which they pay the money, the defendants should give back to them possession of the land ; till that time the defendants should pay the Government assessment and enjoy the produce in lieu of interest."

On 27th June, 1897, plaintiffs applied for execution of the decree, praying for possession alone on the ground that the redemption money had been paid off by their payments of assessment, &c., on behalf of the defendants.

Held, that the application for execution was time-barred under art. 179 of the Limitation Act (XV of 1877). The words of the decree were vague and indefinite, and were to be considered as really mentioning no time for payment. [593] The decree was, therefore, to be taken as operating from its date, and to be enforceable only within three years from that time, unless kept alive by application for execution made according to law within the prescribed periods.

[**Appl.**, 28 M. 211 (213) ; **R.**, 10 Ind. Cas. 187 = 14 O. C. 100 ; 12 Ind. Cas. 993 = 14 O. C. 257; **Expl.**, 26 M. 780 = 13 M. L. J. 412 (418) ; **D.**, 5 C. L. J. 289 (292).]

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* Second Appeal No. 516 of 1898.

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23 B. 592 = 1 Bom. L.R. 31.

SECOND appeal from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge, A. P., of Satara.

In 1883, plaintiffs filed a suit for redemption of a mortgage. In this suit a consent-decree was passed on 27th June, 1885, which provided as follows :—

"The plaintiffs should pay the sum of Rs. 733 to the defendants within a month from this date. In case they do not pay, then, in the year in the month of Chaitra in which they pay the money, the defendants should give back to them possession of the land ; till that time the defendants should pay the Government assessment and enjoy the produce in lieu of interest."

On the 27th June, 1897, plaintiffs gave a *darkhast* for execution of the decree, praying for possession of the property mortgaged, on the ground that the redemption money had been paid off by their payments of Government assessment, &c., on behalf of defendants.

The Subordinate Judge of Islampur rejected the *darkhast* as being time-barred.

On appeal, the Subordinate Judge, A. P., was of opinion that the case was governed by art. 178 of the Limitation Act (XV of 1877), and that "the right to apply for execution would accrue to the mortgagor on payment of the mortgage-debt in any year in the month of Chaitra." He, therefore, held that the *darkhast* was not time-barred. Accordingly he reversed the decision of the Court of first instance, and directed execution to proceed according to law.

Against this decision defendants preferred a second appeal to the High Court.

D. A. Khare for appellants.

N. G. Chandavarkar for respondents.

JUDGMENT.

PARSONS, J.—The decree in this case provides that "the plaintiffs should pay the sum of Rs. 733 to the defendants within a month of this date ; in case they do not so pay, then, in the year in the **[594]** month of Chaitra, in which they pay the money, the defendants should give back to them possession of the land ; till that time the defendants should pay the Government assessment and enjoy the produce in lieu of interest." This decree, which was a consent-decree, was passed on the 27th June, 1885. The plaintiffs on the 27th June, 1897, presented this *darkhast* for execution, asking for possession alone, alleging that the money ordered to be paid had been paid off by their payments of assessment, &c., for the defendants. The Judge of the lower appellate Court, applying art. 178 of sch. II of the Limitation Act, has held the *darkhast* to be in time, as "the right to apply would accrue to the mortgagor on payment of the mortgage-debt in any year in the month of Chaitra." We feel, however, that there is one great obstacle to the application of art. 178, which applies only to applications for which no period of limitation is provided elsewhere in the schedule, and that there is no reason why art. 179 should not apply. The decree directs payment to be made within a month or at a time in succeeding years without mentioning any limit for that time or directing foreclosure in default of payment. It must, therefore, be taken as operating from its date and to be enforceable only within three years from that time unless kept alive by application for execution made according to law within the prescribed periods. In so holding we are, we consider, simply following the decisions of this Court in the cases of *Gan Savant*

v. *Narayan* (1), *Maloji* v. *Sagaji* (2) and *Narayan* v. *Anandram* (3). We can see no difference between a decree which says "the money shall be paid" and one that says "the money shall be paid in future years." Both are equally indefinite and must be considered as really mentioning no time for payment, so that recourse must be had to the Limitation Act in order to ascertain the time. We, therefore, reverse the order in execution of the lower appellate Court and restore that of the Court of first instance, with costs on the plaintiffs throughout.

Order reversed.

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23 B. 595=1 Bom. L.R. 37.

[595] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

JESANG (*Original Plaintiff*), *Appellant* v. A. T. WHITTLE (*Original Defendant*), *Respondent.** [19th January, 1899.]

Easement—Right of way—Change of use—Indian Easements Act (V of 1882), s. 23—Increase of servitude.

Under s. 23 of the Indian Easements Act (V of 1882) a right of way enjoyed for agricultural purposes may be used for the purposes of a factory, provided no additional burden is thereby imposed on the servient heritage.

SECOND appeal from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad.

Suit for an injunction.

Plaintiff and defendant were owners of two adjoining fields. The defendant had a right of way over plaintiff's field for the purpose of carrying agricultural produce from his field on to the public road.

In 1893 the defendant erected a ginning factory on his land and began to use his right of way over the plaintiff's land for the purpose of conveying goods to and from his (defendant's) factory.

Thereupon the plaintiff brought the present suit to restrain the defendant from using the way across his field for this purpose.

The Court of first instance granted an injunction restraining the defendant from using the right of way over plaintiff's land for any other than agricultural purposes.

In appeal the First Class Subordinate Judge held that the defendant had a right of way over plaintiff's land for all purposes. His reasons were as follows :—

"The lower Court has allowed defendant's way through the disputed land for agricultural purposes only in reference to Survey No. 699. I think s. 13 of Act V of 1882, referred to by the lower Court, does not apply to the present case. It is admitted that defendant has set up a ginning factory in Survey No. 699. The lower Court's decree, therefore, denies defendant's right of way for the purpose of the factory. But the Land Revenue Code allows an agricultural land to be used for other than agricultural purposes also. The way to Survey No. 699 should, therefore, be for all purposes allowed by the Land Revenue Code. No [596] additional burden is thrown on plaintiff by using the road for factory purposes. Under

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* Second Appeal No. 448 of 1897.

(1) 7 B. 467. (2) 13 B. 567. (3) 16 B. 480.

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s. 22 of Act V of 1882 defendant can use the way in the mode least onerous to plaintiff. Plaintiff should determine a part of Survey No. 700 for defendant's way to No. 699, and then defendant under s. 23 of the Act can use the way for the factory purposes also."

Against this decision plaintiff preferred a second appeal to the High Court.

N. G. Chandavarkar, for plaintiff.—Defendant had a right of way over plaintiff's land for agricultural purposes only. He has a right to use this way for carrying goods to and from his factory. A right of way for one purpose does not include a right of way for any other purpose—*Wimbledon and Putney Commons Conservators* v. *Dixon* (1) ; *Bradburn* v. *Morris* (2).

Ganpat Sadashiv Rao, for respondent.—Under s. 23 of the Easements Act (V of 1882) a dominant owner can alter the mode of enjoying the easement, provided he does not impose thereby any additional burden on the servient tenement. In this case it is found by the lower Court that no additional burden is thrown on plaintiff's land by using the road for factory purposes. That being so, the injunction sought was rightly refused—*Great Western Railway Co.* v. *Cefn Cribbwr Brick Co.* (3).

JUDGMENT.

PARSONS, J.—The fact that the Land Revenue Code allows agricultural land to be used for other than agricultural purposes does not, as the Subordinate Judge, A. P., has supposed, permit of a right of way being used for all purposes allowed by the Land Revenue Code. Section 23 of the Indian Easements Act, 1882, is express upon this point, enacting, as it does, that "the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage." This only follows the law as declared by judicial decisions in the cases of *Wimbledon, &c., Commons Conservators* v. *Dixon* (1) and *Bradburn* v. *Morris* (2), *viz.*, "the rule is that the owner of the dominant tenement cannot, by changing the character of the occupation of the land in respect of which the right of way or easement exists, **[597]** impose a greater servitude upon the owner of the servient tenement." In the present case the defendant has set up a cotton press upon the survey number which before was used for agricultural purposes only, and wishes, to employ the previously existing right of way for the purposes of the press. The test to be applied is to see whether any additional burden has or will be imposed on the servient heritage of the plaintiff by the use made or sought to be made of the way by the defendant. There has been no inquiry made upon this point, and an incidental remark only about it is made in the judgment of the lower Court. We ask the Judge of the lower appellate Court to find on the issue embodied in these words after taking evidence, and to certify to this Court his finding thereon within two months.

Issue sent back.

(1) (1875) 1 Ch. D. 362. (2) (1876) 3 Ch. D. 812. (3) (1894) 2 Ch. 157.

23 B. 597=1 Bom. L.R. 76.

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23 B. 597=1 Bom. L.R. 76.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

PURUSHOTTAM AND ANOTHER (*Original Plaintiffs*), *Appellants v.* ATMARAM JANARDAN AND OTHERS (*Original Defendants*), *Respondents.**

[23rd January, 1899.]

Partition—Two suits for—First suit for partition of family property—Second suit for partition of property held jointly by family and others—Vritti—Civil Procedure Code (Act XIV of 1882), *ss.* 13 *and* 43*—Practice.*

A suit brought by some members of a family against the other members of the same family for partition of the joint family property does not preclude a second suit by the same plaintiffs for partition of other property belonging jointly to their family and strangers.

[F., 3 Ind. Cas. 9 (11)=14 C.W.N. 221 ; Appl., 4 Ind. Cas. 1097=19 M.L.J. 102=5 M.L.T. 117 (122) ; R., 23 A. 216 (217) ; 15 Ind. Cas. 214=15 O.C. 81.]

SECOND appeal from the decision of J. B. Alcock, District Judge of Nasik.

The plaintiffs and the first six defendants were members of the Parashare family, and as such they were joint owners of a certain *vritti*, called the Parashare *vritti*. They also owned jointly with another family, *viz.*, the Khandve family, a certain other *vritti* called the Khandve-Parashare *vritti*.

[598] In 1881 the plaintiffs (as members of the Parashare family) sued (suit No. 207 of 1881) the first six defendants (also Parashares) for partition of the Parashare *vritti* and other joint family property, obtained a decree, and recovered their share.

The plaintiffs now brought this suit against the other members of their family (defendants Nos. 1 to 6) and the members of the Khandve family (defendants Nos. 7 to 14) for a partition of the Khandve-Parashare *vritti*. The defendants Nos. 1 to 6 contended that as against them the suit was barred by the former suit, inasmuch as the claim now made ought to have been included in it—s. 43 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge disallowed the defendants' contention and passed a decree for the plaintiffs.

On appeal by defendants Nos. 1 to 6 the District Judge reversed the decree and dismissed the suit, holding that it was barred by ss. 13 and 43 of the Civil Procedure Code (Act XIV of 1882).

The plaintiffs filed a second appeal.

Daji A. Khare, for the appellants (plaintiffs).

N. G. Chandavarkar, for the respondents (defendants).

JUDGMENT.

PARSONS, J.—There was a *vritti* owned jointly by the family of the Parashares and there was a *vritti* owned jointly by the families of the Parashares and the Khandves. The plaintiffs are Parashares, and in 1881 they sued the defendants Nos. 1 to 6 (who are also Parashares) for partition of their joint *vritti* and got a decree, and the *vritti* was divided between them. The plaintiffs have now sued the defendants Nos. 1 to 6

* Second Appeal No. 323 of 1898.

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23 B. 597 = 1 Bom. L.R. 76.

and the defendants Nos. 7 to 14 (who are members of the Khandve family) for a partition of their joint *vritti*. The District Judge thinks that the suit barred by the provisions of ss. 13 and 43 of the Civil Procedure Code. We are unable to agree with him. Section 13 cannot apply, for the parties are not the same. Section 43 applies only to claims arising out of the same cause of action. It cannot be said that the claim of the plaintiffs to obtain their share of property owned jointly by them and B. is founded on the same cause of action as their claim to obtain the share of property owned jointly by them and B and C. If the cause of action is founded **[599]** on a refusal on the part of the defendants to divide, then the refusal in each case is that of different persons owning different rights. If it is founded on the right to claim a partition of what is joint, then the subject-matter is different, for the joint property of A and B is not the joint property of A, B and C. Joint family property is the property owned by one family (*familia*) jointly among its own members, and the decision in *Ukha* v. *Daga*(1) was passed in reference to such property only. Property which is held jointly by several families is not the joint family property of each of those families so that it would be compulsory upon each of them, in suing its own member for a partition of their family property, to include it in that suit, or else not be allowed afterwards to sue for its share therein. Section 43 lays down no such rule of law as this. If it did, then this suit would have to include all the joint property of the Khandve family, and if that included property owned by it and other families, the members of those families and all their joint property would also have to be included; the result would be disastrous. We reverse the decree of the lower appellate Court on this preliminary point and remand the appeal for disposal on the merits. Costs to be costs in the cause.

RANADE, J.—The appellants, original plaintiffs, brought this suit to obtain a partition of their share in a joint *vritti* belonging to the Parashares (represented by the appellants and respondents Nos. 1—6) and the Khandves (represented by the respondents Nos. 7—14). There had been a previous partition suit between the appellants and their bhaubands, the respondents Nos. 1—6, in respect of a division of the joint family property consisting of houses, lands and the Parashare *vritti*, and respondents (defendants) Nos. 1—6 contended that the present suit for a partition of the joint Parashare and Khandve *vritti* was not maintainable, under s. 43 of the Civil Procedure Code, as the appellants should have included their present claim in the old suit. The other respondents, Nos. 7—14, representing the Khandves did not raise any objection on this ground to the appellants' claim.

The Court of first instance overruled this objection of respondents Nos. 1—6, but the lower appellate Court held, chiefly on **[600]** the authority of the ruling in *Ukha* v. *Daga* (1), that the objection was fatal to the appellants' claim under the combined operation of ss. 13 (ii) and 43 of the Code. The point for consideration is whether the present claim for the partition of the joint Parashare-Khandve *vritti* was properly rejected by reason of its not having been included in the previous partition suit of the Parashare *vritti*.

It appears to me quite clear that the lower Court of appeal was in error in holding that the precedent in *Ukha* v. *Daga* governed this case. The facts of that case were that the joint family property consisted of lands and debts, and the plaint in the previous suit claimed a division of

(1) 7 B. 182.

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the debts only, and alleged that the rest of the joint property had been divided. Under these circumstances, it was very properly held that a subsequent suit for the division of the lands could not be maintained under s. 43 of the Code. In the present case there was no such allegation. The old suit was confined to the division of the property jointly owned by the Parashare family, including the *vritti* exclusively belonging to the Parasbares. The present suit relates to a division of a *vritti* owned in partnership by the Parasbares and the Khandves, the latter entire strangers to the Parashares in respect of family relationship. This claim against the Khandves could not have been joined in the old suit for a family partition without infringing the provisions of ss. 28, 29 and 44 of the Code about the misjoinder of parties and of subject-matters.

As laid down in *Hari* v. *Ganpatrav* (1), the rule that every partition suit shall embrace all the joint family property is subject to certain exceptions such as (1) where different portions of it are situated in and out of British India—*Ramacharya* v. *Anantacharya* (2); (2) where a portion of it is not immediately available for partition by reason of its being in the possession of mortgagees, or because it was inam land which required Government permission to give Courts jurisdiction—*Narayan* v. *Pandurang* (3), *Balkrishna* v. *Hari* (4) and *Pattaravy Mudali* v. *Audimula Mudali* (5). **[601]** A third class of cases may be similarly excepted from the rule, where, as in the present case, property is held in partnership by the joint family along with strangers, who have no interest in the family partition among the sharers, and who could not, therefore, be made parties in the family partition suit. The case of *Gavrishankar* v. *Atmaram* (6) clearly shows that such cases are possible, and that the mere circumstance that a partition has been effected, does not by itself, in the absence of an agreement to that effect, bar the right for partition of property still undivided, and in respect of which the members retain their status of sharers in an undivided estate. A whole village or a particular community may have joint property in a right of common pasturage or a forest, and such common enjoyment may continue even after there has been a private partition among the members of any one or more of the component families. No intention to relinquish a part of the claim can be inferred by the mere non-inclusion of such a common claim in a family partition suit. The position laid down in *Moonshee Buzloor Ruheen* v. *Shumsoonissa Begum* (7) has been subsequently explained by their Lordships of the Privy Council in *Pittapur Raja* v. *Suriya Rau* (8). In the first of these two cases, it had been laid down that the correct test (for the application of s. 7 of the old Code, now s. 43 of the present Code) was whether the new suit is founded on a cause of action distinct from that which was the foundation of the old suit. This was further explained in the later case. Section 7 does not require that every suit shall include every cause of action, or every claim that a party has, but only that every suit shall include the whole of the cause of action for which the suit was brought—*Mothoor Mohun Mundul* v. *Khemunkuree Dossee* (9). The cause of action, *i.e.*, the fact or facts which afforded ground for complaint in the family partition suit was plaintiffs' relationship in the family of the Parashares. The cause of action in the present suit was the partnership between the Parashares and Khandves. The causes of action being thus distinct, neither s. 13 (ii) nor

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(1) 7 B. 272. (2) 18 B. 389. (3) 12 B.H.C.R. 148.
(4) 8 B.H.C.R. 64. (5) 5 M.H.C.R. 419. (6) 18 B. 611.
(7) 11 M.I.A. 551 (553). (8) 8 M. 520. (9) 5 W.R. 182.

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s. 43 can have any operation here. This was the principle on which second suits were held not to be barred by the previous litigation in the following cases—[602] *Mariathodi* v. *Appu* (1) ; *Pittapur Raja* v. *Suriya Rau* (2) ; *Ramhurry Mondul* v. *Mothoor Mohun Mondul* (3).

One rough test to determine whether the cause of action is the same or distinct, is to see if the same evidence supports both claims—*Soorasoonderee Dabea* v. *Golam Ali* (4). It is clear that, judged by this test also, the present suit is not barred by reason of the previous litigation.

For the several reasons set forth above, we hold that the District Judge was in error in dismissing the claim. We reverse his decree and remand the case back to him for disposal on the merits.

Decree reversed and case remanded.

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APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

KOMARGOWDA (*Original Plaintiff*), *Appellant v.* BHIMAJI KESHAV AND ANOTHER (*Original Defendants*), *Respondents.**

[23rd January, 1899.]

Service lands—Mere non-performance of service does not make the holding adverse—Adverse possession—Limitation—Resumption.

Where lands are held as remuneration for services, the fact that no services have been performed does not of itself make the holding adverse. To make the holding adverse there must be a refusal to perform service or a claim to hold the lands free of service.

[Appl., 7 Ind. Cas. 252=8 M.L.T. 280 ; R., 11 C.W.N. 655 (658).]

SECOND appeal from the decision of L. Crump, Assistant Judge of Dharwar.

Plaintiff was the desai of the Narendra Mahal.

In 1893 he brought this suit to recover possession of certain lands forming part of his *deshgat inam* lands. He alleged that his ancestors had assigned these lands to the ancestors of defendant No. 1 as remuneration for services to be rendered in connection with the office of *mutalik* or deputy of the desai ; that up [603] to 1882 these services had been rendered from time to time by the defendant's family, but that latterly defendant No. 1 had refused to perform any services, and was, moreover, unfit to perform them. He claimed that he was, therefore, entitled to resume the lands. Defendant No. 1 pleaded (*inter alia*) that his ancestors had held the lands uninterruptedly for nearly 200 years ; that the suit was time-barred ; that he was unaware that any services were attached to the land ; that the plaintiff had never demanded performance of service ; and that he was willing to perform any services which the Court might direct.

The Subordinate Judge held that the lands in suit formed part of plaintiff's *deshgati* vatan that they had been held and enjoyed by the first defendant's family as remuneration for services rendered by them as *mutaliks* of the desai, and that such services had been duly performed up to 1882-83. The suit was, therefore, not barred by limitation.

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* Second Appeal No. 391 of 1898.

(1) 15 M. 296. (2) 8 M. 520. (3) 20 W.R. 450. (4) 19 W. R. 141.

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He passed a decree in plaintiff's favour, awarding possession of the lands.

On appeal, the Assistant Judge agreed with the Subordinate Judge in holding that the lands in dispute originally belonged to the plaintiff's family; that they had been assigned to the family of defendant No. 1 for services to be rendered as *mutaliks* of the desai; and that they had always been treated as forming part of the plaintiff's *deshgat inam* lands. He found, however, that defendant No. 1 had held the lands without rendering any service for over thirty years, and was of opinion that his possession had become adverse, and that the plaintiff's claim was, therefore, time-barred. He accordingly reversed the decree of the Subordinate Judge and dismissed the suit.

Against this decision, plaintiff preferred a second appeal to the High Court.

Inverarity (with him *Manekshah Jehangirshah*), for appellant.

Branson (with him *N. G. Chandavarkar*), for respondents.

JUDGMENT.

PARSONS, J.—The concurrent findings of the lower Courts are that—

1, the lands in suits originally formed part of the plaintiff's *deshgat inam* lands;

[604] 2, they were assigned by the ancestors of the plaintiff to the ancestors of the first defendant for services to be rendered by the latter to the former.

The lower appellate Court, however, differing from the Court of first instance, found that the suit to recover possession of the lands was time-barred. In coming to this conclusion, the Assistant Judge has held that the mere non-render of any service made the possession of the defendant adverse. This is clearly incorrect. The lands were held for service, and the fact that no service was performed would not of itself make the holding adverse. In this respect, render of service is on the same footing as payment of rent, and the principle laid down in the cases of *Dadoba* v. *Krishna* (1) and *Budesab* v. *Hanmanta* (2) would be applicable. To make the possession of such lands adverse, there must be a refusal to perform service, or a claim to hold the lands free of service. The Subordinate Judge has shown conclusively that the defendant continued to serve as patil on behalf of the plaintiff up to 1882-83, and that no refusal to serve was made till after that time, and his decision on the point of limitation is undoubtedly correct.

In this connection, I notice the Ex. 256, which is a document passed by the first defendant to the plaintiff on the 24th July, 1880. In it the defendant states that the lands in dispute and others formed a part of the *chavrat* lands of the plaintiff's *deshgati vatan* of Narendra Mahal and were continued to him (first defendant) as remuneration for doing *mutaliki* service, and that he was liable accordingly to perform the service directed by the plaintiff by paying Rs. 100 as judi per annum for those lands, and he further states that not having performed the said service or paid the judi so long regularly and from time to time, and having humbly represented to the plaintiff that he would not thenceforth commit such default or act in such a way, and the plaintiff having agreed to appoint him to the office of patil of Narendra on condition of his regularly paying the judi of the lands in question as before, he proceeds to

(1) 7 B. 34 (39). (2) 21 B. 509 (516).

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execute this kararpatra with his free will and consent with an agreement to perform [605] thenceforth the aforesaid duties with ability and pay the judi regularly as stated above. This was admitted in evidence by the Subordinate Judge, but rejected by the Assistant Judge on the ground that it was not registered. I do not think that it is a document that required registration. It is merely a statement of past facts with a promise for the future to act in accordance therewith. No interest in immoveable property is declared, and no new rights or obligations are created by it. The document was admissible in evidence. The Assistant Judge says of this document that, if admissible, it makes it quite clear that service was actually performed. It shows further, I think, that service was admitted and promised to be performed, and that there was no adverse possession.

It only remains to notice the fourth issue, which related to the particular relief, out of those claimed, to which the plaintiff might be entitled. This was fully dealt with and found upon by the Subordinate Judge who awarded possession, but was only discussed by the Assistant Judge on account of his finding on the point of limitation. I am unable, therefore, to accept the opinion of the latter on the point. I think there should be a fresh finding thereon by the lower appellate Court after a full consideration of the evidence of the plaintiff himself (as to demand of service) and of the conduct of the defendant which will be found fully set out by the Subordinate Judge at p. 11 of the paper book. We, therefore, ask the Judge of the lower appellate Court to record a fresh finding on his fourth issue and certify it to this Court within two months.

RANADE, J.—The appellant, desai of Narendra Mahal in Dharwar, brought this suit for the resumption of certain lands granted as remuneration for service as *mutalik* desai by appellant's ancestors to the ancestors of respondent No. 1. The resumption was sought on the ground that respondent No. 1 had become unfit for such service, and refused to render service though asked to do so in 1882. There was also an alternative claim for rent and judi and local cess for three years. Respondent No. 1 claimed to be in possession of the lands for over 150 years, and stated that he was not aware that any service had to be rendered for the same. He denied that any service had been [606] demanded of him, and said that he was ready to render service if it was proved that he was bound to do so. He finally denied any liability to pay rent or judi or local cess.

The second respondent and other defendants claimed title under respondent No. 1. The Court of first instance decreed the appellant-plaintiff's claim, holding that the lands were held by respondent No. 1 on service tenure, and that as respondent had refused to render such service, appellant had a right to resume possession of the lands. In appeal, the Assistant Judge found that the lands in dispute belonged to the desai; that they were assigned by his ancestors to respondent No. 1's ancestors in connection with, and as remuneration for, the office of *mutalik* desai; that respondent's ancestors rendered *mutalik* service thirty years ago, and respondent No. 1 himself officiated as patil ten years before the suit. He, however, held that this last duty was not performed as *mutalik*, and that as respondent No. 1 had enjoyed the lands without rendering any service for thirty years, respondent's possession was adverse to the appellant, and barred the claim. Finally, the Assistant Judge held that there was no evidence of demand and refusal. The claim was accordingly dismissed.

The principal point for consideration is the question of limitation. There can be no doubt that the Assistant Judge was in error in holding

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that the mere non-rendering of service for thirty years under the circumstances stated by him constituted adverse possession of the lands so as to bar appellant's claim. It has been repeatedly held that mere non-payment of rent by a tenant to his landlord does not constitute his possession adverse to the landlord. When the relationship of landlord and tenant has been established, mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased. There must be affirmative proof to that effect—*Rungo Lall* v. *Abdool Guffoor* (1) and *Poresh Narain* v. *Kassi Chunder* (2). In the first case, rent had not been paid for over fifteen years, and a rent suit had been actually withdrawn. The same position was laid down by this Court in *Gangabai* v. *Kalapa* (3), where **[607]** the landlord had been inamdar of the land, and the inam had been resumed in 1858, and the tenants, who claimed to hold the lands under a permanent lease from the inamdar, continued in possession after the resumption for over twenty years. The Madras High Court has followed the same ruling in *Rango Lall* v. *Abdool Guffoor* (1) in *Tiruchurna* v. *Sanguvien* (4). The mere fact that the lands in dispute are held on service tenure makes no change in the relationship of landlord and tenant: s. 105 of the Transfer of Property Act expressly classes service with money or grain rents. The rulings in regard to rents apply with equal effect to service tenure lands. In *Easwara Doss* v. *Pungavanachari* (5), the zemindar's right to resume lands held on service tenure was upheld. The portion of the judgment, which relates to the point of limitation, bears intimately upon the point now under consideration. The Assistant Judge has not found that there has been, over and above the omission to render service, any active assertion of an adverse right on the part of the respondent. On the contrary, he has expressly found that service was regularly rendered thirty years ago, and some service was rendered within ten years previous to the suit. So far from asserting any adverse right, the respondent has expressed his readiness to serve, if it is proved that he is bound to do so. The document, Ex. 256 excluded for want of registration, may be referred to show that the service as patil was a part of the *Mutaliki* duties. Under these circumstances, we must hold that the respondent's possession has not been adverse, and that the claim is not barred by limitation.

The statement in the judgment of the Assistant Judge, that there was nothing to show any demand and refusal in this case, was challenged by Mr. Inverarity, counsel for the appellant. The lower appellate Court laid down no issue on this point, and the Court of first instance has expressly found that there was a wilful default on the part of the respondent in the matter of service. In deciding questions about the resumption of lands held on service tenure, the general principles to be observed have **[608]** been laid down in *Forbes* v. *Meer Mahomed Tuquee* (6), followed in *Sitaramarazu* v. *Ramachendrarazu* (7). It is desirable that a clear finding should be recorded on the point before the right to claim resumption is enforced. The appellant asserts that he made a demand and that respondent refused to render service. The respondent directly challenges this position. We must, therefore, send down an issue and require the Assistant Judge to find whether there has been such a demand and refusal as to entitle the appellant to claim resumption of the possession of the lands in dispute.

(1) 4 C. 314. (2) 4 C. 661. (3) 9 B. 419.
(4) 3 M. 118. (5) 13 M. 361 (365). (6) 13 M.I.A. 438.
(7) 3 M. 367 (369).

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APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

YAMUNABAI (*Original Defendant*), *Appellant v.* MANUBAI (*Original Plaintiff*), *Respondent.** [30th January, 1899.]

Hindu law—Maintenance—Maintenance of daughter-in-law—Claim of daughter-in-law against self-acquired property of her father-in-law in hands of his heirs.

The widow of a predeceased son, who lived in union with his father, has a legal right to maintenance from her mother-in-law out of the self-acquired property of the father-in-law to which his widow has succeeded as his heir. A son's widow has no legal claim for maintenance against self-acquired property in the hands of her father-in-law, but when such property devolves upon his heirs, the daughter-in-law has a claim against it in their hands for maintenance if her husband had lived in union with his father.

[Appr., 17 C.W.N. 1141=23 Ind. Cas. 539; R., 29 C. 557 (573); Cons. and Expl., 25 B. 263 (266).]

APPEAL from an order passed by Rao Bahadur V. M. Bodas, First Class Subordinate Judge of Sholapur, with appellate power.

Suit against a mother-in-law for maintenance. The plaintiff's husband Tatia was the son of the defendant and her husband Bala. Tatia had lived in union with his father Bala, but had died before him. Bala subsequently died, leaving no surviving issue, and his property went to his widow, the defendant. The plaintiff now sued the defendant for maintenance.

The Subordinate Judge found that the property left by Bala was his self-acquired property and that the plaintiff had, therefore, no right to maintenance out of it. He dismissed the suit without finding on the other issues in the case.

[609] On appeal, the Judge reversed the decree and remanded the case for a finding on the other issues.

The defendant appealed against the order of remand.

Daji Abaji Khare, for appellant (defendant).

There was no appearance for the respondent (plaintiff).

JUDGMENT.

RANADE, J.—The question of Hindu law raised in this appeal is whether the widow of a predeceased son, who lived in union with his father, has a legal right to claim maintenance from her mother-in-law when the latter succeeds as heir to her husband, who left only self-acquired property at the time of his death.

The principle that a son's widow has no legal claim for maintenance against the self-acquired property in the hands of her father-in-law, has been affirmed in a series of decisions by this Court, as also by the other High Courts of Bengal, Madras and Allahabad—*Savitribai* v. *Luximibai* (1); *Khetramani Dasi* v. *Kashinath Das* (2); *Ganga Bai* v. *Sita Ram* (3); *Janki* v. *Nand Ram* (4); *Kalu* v. *Kashibai alias Lakshmibai* (5). The obligation to maintain the widowed daughter-in-law in such cases has been held to be only a moral and imperfect obligation, not enforceable in law.

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* Appeal No. 24 of 1898 from order.

(1) 2 B. 573. (2) 2 B.L.R. 15. (3) 1 A. 170.
(4) 11 A. 194. (5) 7 B. 127.

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As against the father-in-law, the right of the son's widow to be maintained rests, not on her husband being a co-member of a joint family, but on being a joint owner of ancestral property with his father—*Mussamut Hema Kooeree* v. *Ajoodhya Pershad*(1); *Savitribai* v. *Luximibai* (*supra*); *Musammat Lalti Kuar* v. *Ganga Bishan* (2) ; *Devi Persad* v. *Gunwanti Koer* (3).

While the nature of the claim of a widowed daughter-in-law for maintenance by the father-in-law has been thus clearly defined, a distinction has been recognized by the High Courts of Bengal and Allahabad between the position of the father-in-law and those who succeed him as heir to his separate or self-acquired estate. The moral obligation of the father-in-law is held to be converted into a legal obligation when his self-acquired property devolves upon his heirs. Under certain circumstances and in the **[610]** hands of such heirs, such property is held liable to provide maintenance to the widow of a predeceased son of the person who acquired the property when such son lived in union with him. This principle was first laid down in Bengal, and has been more recently affirmed by the Allahabad High Court—*Rajjomoney Dossee* v. *Shibchunder Mullick*(4) ; *Janki* v. *Nand Ram*(5) ; *Kamini Dassee* v. *Chandra Pode Mondle*(6) ; *Devi Persad* v. *Gunwanti Koer*(3). This same distinction was recognized and given effect to in this Court in *Adhibai* v. *Cursandas*(7), where it was held that the self-acquired property of the father, when it descended to one of his surviving sons, was to be regarded as ancestral property, and as such subject to the obligations of ancestral property to provide maintenance to the widow of a predeceased son living in union with his father. The Allahabad High Court in *Janki* v. *Nand Ram* declined to subscribe to the view that such self-acquired property became ancestral in the hands of the original owner's heir, but rested the liability on the ground that the heir in such cases took the property for the spiritual benefit of the deceased owner, and so taking it, the old moral obligation was turned into a legal obligation which could be enforced. The Calcutta High Court rested this distinction on the ground that the heir in such cases is under a legal obligation to provide, out of the estate which descends to him, maintenance for the persons whom the ancestor was bound legally or morally to maintain, and the heir takes the estate, not for his benefit, but for the spiritual benefit of his ancestor—*Khetramani Dasi* v. *Kashinath Das* (8); *Devi Persad* v. *Gunwanti Koer* ; *Kamini Dassee* v. *Chandra Pode Mondle* (*supra*). Though there is thus a divergence in the reasons given by this Court and by the Calcutta and Allahabad High Courts, the conclusion they arrive at is identical.

It was contended, however, that the mother-in-law did not take her husband's estate as ancestral property as her husband was not her ancestor, and the ruling in *Adhibai* v. *Cursandas* did not apply to the present case.

[611] It is plain that the obligation cannot safely be made to rest on the narrow ground on which is was made to rest in the judgment of Mr. Justice Farran in *Adhibai* v. *Cursandas*. It is true that in that particular case the property had descended to Cursandas, who was a son of the deceased owner, but this was a mere accident. The deceased Nathu left behind him a widow and two sons. If he had left no sons, the widow would have succeeded, and in such a case, it could not with propriety be contended that while the son of Nathu was bound to maintain his brother's

(1) 24 W.R. 474. (2) 7 N.W.P.H.C.R. 261. (3) 22 C. 410.
(4) (1864) 2 Hyde, 103. (5) 11 A. 194. (6) 17 C. 373.
(7) 11 B. 199. (8) 2 B.L.R. 15.

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wife, Nathu's widow was not under any obligation because the property had not devolved upon her from her ancestor. This was one of the reasons assigned by the Full Bench of the Allahabad High Court for dissenting from the reasoning, while accepting the conclusion of the Bombay ruling. In the case before the Allahabad High Court the defendants were a brother-in-law and the mother-in-law of the widow-plaintiff.

Quite independently of this circumstance, the word "ancestral" is in Sanskrit *pitrarjit*, and is opposed to *swarjit* or self-acquired. In the case of a widow or mother or sister succeeding as heir, the word *pitrarjit* would obviously be out of place. Ancestral property, as technically defined, means property transmitted in direct male line from a common ancestor, and the legal incidents attaching to it distinguished it from self-acquired property. If the property in the hands of the father was self-acquired down to the moment of his death, it could not, immediately after his death, become ancestral in the hands of his widow. The two incidents of self-acquired property, which are of importance, are (1) that partition cannot be enforced in regard to it by the sons, and (2) that the owner has unrestricted power of disposing of it by gift, or devising it by will. These incidents cease to attach to it when the owner dies without making any disposition. It then becomes the joint common property of the family, and all the sons share equally in it like any other ancestral property, and no purpose is served by calling it ancestral in the hands of the heirs. If the heir had been a testamentary devisee, the incidents of self-acquisition would protect such property even in his hands. Mr. Justice Farran referred to this circumstance in his judgment (p. 207), and it is, therefore, **[612]** clear that he did not mean to lay any special emphasis in his use of the word "ancestral," except to signify that it was inherited property. In the case of *Rajjomoney Dossee* v. *Shibchunder Mullick* the liability is made to depend on the fact that the property descends to the heir. The burden is on the inheritance in the hands of the heir. In *Khetramani Dasi* v. *Kashinath Das* Sir B. Peacock observed that the obligation is on the heir, for the estate is inherited subject to the obligation of providing maintenance. Mr. Justice Farran quoted these observations with approval, and based his argument on them, and it is thus clear that no emphasis was meant to be laid on the fact of the self-acquired property becoming ancestral after the owner's death. There is thus no real divergence between the principles laid down by the three High Courts in regard to this liability. The mere fact that, in the present case, the heir is the mother-in-law of the widow, and not her brother-in-law, does not, therefore, as the appellant's pleader contended, distinguish this case from the ruling in *Adhibai* v. *Cursandas*. If the son's widow has a claim for maintenance against the unobstructed rights of a full heir, it cannot be maintained that her rights are not equally valid against the mother-in-law, whose interest is admittedly of a more restricted character.

It is not strictly necessary, in the view taken above, to notice the earlier decisions of this Court, especially the ruling in *Savitribai's case*, where a contrary view has been suggested, and the claim of the son's widow is made to rest, as in the Madras Presidency, solely on the fact of the existence of ancestral or joint property in which the widow's husband had an interest. The older decisions of this Court—*Chandrabhagabai* v. *Kashinath* (1) ; *Timmappa* v. *Parmeshriamma* (2) ; *Udaram* v. *Sankabai* (3)

(1) 2 B.H.C.R. 323. (2) 5 B.H.C.R. (A.C.J.) 130. (3) 10 B.H.C.R. 483.

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23 B. 608 = 1 Bom. L.R. 95.

—went to the length of resting the right of the widow to maintenance on the fact of her actual destitution, independently of all questions regarding union or separation, or the existence of ancestral or self-acquired property. All these earlier cases were exhaustively reviewed by Westropp, C.J., in *Savitribai* v. *Luximibai*, which **[613]** was a Full Bench decision, and they were either overruled or distinguished, and it was finally laid down that the right of the son's widow depended on the existence of ancestral property, or property of which the widow's husband was owner. The facts in that case, however, clearly distinguish it from the present. There was no union of interests between the widow's husband and the defendants in that case. There had been a partition between the defendant (uncle) and the widow's husband. This distinction is important, for on it the legal claim of dependent members of a family who are entitled to maintenance really rests. Manu enjoins the duty of supporting dependent members of the family. Narad enjoins the same duty (1). So does Brihaspati quoted in Gurudas Bannerji's Lectures (Tagore Law Lectures, 1878, p. 210). The text of Sankha enjoins on the parent the duty of allotting maintenance to the childless wives of brothers and sons (2). The widow-plaintiff in the case of *Savitribai* v. *Luximibai* was not a dependent female member of defendant's family, as there had been a partition between her husband and his uncle, the defendant. These and many more texts were noticed by Westropp, C. J., who, however, construed them as preceptive, and not mandatory. They would be preceptive in cases such as those of *Savitribai*, *i. e.*, widows of separated kinsmen, but where there was no separation, as in the present case, it would be straining the texts too far to hold them to be preceptive only. Westropp, C. J., in his judgment notices the text of the Mayukha, where the Guru (including father-in-law) is expressly enjoined to give maintenance to his son's widow where there was no separation of interests. This distinction of union or separation is thus very material, and the ruling in *Savitribai* v. *Luximibai* must be considered as specially limited to the circumstances of that case where the widow was the widow of a separated son or nephew. The right of female dependent members to be maintained out of the estate prevails even against the king who succeeds to the estate by escheat—*Mussumut Golab Koonwur* v. *The Collector of Benares* (3). The considerations of natural equity and social justice, noticed by Mahmood, J. towards **[614]** the conclusion of his judgment in *Janki* v. *Nand Ram*, seem also to be very appropriate in the case of the widow of a predeceased son dying in union with his father.

On the whole, therefore, we must hold that the respondent's right to claim maintenance must be allowed as against the appellant, her mother-in-law, as in her hands the property is subject to the legal obligation of maintaining the widowed daughter-in-law whose husband was united in interest with his father.

We dismiss the appeal with costs on the appellant.

Appeal dismissed.

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(1) Jolly's Translation, Ch. 13: (2) Colebrooke, Vol. 2, 538.
(3) 4 M.I.A. 246.

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APPEL-
LATE
CIVIL.

23 B. 614=
1 Bom. L.R.
102.

23 B. 614=1 Bom L.R. 102.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

RAMCHANDRA VITHAL RAJADHIKSHA AND OTHERS (*Original Defendants*), *Appellants v.* SHEIKH MOHIDIN (*Original Plaintiff*), *Respondent*,* AND SHEIKH MOHIDIN (*Original Plaintiff*), *Appellant v.* RAMCHANDRA VITHAL RAJADHIKSHA AND OTHERS (*Original Defendants*), *Respondents.** [9th February, 1899.]

Limitation Act (XV of 1877), sch. II, art. 134—Mortgage—Purchaser from mortgagee—Necessity of possession in order to validate transaction as against original mortgagor.

A person purchasing or taking a mortgage from a mortgagee believing that he is getting a good title must have possession of the property for the statutory period in order to validate the transaction as against the original mortgagor under art. 134 of the Limitation Act (XV of 1877).

[F., 36 B. 146=13 Bom.L.R. 1057=12 Ind. Cas. 737; Appl., 12 O.C. 84 (90); R., 29 A. 471=4 A.L.J. 375 (388)=27 A.W.N. 133.]

SECOND appeal from the decision of Thakurdas Mathuradas, Assistant Judge of Ratnagiri, amending the decree of Rao Saheb Vishvanath Vaikunt Vagh, Subordinate Judge of Vengurla.

Suit for redemption. The lands in question belonged to the Renges, who mortgaged them with possession to the Rajadhiakshas in 1840, 1856, 1859. The Rajadhiakshas divided the mortgaged lands among themselves and Balaji Rajadhiaksha in September and October, 1877, mortgaged his share of them to one Kamat (defendant No. 6). Balaji, however, retained possession, but, after **[615]** his death, his widow mortgaged the same lands again to Kamat (defendant No. 6), and gave him possession.

The plaintiff was the purchaser of the equity of redemption in these lands from the Renges, and in 1890 he brought this suit for the redemption of the mortgages of 1840, 1856 and 1859.

It was contended on behalf of Kamat (defendant No. 6) that the plaintiff could not recover possession of the land without paying off his two mortgages of 1877 as well as the earlier mortgages which he sought to redeem, and he relied on art. 134 of the Indian Limitation Act (XV of 1877). The lower Courts disallowed this contention on the ground that Kamat had not obtained possession more than twelve years before suit, and held that the plaintiff might redeem the early mortgages without also redeeming the mortgages to Kamat.

The defendants appealed.

Ghanasham N. Nadkarni, for appellants (defendants).—We knew nothing of the earlier mortgages. We are *bona fide* purchasers for value without notice. The plaintiff cannot take the land from us without paying what we have advanced on its security. Article 134 of the Limitation Act does not require that the purchaser should have possession from the date of the purchase. We took actual possession in 1883, but previously to that our mortgagors held possession under kabulayat. Their possession was our possession—*Yesu Ramji* v. *Balkrishna Lakshman* (1); *Maluji* v. *Fakirchand* (2).

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* Cross Second Appeals Nos. 493 and 492 of 1899.

(1) 15 B. 583. (2) 22 B.

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23 B. 614 = 1 Bom. L.R. 102.

H. C. Coyaji, for respondent (plaintiff).—The lower Courts have held that the defendant as mortgagee had no possession until 1883. That is a matter of fact, and the finding must be accepted. Article 134 does not apply except where possession has been enjoyed. It refers to a suit to recover possession. Possession is implied. Possession for twelve years gives the purchaser a right as against the original owner, but if the purchaser has not had possession for that term, the original owner need not regard the transactions at all—*Radanath* v. *Gisborne*(1); *Muthu* v. *Kambalinga*(2).

JUDGMENT.

[616] RANADE, J.—Most of the points raised in these cross appeals were disposed of by us in the course of the arguments urged on both sides. Mr. Ghanasham, pleader for the appellants in appeal No. 493, however, laid considerable stress on the point of limitation. The facts relating to this contention, as they have been found proved by the Courts below, may be thus briefly stated.

The lands in dispute were proved to have belonged to the Renges, who mortgaged them with possession to the Rajadhiakshas in 1840, 1856, and 1859 (Exs. 145, 16, 147). The Rajadhiakshas divided the mortgaged lands among themselves, and Balaji Rajadhiaksha mortgaged his share in these lands and other property to the original defendant No. 6, Kamat, in September and October, 1877, under two separate deeds, Exs. 309-310, and the same Rajadhiaksha's widow passed a third mortgage-bond in January, 1883 (Ex. 311). The lower appellate Court has found that the first two mortgages by Rajadhiaksha to Kamat were without transfer of possession till 1883, till which time the lands were in the possession of the Rajadhiaksha.

It was, however, contended on behalf of this appellant (original defendant No. 6) that he had a right to require the respondent-plaintiff, who sued for the redemption of the original mortgages effected by the Renges with the Rajadhiaksha, to redeem also the later two mortgages of 1877 effected by the Rajadhiaksha with Kamat. It was contended that under art. 134 of the 2nd schedule of the Limitation Act, Kamat was a purchaser for value from the Rajadhiaksha without notice of the prior mortgage, and as the mortgages of 1877 were passed more than twelve years before the suit of 1890, the respondent-plaintiff could not recover possession of the lands without paying these two Rajadhiaksha's mortgages as well as the earlier Renges' mortgages. A similar contention was raised on behalf of the other Kamat appellant, original defendant No. 16, whose mortgage-bond was passed in 1878. The lower appellate Court disallowed these contentions on the ground that as these two appellants did not obtain possession under their mortgages more than twelve years before suit, the respondent-plaintiff had a **[617]** right to redeem the lands from the mortgage-debt of Renge's bonds without being subject, at the same time, to redeem Rajadhiaksha's mortgages.

Mr. Ghanasham contended that the lower appellate Court ought to have held that the two mortgages of 1877 of defendant No. 6 as also the mortgage of 1878 of defendant No. 16 were mortgages with possession, and that anyhow, as they were executed more than twelve years before the redemption suit, they were entitled to the protection of art. 134 as being purchases for valuable consideration. His contention was that the

(1) 14 M. I. A. 1. (2) 12 M. 316.

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23 B. 614 = 1 Bom. L.R. 102.

limitation in such cases commences from the date of purchase (1877 and 1878), and that transfer of possession was immaterial, though in this case the Rajadhiaksha had passed rent notes on the date of mortgage-bonds. The lower appellate Court has relied chiefly on the authority of the ruling in *Maluji* v. *Fakirchand* (1), in which it was laid down that until the defendants held possession under their mortgage for the full period of twelve years, the plaintiffs could disregard their mortgage and recover possession, notwithstanding its existence, by paying off the original mortgage. When the defendants Nos. 2 and 3 (in that case) had held possession under it for twelve years, art. 134, coupled with s. 28, would validate it, and the plaintiff would be debarred from recovering possession disregarding the later mortgagee's mortgage.

In the present case, the possession of the Kamat appellants has not ripened into adverse enjoyment for twelve years, so as to validate their mortgages, in a way to bind the respondent-plaintiff to redeem them. The case, therefore, clearly falls within the scope of the ruling referred to above.

It was, however, pressed upon us that the wording of the article takes no account of possession and speaks only of purchase, and as the Kamat purchases were more than twelve years old, the want of actual possession by them before 1883 was of no consequence. It thus becomes necessary to consider this point more fully in reference to the principle given effect to by the judicial enlargement of the scope of art. 134, and the **[618]** decisions passed upon that article. Article 134 relates to suits for recovery of possession of immoveable property which is bequeathed or conveyed in trust or mortgaged, and is afterwards purchased from the trustee or mortgagee for a valuable consideration. In so far as the article refers to trustees, it must be read along with s. 10, which also relates to trustees, and permits *cestui que trust* to follow trust property in the hands of trustees, or their assigns (excepting assigns for valuable consideration). This exception has obvious reference to the same class of considerations as are given effect to in art. 134 in respect of suits for possession. Unless the assignee for valuable consideration has possession, it is plain that trust property cannot be followed into his hands, and similarly, unless the purchase is with possession, the mortgagor owner has no notice, and no means of knowing any breach of the trust, and no suit can lie for recovery of possession from the alienee. The purchase generally must, therefore, be with possession. More especially must this be the case where the purchase is a purchase *sub modo*, and is, in fact, a mortgage as in this case.

In all the cases where the rights of purchaser have been given effect to, the purchasers or mortgagees had possession. This was the case in *Yesu* v. *Balkrishna* (2) where the status of mortgagees as purchasers under art. 134 was first recognized. The same was the case in *Pandu* v. *Vithu* (3), where the word "purchaser" was defined, in the words of their Lordships of the Privy Council in *Radanath Doss* v. *Gisborne and Co.* (4), as one who purchases what is *de facto* a mortgage upon a representation, and in the belief that he is purchasing an absolute title. Possession was also admitted in the case of the auction purchase which was upheld in *Muthu* v. *Kambalinga* (5). Both on principle and precedent it is thus clear that the purchaser from a mortgagee of what is represented and believed to be absolute right must be a purchaser with possession. His possession is an essential element of this purchase *sub modo*, which alone

(1) 22 B.225. (2) 15 B. 583. (3) 19 B. 140. (4) 14 M.I.A. 1. (5) 12 M. 316.

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can make the purchase valid as against the true owner after twelve years' enjoyment.

[619] This point becomes still more clear when it is borne in mind that the same art. 134 refers to alienations by trustees. These, like alienations by mortgagees, are protected after twelve years' possession. In the case of alienations by trustees, unless there is a transfer of possession to the alienee, the transaction would be incomplete and of no effect against the *cestui que trust*. The ruling in *Maniklal* v. *Manchershi Dinsha* (1) refers to such alienations by trustees. So far as that ruling related to the question of *bona fides*, art. 134 has rendered all inquiry unnecessary, but the element of possession was then, as now, necessary to validate the purchase as against the true owner. The alienations of temple property, which were the subject of dispute in *Nilmoney Singh* v. *Jagabandhu Roy* (2) and *Sajedur Raja Chowdhuri* v. *Gour Mohun Das*(3), also involved transfer of absolute right and possession. It is also clear that under English law (3 and 4 Vic., c. 27, s. 25, which corresponds to art. 134), possession by the purchaser for valuable consideration for the statutory period of property conveyed in breach of trust is necessary to validate the trust as against the *cestui que trust* (4). In English law, mortgages are effected in the form of purchases ; and the law of trusts governs to a large extent the equitable relations between mortgagor and mortgagee. The Indian Law has followed the English law in this respect, and this analogy of trusts makes it clear that when the purchaser from the mortgagee is under the belief that he is purchasing an absolute title, there must be an enjoyment of possession for the statutory period to validate his purchase as against the original mortgagor. The Courts below have, therefore, correctly applied the law, and we confirm the decree of the lower appellate Court. Costs in each appeal on the respective appellants.

Decree confirmed.

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23 B. 620 = 1 Bom. L.R. 82.

[620] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

VIRUPAKSHAPPA (*Original Defendant No.* 1), *Appellant v.* SHIDAPPA AND ANOTHER (*Original Plaintiffs*), *Respondents.** [14th February, 1899.]

Minor—Suit on behalf of minor—Decree—Compromise of decree by next friend—Application to set aside compromise—Modes of impeaching the decree—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), s. 462.

Where a decree to which a minor is a party has been compromised with leave of the Court granted under s. 462 of the Civil Procedure Code (Act XIV of 1882), the compromise cannot be subsequently re-opened by the Court *proprio motu* on the ground that it gave the minor less property than he was entitled to under the decree. The modes in which such an order can be impeached are, at the most, two, namely, by review or by suit.

[R., 16 Ind. Cas. 543 ; **Expl.** 26 B. 109 (119) = 3 Bom. L. R. 565.]

APPEAL from the decision of Rao Bahadur Mahadeo Shridhar, First Class Subordinate Judge of Sholapur.

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* Appeal No. 88 of 1898.

(1) 1 B. 269.
(2) 23 C. 536.
(3) 24 C. 418.
(4) Lewin on Trusts, 633, 5th Ed.

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23 B. 620 = 1 Bom. L.R. 82.

The plaintiffs, by their mother and next friend, sued for partition in 1895, and on 21st December, 1897, obtained a decree for their shares. In execution certain property in possession of the defendants was attached. On the 13th June 1898, the plaintiff Shidappa, who described himself as then of age, and his brother Basappa (the co-plaintiff) by his guardians (his mother and brother) applied to the Court to release the attached property and restore it to the defendants, stating that they (the plaintiffs) had adjusted the decree on the 6th June, 1898, and taken possession of the property given to them under the adjustment, and had no further claim against the defendants. The Court granted the application and ordered the *darkhast* to be struck off the file after restoring the attached property to the defendants.

On the next day (14th June, 1898) one Nijlingappa, a stranger to the suit, alleging himself to be interested in the plaintiffs, applied that the *darkhast* should be restored to the file and that further inquiry into the matter should be made. He stated that it was not true that Shidappa had attained his majority, and alleged that the guardian had been deceived, and that the adjustment had been made in fraud of the minors.

The defendant Virupakshappa opposed the application, contending that Nijlingappa had no authority to move in the matter; that the [621] statements made in his application were untrue; that the adjustment of the decree had been honestly made and communicated to the Court which recognized it; that the adjustment was beneficial to the plaintiffs; and that the Court had no power to go into the matter after the *darkhast* had been struck off the file and the whole execution proceeding concluded.

The Judge held that the adjustment of the decree ought not to be recognized and that the execution should proceed. The following is an extract from his judgment:—

"I think I can entertain Nijlingappa's application. The application by plaintiff No. 1 and Nilgangava was granted and the *darkhast* was ordered to be struck off, but the fact that the decree was compromised on behalf of minor plaintiffs by their next friend and mother does not appear to have been brought to the notice of the Court. The application appears to have been considered as made under s. 257 of the Civil Procedure Code. It is, therefore, open to me to inquire whether the decree was adjusted and the plaintiff's mother received the money and property under the adjustment with or without the leave of the Court, or whether the minor's interests have not been prejudicially affected. I am also of opinion that I can make this inquiry *proprio motu*, or on the application of any person interested in the welfare of the minors.

"There is no evidence in this case to show that the plaintiff No. 1, Shidappa, has attained majority. Under the Civil Procedure Code it is his right to elect to prosecute the suit as a major, and till he has exercised this right he is to be treated as a minor. Plaintiff No. 1 is not only not proved to have arrived at man's estate, but has made no application electing to be treated as a major. I am also of opinion that the adjustment of the decree cannot take effect as regards plaintiff No. 1.

"There remains the first issue (namely, whether the adjustment of the decree is beneficial to the minor plaintiffs) and that is easily disposed of. The *darkhast* gives the plaintiffs property of less value than that they were entitled to under the decree. A comparison of the decree with the parkhat makes this clear."

Defendant No. 1, Virupakshappa, appealed.

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23 B. 620 = 1 Bom. L.R. 82.

Dattatraya A. Idgunji for the appellant (defendant No. 1).—The Judge was wrong in treating the application of the 13th June, 1898, as one under s. 257 of the Civil Procedure Code. The fact that one of the applicants was a minor was apparent on the face of the application. The adjustment was not only certified to the Court; the leave of the Court was asked for and granted. This was sufficient compliance with s. 462 of the Civil Procedure Code—*Usman* v. *Gnanu* (1). Shidappa described himself as having attained **[622]** full age; the proceedings taken by him on his own behalf were not invalid—*Doorga Mohun Dass* v. *Tahir Ally* (2). The adjustment was conclusive as against him. There was no evidence to show that he had not attained majority. The entertaining of the application of the 14th June, 1898, and the subsequent inquiry were *ultra vires*. There is no provision of law enabling a Court *proprio motu*, or on the application of a person describing himself as interested in the welfare of the minors, to open up an adjustment duly sanctioned by the Court—*Karmali* v. *Rahimbhoy* (3); *Mirali* v. *Rehmoobhoy* (4); *Eshan Chundra* v. *Nundamoni Dassee* (5); *Bibee Solomon* v. *Abdool Azeez* (6). The only mode of doing so is by review under s. 623 or by suit under s. 11 of the Civil Procedure Code.

The mere fact that the adjustment allotted property of less value than that granted by the decree, does not show fraud. The family property consisted of large outstandings and included bad debts. The plaintiffs were paid in cash, and an allowance was made in our favour, because we undertook the risk of recovering the outstandings and bad debts. This was, we submit, a fair arrangement.

There was no appearance for the respondents (plaintiffs).

JUDGMENT.

PARSONS, J.—The Subordinate Judge, no doubt, acted hastily in granting the application of the 13th June and striking off the *darkhast* without enquiry. He says that the fact that the decree was compromised on behalf of the minor plaintiffs by their next friend and mother, does not appear to have been brought to the notice of the Court, but that fact was apparent on the face of the application itself, and the Subordinate Judge should not have sanctioned the compromise without being satisfied that it was *bona fide* and for the benefit of the minors. Nevertheless the fact remains that the leave of the Court was given to it and it must be considered to have been granted under s. 462 of the Civil Procedure Code. It was not, therefore, we think, a matter that the Subordinate Judge could re-open *proprio motu* as he has done and set aside his order on the mere ground that the compromise gave the minors less property than what they were entitled to under the decree. The modes in which such an order can be impeached have been fully discussed in the case **[623]** of *Karmali Rahimbhoy* v. *Rahimbhoy* (3) and in the cases therein cited, and resolve themselves into two at the most, *viz.*, by review or by suit. In the present case no suit has been filed, and the minors have not approached the Court at all to ask for relief, so that we cannot treat the proceedings of the lower Court as taken upon an application for review of the order.

We must reverse the order of the 15th October, 1898, as made without jurisdiction, leaving the minors, or some one legally competent to act on their behalf, free to take such steps as they may be advised to take, if they wish to have the order of the 13th June set aside.

Order reversed.

(1) P. J. (1891), p. 111. (2) 22 C. 270. (3) 13 B. 137.
(4) 15 B. 594. (5) 10 C. 357. (6) 6 C. 687.

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APPEL-LATE CIVIL.

23 B. 623 = 1 Bom. L.R. 87.

23 B. 623 = 1 Bom. L.R. 87.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

RATANLAL (*Original Defendant No.* 3), *Appellant v.* BAI GULAB. (*Original Plaintiff*), *Respondent.** [28th February, 1899.]

Civil Procedure Code (*Act XIV of* 1882), *s.* 231—*Application for execution by one of several joint decree-holders—Order refusing to allow execution by one of several joint decree-holders—Appeal—Practice.*

No appeal lies against an order under s. 231 of the Code of Civil Procedure (Act XIV of 1882), refusing to allow one of several joint decree-holders to execute a joint decree.

[R., 7 Ind. Cas. 474 = 61 P.R. 1910 = 110 P.L.R. 1910 = 90 P.W.R. 1910; D., 23 T.L.R. 245 (246).]

APPEAL from the decision of Rao Bahadur K. B. Marathe, First Class Subordinate Judge of Surat.

One Ratanlal Rangildas and Utamram Itcharam traded together in partnership in Bombay.

Utamram was charged with criminal breach of trust in respect of certain jewellery entrusted to him for sale by one Bai Gulab of Surat.

In execution of a search warrant issued by the First Class Magistrate of Surat, the Police seized the jewellery from the accused's partner, Ratanlal, and produced it before the Magistrate.

[624] The Magistrate, after trying the case, discharged Utamram and passed an order directing the jewellery to be handed over to the complainant Bai Gulab.

The High Court set aside this order and directed the jewellery to be restored to the possession of Ratanlal from whom it was taken (1).

Thereupon Bai Gulab filed a suit, No. 247 of 1892, to establish her title to the jewellery in question, and for an injunction restraining Utamram (defendant No. 2) and his partner Ratanlal (defendant No. 3) from taking away the property from the Magistrate's Court. Pending this suit the Nazir was appointed receiver of the property in dispute.

The Subordinate Judge decided the suit in Gulab's favour, awarding her possession of the property.

In execution of this decree the Nazir handed over the property to Bai Gulab.

In appeal the High Court reversed the decree of the Subordinate Judge and dismissed Gulab's suit with costs as against Utamram and Ratanlal (defendants Nos. 2 and 3).

Thereupon Ratanlal (defendant No. 3) alone applied for execution of the High Court's decree for costs and for restitution of the jewellery handed over by the Nazir to Gulab (the plaintiff). This application was resisted by Utamram.

The Subordinate Judge rejected this application, holding that Ratanlal alone was not entitled to execute the decree of the High Court, which was in favour of both him and Utamram jointly. He referred them to a separate suit to determine their respective rights.

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* Appeal No. 104 of 1898.

(1) 17 B. 748.

Against this decision defendant No. 3 appealed to the High Court.
Ramdatt V. Desai and *G. S. Rao*, for appellant.
M. N. Mehta and *K. M. Javheri*, for respondent.

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JUDGMENT.

PARSONS, J.—The decre of the High Court, sought to be executed in this case, was certainly a joint decree in favour of the [625] defendants Nos. 2 and 3, since it reversed the decree passed by the Subordinate Judge, First Class, and ordered the suit against them to be dismissed with costs, thus entitling them to recover their costs jointly and also to obtain the restitution of any thing taken from them under the reversed decree. It is admitted that they were partners at the time of the decree, and presumably, therefore, the ornaments taken from them (or rather from the Nazir who held them on their behalf) were their joint property. This being so, the order of the Court refusing to allow the decree to be executed by the defendant No. 3 alone must have been passed under s. 231 of the Code of Civil Procedure, and no appeal lies against that order. See *Bai Kashi* v. *Chunilal Vishvanath* (1).

In the present case, the defendant No. 2 has himself come forward and directly impugned the right of the defendant No. 3 to alone execute the decree, and the Subordinate Judge has referred them to a civil suit to determine their respective right. This he had a discretion to do, and we see no reason to interfere. The case of *Lakshmi Ammah* v. *Ponnassa* (2) cannot be said to be in point ;· for, here the contest is essentially one between the two joint decree-holders. It has been argued before us that at any rate the lower Court should have ordered the decree to be executed so far as to take the ornaments out of the possession of the plaintiff and recover the amount of the costs, and should then hold the same for the benefit of whoever may ultimately be found to be entitled thereto. No doubt this is a sound argument, but up to the present that Court has not been asked to do this. It will be time enough to come here when that Court has been asked and has refused to do so. We dismiss the appeal with costs.

Appeal dismissed.

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23 B. 626 = 1 Bom. L. R. 384.

[626] TESTAMENTARY AND INTESTATE JURISDICTION.

Before Mr. Justice Starling.

MOWJI DHARAMSEY, *Plaintiff v.* NEMCHAND NARANJI AND OTHERS, *Defendants.* * [18th March, 1899.]

Practice—Commission—Application by a defendant (caveator) to examine witnesses on commission—Civil Procedure Code (Act XIV of 1882), Chap. XXV.

Where a defendant (caveator) applied for the issue of a commission to examine witnesses, the Judge having regard to the circumstances of the case and to the principles laid down in *Berdan* v. *Greenwood* (3) refused the application.

THE plaintiff applied on the 5th December, 1898, for letters of administration to the estate of one Vassonji Harrakchand, who was alleged

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* Testamentary Suit No. 1 of 1899.

(1) P. J. (1890), p. 249. (2) 17 M. 394. (3) (1880) 20 Ch. D. 764, foot-note (3).

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to have died intestate at Porbandar in Kathiawar on the 15th December, 1894. In his petition he alleged that he was one of the three nephews and heirs of the deceased, and that there was no other nearer relative living.

On the 21st December, 1898, the defendants Nemchand Naranji and Bhimji Ramdas filed a caveat, alleging that the deceased had left a will, and that they were the executors appointed thereby.

On the 10th January 1899, another caveat was filed by the defendant Kalidas Vandravandas, also stating that the deceased Vassonji had left the will alleged by the other caveator Nemchand Naranji. He further alleged that by the said will Vassonji had left his property to his wife Mankuverbai, who had accordingly taken possession of it and enjoyed it until her death in January, 1898, that she left a will whereby she appointed him (Kalidas) and one Devchand Ramchand his executors. He claimed that all the property of Vassonji which had come to Mankuverbai had now vested in him and his co-executor.

The original will was not forthcoming. Each caveator alleged that it was in the possession of the other, and that he himself had only a copy of it.

The defendant (caveator) Nemchand now applied for a commission to Porbandar to examine the persons who, he alleged **[627]** were witnesses to the will and who would prove its execution. He obtained a Judge's summons on 28th February, 1899, calling on the plaintiff to show cause why a commission should not issue.

Macpherson, for the plaintiff showed cause.

Lowndes in support of the summons.

Vicaji, for the third defendant.

JUDGMENT.

STARLING, J.—In this suit the plaintiff, Mowji Dharamsey, as one of the nephews and reversionary heirs of the deceased Vassonji Harrakchand, seeks for letters of administration to his uncle's estate on the death of the widow, his aunt.

The first two defendants have filed a caveat on the ground that the deceased did not die intestate, but left a will. The third defendant Kalidas Vandravandas files a caveat on the same ground. The will, however, is not forthcoming, each set of defendants alleging that it is or should be in the possession of the other, and both sets alleging that they possess a copy of the will, the two copies, however, differing from each other in one important point at least.

Under these circumstances the first set of defendants apply for a commission to Porbandar to examine their witnesses not *viva voce* but on interrogatories in order to prove the existence and contents of the will, on the ground that they cannot procure their attendance in Bombay, an application which is opposed by the plaintiff.

The case of the defendants as to the existence of a will is, on the face of it, suspicious, and to make it more so, after I had offered on Saturday to examine to-day two witnesses (one of them being the same Kalidas Vandravandas mentioned above), who were stated to be in Bombay, it was announced that they had gone away by the morning train. Saturday was known by Kalidas Vandravandas to be the day for the hearing of the summons, for he had instructed Mr. Viccaji on his behalf, although the summons had not been served on him, and it was not unlikely that an order for the examination *de bene esse* of witnesses then in Bombay would have at once been made.

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I adjourned the hearing till to-day to enable me to look into the English cases, and I have done so, and it seems to me [628] that the case of *Berdan* v. *Greenwood* (1) lays down a number of principles which are directly applicable to the present application. That was a case in which the plaintiff applied for his examination on commission on the ground that he was suffering from fatty degeneration of the heart and that a passage across the Channel would very probably cause his death. I will [now] refer to the principles laid down by the Court of Appeal in that case (pp. 765, 766 and 768). Baggallay, L. J., said :—

"We must regard the interests of justice, the interest of the defendants as well as that of the plaintiff, and of course we must consider the nature of the issues which are raised in the pleadings.

"One can well imagine the extreme importance to the defendants, in a case of this kind, of having the fullest opportunity of thoroughly investigating the claim and testing by cross-examination the witnesses who are called [to prove that the alleged services were rendered].*

"I am very unwilling to express any opinion upon the question which has been so much argued, the credibility of General Berdan, but in considering whether the examination of a witness should be taken by commission, we must have regard, at any rate, to the possibility of his not being a credible witness. If the witness is a credible witness, it is hardly material whether he gives his evidence *viva voce* in Court or before a comisssion, or by affidavit, or in any other form. But we must assume the possibility of his not being a credible witness, and then it becomes of the most extreme importance that the jury or the Court which has to decide the question should have the opportunity of seeing the demeanour of the witness, and observing the way in which the various questions which are put to him in cross examination are answered."

† ["Now it has been suggested that the questions, for cross-examination of the plaintiff (assuming that the commission is to issue) have been put in a form which does not indicate any very searching inquiry, or anything as to which there might be any great advantage in his giving his answers before the jury rather than before the commissioners, who would report the effect of the answers. But it must be borne in mind that when cross-examinations of this sort are made, the answer to one question is suggestive of other questions, and unless the whole body of legal advisers of the defendants, are to go over and attend the commission, so that they may be prepared to meet any possible emergency which may arise in the course of the cross-examination, it does not appear to me that there would be the same facilities of cross-examination before the commission as there would be if the witness were here giving his evidence in Court."]

Cotton, L. J., said :—

"But we ought to consider not merely what the plaintiff's case requires, but what justice to the defendant as well as to the plaintiff requires. And in such a case as this it is, in my opinion, eminently important that the demeanour of the witness should be seen and his precise answers to the questions put to him should be heard by the Judge, or the Judge and jury, who have to decide the case, and that the defendants should have the fullest opportunity of cross-examining him, they being

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*[Words and phrases in rectangular brackets are portions of judgment not found in I. L. R.—ED.]

† Portion of judgment not found in I. L. R.—ED.

(1) (1880) 20 Ch. D. 764 foot-note (3).

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really only able to do that effectually when the witness is in Court, and his demeanour, and the way in which he answers the questions can be judged of by the Judge and by the jury."

Now taking into account the case of the plaintiff and also that of the defendants, taking into account, the fact that the will itself is not forthcoming, and that the copies which are alleged to exist do not agree with each other, and taking into account the fact [629] that these witnesses will not give their evidence nor be cross-examined *viva voce* (the last a point much relied upon in *In re Boyse*, *Crofton* v. *Crofton* (1) ; taking also into account the fact that two of the witnesses now sought to be examined on commission have recently been in Bombay and only went away on last Saturday morning, so that it is evident that, if the applicant had been so minded, he might have had them examined here *de bene esse* last week: also taking into account that it is not clear on the affidavits that it will be impossible to get the witnesses to come to Bombay for the trial, or that the applicant may not be able to examine some of them *de bene esse* in the meantime, if they should visit Bombay, (for it is evident that some do come here from time to time), and applying to these facts the principles laid down in the cases I have already cited, I have come to the conclusion that it is not in the interests of justice that these witnesses should be examined in the way it is proposed, and that, using a judicial discretion, it is my duty to refuse to grant the commission asked for.

The summons will, therefore, be dismissed with costs. Counsel certified for.

Summons discharged.

Attorneys for plaintiff.—Messrs. *Mansuklal, Damodar and Co.*
Attorneys for defendants.—Messrs. *Bicknell, Merwanji and Motilal.*

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ORIGINAL CIVIL.

Before Mr. Justice Starling, and, in appeal, before Sir L. Jenkins, Chief Justice, and Mr. Justice Candy.

LUXUMIBAI (*Plaintiff*) *v.* HAJEE WIDINA CASSUM (*Defendant*).*

[28th March, 18th August, 1899.]

Practice—Arbitration—Order of reference to arbitration—Civil Procedure Code (Act XIV of 1882), s. 506—Jurisdiction—Absence of written authority to refer.

By a Judge's order consented to by the plaintiff and defendant this suit was referred to arbitration on the 13th December, 1898. In the following January [630] and February two meetings were held before the arbitrator which were attended by the defendant and the managing clerk of his then attorney, and he took an active part in the proceedings. Subsequently the defendant changed his attorney and declined to proceed with the arbitration, contending that the order of reference was illegal, inasmuch as no special authority in writing was given by the parties to their attorneys to obtain the order, as required by s. 506 of the Civil Procedure Code (Act XIV of 1882). He took out a summons to set aside the order.

Held, (dismissing the summons) that the absence of a written authority did not invalidate the order of reference.

[R., 30 A. 32=4 A.L.J. 691 (693)=27 A.W.N. 273 ; 9 Ind. Cas. 412 (413).]

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* Suit No. 196 of 1897 ; Appeal No. 1025.

(1) (1882) 20 Ch. D. 764.

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IN chambers. Summons taken out by the defendant, dated 17th March, 1899, calling on the plaintiff to show cause why an order dated 13th December, 1898, referring this suit to arbitration should not be set aside.

This suit was brought by the plaintiff to recover damages for breach of an agreement. In December, 1898, the parties agreed to refer the suit to arbitration, and by a consent order dated 13th December, 1898, the suit was referred by Russell, J., to two arbitrators therein named. In January and February, 1899, two meetings were held before the arbitrators which were attended by the defendant and the managing clerk of his then attorney, and the defendant took an active part in the proceedings.

Subsequently, however, the defendant changed his attorney and declined to proceed with the arbitration, contending that the order of reference was illegal, inasmuch as no special authority in writing had been given by the parties to their attorneys to obtain the order of reference as required by s. 506 of the Civil Procedure Code (Act XIV of 1882).

On the 17th March, 1899, the defendant took out the above summons.

Lowndes, for plaintiff showed cause.—Even if the defendant was at one time entitled to have the reference set aside, he is not so now—*Unniraman* v. *Chathan* (1). He attended two meetings—*Halimbhai* v. *Shanker Sai* (2); *Ardesar H. Wadia* v. *Secretary of State for India* (3); *Wynne* v. *Edwards* (4); *Sultan Muhammad* v. *Sheo Prasad* (5). He also cited *Jogeesur* v. *Kulyanee* (6).

[631] *Scott* for defendant, *contra*. He cited the following cases.—*Pestonjee Nusserwanjee* v. *Manockjee* (7); *Nusserwanjee Pestonjee* v. *Meer Mynodeen Khan* (8); *Jeyasankira Devi* v. *Nagannada Devi* (9); *Kishna Ram* v. *Suhodra Bebee* (10).

STARLING, J.—In this case the plaintiff and defendant through their attorneys agreed to refer the suit to arbitration, and a Judge's order was by consent of both attorneys signed in order to carry out that agreement. It is quite clear from the letters annexed to the affidavits of Pandurung Shamrao Laud that there was a considerable amount of correspondence between the attorneys to the parties about the terms of the reference of which the defendant was cognizant, and that he agreed to the order of reference as finally settled. This he does not deny; but he alleges that, as he did not sign a special authority to his attorney to sign the consent order, that order is not binding upon him, and ought to be set aside. Between the date of the order of reference and the defendant's application to have it set aside, two meetings of the arbitrators were held at which the defendant was apparently present; at the first of which, copies of the plaint and the written statement were given to the arbitrators and the case was explained to them, and at the other a witness was called and produced the agreement between the plaintiff and defendant upon which the suit was based, but at neither of these meetings did the defendant make any objection to the arbitration proceeding. After that, he changed his attorney two and half months after the date of the order of reference, sent notices to the plaintiff and to the arbitrators withdrawing his assent to the arbitration, and finally took out the present summons.

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(1) 9 M. 451. (2) 10 B. 381. (3) 9 B. H. C. R. 177.
(4) 12 M and W. 708 (712). (5) 20 A. 145.
(6) 24 C. W. R. 41. (7) 12 M. I. A. 112. (8) 6 M. I.A. 134 (155).
(9) 1 M.H.C. R. 106. (10) N. W. P. S. D. R. (1863), 127.

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Mr. Scott relied upon the words of s. 506, Civil Procedure Code, which provide that where a party is not present in person, his pleader must be specially authorized in writing to consent to a reference, and argued upon the authority of *Nusserwanjee* v. *Meer Mynoodeen Khan* (1) that this was a special jurisdiction given in special terms by an Act of the Legislature, and that in order to give the jurisdiction, every one of those terms [632] must be complied with. No doubt that is a decision to which I must bow if it is applicable to this case ; but I may remark that the facts of that case and the regulation which was being interpreted are not quite on all fours with the present facts and Act. I can find no reported case in which such a contention as the present one has been raised during the pendency of an arbitration. Mr. Lowndes has, however, referred to several, in which the objection has been made to an award on the ground that the pleader of the unsuccessful party was not authorized in writing to consent to the reference—*Unniraman* v. *Chathan* (2) ; *Halimbhai* v. *Shanker Sai* (3) ; *Ardesar* v. *Secretary of State for India* (4). Besides these I have found the case of *Saturjit Pertap* v. *Dulhin Gulab* (5), in which the case of *Unniraman* v. *Chathan* (2) was approved and followed. In all these cases, the Courts refused to set aside the award on the ground that the reference was not authorized personally in Court by the party complaining or by a pleader specially authorized in writing. Mr. Lowndes also referred to the case of *Jogessur* v. *Kulyanee* (6) in which it was held that the corresponding section of the Code of 1859 was an enabling section and that the acts of the parties *sui juris* ought to be interpreted liberally.

I feel that this is a point of some difficulty, but at the same time I am not disposed to assist a party who has agreed to an order of reference, and has gone on with the arbitration under it to a certain extent, in turning round and saying he is not bound by it for no other reason than that he has not signed it, for there is no doubt that, if he had signed it, he could not now have backed out of it. The principles laid down in the cases cited by Mr. Lowndes seem to me to be applicable to the present case, and I shall, therefore, follow them. Besides this, although the point was not argued before me, I am inclined to think that when a party has seen an order, and authorized his attorney to consent to it, even though he does not sign it, that writing may be regarded as a special authorization in writing to his attorney to consent to the terms referred to therein.

[633] I must, therefore, dismiss the summons with costs. Counsel certified for.

The defendant appealed. It was urged that there had been no valid reference to arbitration : that by reason of the non-observance of the formalities prescribed by s. 506 of the Civil Procedure Code (Act XIV of 1882) the Judge in chamber (Russell, J.) had no jurisdiction to refer the the matter in question in the suit to arbitration under Chap. XXXVII of the Civil Procedure Code (Act XIV of 1882), and that the absence of the prescribed formalities could not be cured by any conduct of the defendant not amounting to a compliance with such formalities.

The appeal was heard by Jenkins, C. J., and Candy, J., on 18th day of August, 1899.

Scott (Acting Advocate General) for the appellant (defendant).

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(1) 6 M.I.A. 134 (155). (2) 9 M. 451. (3) 10 B. 381.
(4) 9 B. H. C. R. 177. (5) 24 C. 469 (472). (6) 24 W. R. 41.

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Macpherson for the respondent (plaintiff).

In addition to the authorities cited in Chambers the following were cited :—Maxwell on Statutes, p. 518; *Andrews* v. *Elliott* (1); *Barker* v. *Palmer* (2).

JUDGMENT.

JENKINS, C. J.—This is an appeal from an order of Mr. Justice Starling refusing an application to have the suit set down on the board of causes for trial.

The point on the appeal is whether a reference to arbitration directed by an order passed by Mr. Justice Russell on the 13th December, 1898, is void by reason of non-compliance with the terms of s. 506 of the Code of Civil Procedure.

It is clear that the Court has no power of its own motion to order a reference, and it can only do so under the provisions of Chapter XXXVII of the Code of Civil Procedure. The power to make the order is given by s. 508, and s. 506 contains the provisions as to how the order is to be applied for. From that section it appears (1) that all the parties to the suit must desire a reference, (2) they must all apply to the Court for an order of reference, (3) they must apply either in person or by their respective pleaders specially authorised in writing, (4) the **[634]** application must be in writing, and state the particular matter sought to be referred.

Now in this case the defect exists only in respect of one of these four heads. It is beyond all doubt that all the parties in this case desired a reference. I think, too, it may be said that there was a sufficient application in writing to satisfy the requirements of the section, and it is also clear that all the parties made the application by their attorneys and that those attorneys were specially authorised in that behalf. It has not been suggested before us that respondent's attorney was not duly authorised : so, I therefore assume, no question arises on that head, and it is shown that the appellant knew before the order was made of its proposed terms accurately and precisely ; gave instructions for the application, and after the order was passed, he became aware of it and acted on it by attending two meetings convened by the arbitrator. The only defect is that the authorisation (the existence of which is beyond all question) was not expressed in writing. What, then, under the circumstances of the case is the consequence of that defect ? Now I feel no doubt that the Court could, on the score of it, have declined to make the order, and, if it had been brought to its notice, would probably have done so. As a matter of fact, attention was not called to the defect, and the order was made. But is the appellant entitled to come to the Court now and ask for an order which can only be made if Mr. Justice Russell's order—from which no appeal was preferred—be treated as a nullity, simply by reason of this defect ? For, the Advocate General has very candidly admitted that he relies on this defect alone, and that it is of a purely technical character. Ought the section to be so construed as to attribute to the provision for written authorisation so mandatory a character as that failure to observe it must result, under all circumstances, in a complete nullification of the order and all consequent proceedings ? While recognising to the full the desirability of a written authority, a desirability, which is the more obvious in the mofussil than in the

(1) (1855) 25 L. J. (Q. B.) 1 ; 5 Ell. and Bl. 502. (2) (1881) 8 Q. B. D. 9.

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High Courts, I am unable to come to that conclusion. I think the provision is one which properly comes within the rule that consent cures errors, and that under appropriate circumstances the defect is not fatal. [635] In support of his view the Advocate General has relied on *Nusserwanjee Pestonjee* v. *Meer Mynoodee Khan* (1) and more particularly on the principle enunciated at p. 135. It has been said that case is distinguishable in that it did not deal with the section now in hand, but I would not seek to distinguish it on that ground, because the principle it lays down is of universal application. It appears to me, however, that the facts of this case do not invite the application of the principle. There no order had been made, but it simply was that the parties had proceeded with their reference under a document which was deficient in a material particular, and when the Court was asked to act on it, the application was refused as it was not made on proper materials. That case was in fact at the stage this one was when Mr. Justice Russell made his order. Here, however, the matter has advanced a stage further; the order has actually been made and the case has reached that point at which it may be asked whether the rule that consent cures error should not be applied. I am fortified in this conclusion by a later decision of the Judicial Committee also reported in the same volume—*S. B. Haines* v. *The East-India Company* (2), or perhaps it would be more correct to say by the cases of *Tyerman* v. *Smith* (3) and *Andrews* v. *Elliott* (4) and in error at p. 3, where the rule to which I have referred was applied in a state of facts bearing an essential resemblance to the present. It is to be noted in this connection that in both the cases in Moore the opinion of the Board was expressed by Sir John Patteson.

Having then come to the conclusion that the defect is not fatal it only remains to consider whether in this case the facts justify us in treating it as cured. This is a point on which each case must be governed by its own circumstances, and here I think there can be no doubt that we ought not to allow the technical objection to prevail. The appeal will, therefore, be dismissed and the order of Mr. Justice Starling affirmed with costs.

Before parting with the case I should say that Mr. Macpherson at one time suggested that there might be a preliminary objection that no appeal would lie, but, as he did not press this objection [636] or present any argument in support of it, I have not thought it necessary to deal with it in disposing of the appeal.

CANDY, J.—I concur. I think the absence of a writing in this case does not make the order invalid. The vital point according to the section is the desire of the parties that the order should be made, and there is no doubt that in this case that desire existed.

Appeal dismissed with costs.

Attorneys for plaintiff.—Messrs. *Smetham Bland and Noble.*
Attorneys for defendants.—Messrs. *Thakurdas, Dharamsi, Cama and Hormasji.*

(1) 6 M.I.A. 134.
(2) 6 M.I.A. 467.
(3) (1855) 25 L.J. (Q. B.) 359.
(4) (1855) 25 L. J.(Q.B.) 1.

23 B. 636=1 Bom. L.R. 123.

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APPELLATE CIVIL.

23 B. 636=1 Bom. L.R. 123.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

GANPAT VENKATESH DESPANDE (*Original Plaintiff*), *Appellant* v. GOPALRAO VENKATESH DESPANDE AND OTHERS (*Original Defendants*), *Respondents.** [20th February, 1899.]

Partition—Son born after partition—Right of such son to partition—Share of such son—Family arrangement—Limitation—Hindu law.

In the year 1875, one Venkatrav having at that time three sons, *viz.*, defendants Nos. 1, 2 and 3, divided his property, allotting one-third to the first defendant and retaining the remaining two-thirds in his own possession in the interest of his other two sons (defendants Nos. 2 and 3), who were then minors. The latter continued to live with him, and he managed the property. The first defendant was the son of Venkatrav's elder wife and the second and third defendants were the sons of his younger wife. In 1880 the plaintiff was born and in 1894 he brought this suit by his mother (the younger wife) as next friend for a partition of the whole of Venkatrav's property, including that which in 1875 had been allotted to the first defendant. The plaintiff claimed a fourth share.

Held, that the plaintiff was not entitled to any part of the property which had been given to the first defendant in 1875. The family arrangement then made had been acquiesced in for more than twelve years and could not be disturbed. The plaintiff could only claim against defendants Nos. 2 and 3, who lived with their father in union and with whom the plaintiff himself had lived as member of a joint family.

[R., 33 B. 267=10 Bom. L.R. 778 (780); 9 Ind. Cas. 834]

APPEAL from the decision of Rao Bahadur G. V. Bhanap, First Class Subordinate Judge of Dharwar.

Suit to set aside a prior partition and for a fresh partition.

[637] The plaintiff was the youngest son of Venkatrav Despande and was born in 1880. Venkatrav Despande had two wives, the elder of whom was the mother of one son (defendant No. 1) and the younger of whom was the mother of the plaintiff and two other sons (defendants Nos. 2 and 3).

In 1875 (*i.e.*, four years prior to the birth of the plaintiff) Venkatrav, having then only three sons (defendants Nos. 1, 2, 3) and having disagreed with defendant No. 1 (the eldest of them), made a division of his property and gave a one-third share to the defendant No. 1, and retained the remaining two-thirds in his own possession in the interest of his other two sons (defendants Nos. 2 and 3). These two sons were then minors. Venkatrav continued to live with them and to manage the property until his death.

In 1894 the plaintiff, who was then still a minor, brought this suit claiming a fourth share of the whole of his father's property, including that which had been allotted to defendant No. 1 in 1875 as well as that retained by Venkatrav for defendants Nos. 2 and 3. He prayed that the partition effected in 1875 might be declared cancelled, and he claimed mesne profits. He contended that he was not bound by the partition in 1875, as Venkatrav's wife was then capable of bearing children, and Venkatrav was, therefore, not competent to make a partition.

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* Appeal No. 64 of 1898.

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The first defendant contended that the share allotted to him in 1875 was exempt from a fresh partition; that he had been ever since that time in undisturbed possession as owner; that the plaintiff's claim should be limited to that portion of the property which was in the hands of his (plaintiff's) full brothers (defendants Nos. 2 and 3).

Defendants Nos. 2 and 3 admitted the claim and prayed that their respective claims should be awarded to them separately.

Defendants Nos. 4 to 23, some of whom did not appear, resisted the claim on the ground that they were alienees, either by purchases or mortgages, of parts of the properties from defendants Nos. 1, 2 and 3.

The Subordinate Judge disallowed the claim as against defendant No. 1. He passed a decree directing the plaintiff to recover [638] one-third share from the property in the possession of defendants Nos. 2 and 3, after paying one-third share of the debts due by them.

The plaintiff appealed. Pending the appeal he attained majority and the name of his next friend was struck off the record.

Branson (with *Daji A. Khare*), for the appellant (plaintiff).—The Judge erred in rejecting our claim for the cancellation of the partition of 1875. At the time of that partition our mother had not passed the stage of child-bearing, and consequently the partition then made cannot stand to our detriment. The authorities are quite clear and they show that we are entitled to a fourth share in the whole property including that allotted to defendant No. 1, as well as that retained for defendants Nos. 2 and 3. The Judge held that our claim to a share in the property allotted to defendant No. 1 cannot lie. This is not a correct view. We are entitled to have the partition re-opened—Mayne's Hindu Law, para. 431; Colebrook's Hindu Law, Vol. II, p. 268; *Krishna* v. *Sami* (1); *Chengama* v. *Munisami* (2). The partition deed of 1875 shows that the immoveable property only was divided and not the moveable. We, therefore, contend that the alleged partition was merely a family arrangement made for the purpose of settling quarrels between the father and one son. The arrangement was not by itself a partition.

Inverarity (with *Manekshah J. Taleyarkan*), for respondent No. 1 (defendant No. 1).—The view taken by the Judge as to the plaintiff's position according to Hindu law is correct. The partition effected by Venkatrav in 1875 is binding on him. The plaintiff is entitled to recover only a share in the property which was in his father's hands at the time of his birth—*Yekeyamian* v. *Agniswarian* (3); *Nawal Singh* v. *Bhagwan Singh* (4). If the allegation of the plaintiff be correct that his father retained only moveable property, then these rulings show that he can take a share in that property only, and has no right to a share in the immoveable property. If Venkatrav had made a *bona fide* alienation of a portion of the property to a stranger before the plaintiff's birth, [639] such an alienation would have bound the plaintiff—*Rambhat* v. *Lakshman* (5). The cases of *Krishna* v. *Sami* (1) and *Chengama* v. *Munisami* (2) do not apply.

Dhondu P. Kirloskar, for respondents Nos. 7, 8, 11, 12 and 16 (defendants Nos. 7, 8, 11, 12 and 16).

(1) 9 M. 64. (2) 20 M. 75. (3) 4 M.H.C.R. 307.
(4) 4 A. 427. (5) 5 B. 630.

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23 B. 636 = 1 Bom. L.R. 123.

JUDGMENT.

RANADE, J.—The appellant, who is now major, brought this suit as minor by his next friend, his mother Lakshmibai, against his step-brother and two full-brothers (respondents Nos. 1, 2, 3) and others claiming through them, to cancel a partition made in 1875 in his lifetime by their father Venkatrav five years before appellant was born, by which partition a third share in ancestral family property had been assigned to respondent No. 1, and the remaining two-third share had been retained by Venkatrav for the use of the respondents Nos. 2, 3 (who were then minors) in his own possession. Appellant also sought a re-partition of his one-fourth share in all the ancestral property.

Respondents Nos. 2 and 3 offered no opposition to the claim, but only asked for a separation of their own shares in the whole of the property.

Respondent No. 1 contended that the appellant had no right to sue him for a cancellation of the partition effected in 1875, and that the claim was time-barred. The appellant might sue his full-brothers and obtain a partition of his one-third share from them.

The lower Court held that this contention of respondent No. 1 was well-founded, and, while rejecting appellant's claim for cancelling the partition of 1875 as against respondent No. 1, it allowed the claim of the appellant as against his full-brothers, respondents Nos. 2 and 3, and directed that appellant might recover his one-third share of the property in their possession after paying one-third share of the debts due by them.

In the appeal before us, it was contended that, as an afterborn son, appellant had a right to the relief claimed by him, namely, a cancelment of the partition of 1875, and a repartition **[640]** of his one-fourth share in the entire property in the possession of the respondent No. 1, as also of the respondents Nos. 2, 3. The appellant's counsel placed his reliance chiefly on two decisions of the Madras High Court. In the first of these decisions—*Krishna* v. *Sami* (1)—the question in dispute related to the right of the sons of a person, disqualified by reason of his being deaf and dumb, to claim a share with their uncles in the property of their grandfather in the life-time of their disqualified father, even though they were born after the death of their grandfather. This right had been negatived in two decisions of the Calcutta High Court—*Pareshmani* v. *Dinanath* (2) and *Kalidas* v. *Krishan Chandra* (3). Turner, C. J., distinguished these Bengal decisions as being governed by the law of the Dayabhaga, and held that, under the Mitakshara law, the sons of a disqualified sharer, though subsequently born, had a right to divest their uncles, and claim a share of the inheritance.

It will be at once seen that this Madras case did not involve any question as to the binding character of any partition already made, such as is the case in the present dispute. In the course of his judgment, Turner, C.J., referred to the analogy which exists between the right of a disqualified person to inherit, when he is cured of his malady, and the right of a son born after partition, and it was stated that "the son who is begotten and born after partition takes the share of his parents and acquisitions made after partition, or *if his father has reserved no share to himself*, he may call on his brothers to make up a share for him." It was contended by Mr. Branson that, in the present case, Venkatrav reserved

(1) 9 M. 64. (2) 1 B.L.R. (A.C.J.) 17. (3) 2 B.L.R. F.B. 103.

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no share to himself in the partition of 1875, and that, therefore, appellant, as his son begotten and born after partition, had a right to call upon all his three brothers to make up his one-fourth share. In the other Madras case also—*Chengama* v. *Munisami* (1)—the father had reserved no share to himself, and the High Court allowed the after-born son to claim a share from the separated brothers, not only in the property divided, but also in the accumulations made with the help of the divided property.

[641] If the present dispute had been a case of equal partition between brothers, and the father had reserved no share to himself, but had distributed his property between his three sons, there would be some force in the appellant's contention that the appellant, as an after-born son who could not fall back on his father's share or acquisitions, would have a right to claim repartition as against the brothers. The peculiar feature of this case, however, is that here there was no partition between the three sons of Venkatrav in which Venkatrav left no share to himself. The appellant-plaintiff in his plaint has stated that what really took place in 1875 was that Venkatrav, owing to his disagreement with respondent No. 1, who was his son by one wife, effected a division by giving one-third of his property to respondent No. 1, and retained the remaining two-third share in his own possession in the interest of his two other sons by a younger wife. These two sons were then minors, and he lived with them and continued to manage this property as owner till his death in 1890, and these two sons as well as plaintiff remained in union with him, and after his death, the respondents Nos. 2, 3 managed the property, and the appellant lived with his brothers and his and their mother. The so-called partition-deed brings out this fact very prominently. The deed is called a memorandum made with the full concurrence of the two persons, Venkatrav and respondent No. 1, who have signed it. It recites that, owing to differences, one-third share was separated, and given to respondent No. 1. The details of the lands so set apart are then mentioned, and the deed states that respondent No. 1 and Venkatrav were to recover the profits of the one-third and two-third shares, and pay the judi in proportion. The lands which had come to Venkatrav in right of his eldership were impartible, and, therefore, they were retained by him in his possession for life, but these eldership lands were to revert to respondent No. 1 after Venkatrav's death. The respondent No. 1 was next required to accept responsibility for one-third of the debts due by Venkatrav, and Venkatrav was to be responsible for his two-third share of the debts. The vatan lands were to be entered in respondent No. 1's name after Venkatrav's death, and the three brothers were to enjoy the vatans and **[642]** perform service in their turns. The moveable property was to remain in the possession of Venkatrav and respondent No. 1 as it was in their respective possession on the date of the division. Towards the end there is a re-affirmation of the object of the division, namely, that respondent No. 1's one-third share being separately allotted to him, no disputes remained. Venkatrav put himself forward as making the division of his own accord. The separate shares of respondents Nos. 2 and 3 are nowhere specified, and Venkatrav and respondent No. 1 secured the peace of the family by entering into an amicable arrangement by which respondent No. 1 got a one-third instead of a one-fourth share, but most of the eldership property remained with Venkatrav for his life. It was not, therefore, a case of equal division between brothers or sons in

(1) 20 M. 75.

which the father reserved no share to himself. Seeing that he was more than sixty years old at the time, and both his sons by the younger wife were minors, whose interests he would have to protect for the few remaining years that he expected to live, there was nothing surprising in Venkatrav's allotting one-third share to his eldest son. He could not well expect that another son would be born to him when he was nearly seventy years old. The arrangement made in 1875 was thus in every way fair and equitable, and it was acquiesced in as such by all the parties for over twelve years.

The father in a Hindu family has a right when he so desires to make a partition, and it binds his grown-up as well as minor sons. In *Kandasami* v. *Doraisami* (1), such a partition made by a father between two sets of his sons by different wives was upheld when it was shown to be *bona fide* and in conformity with Hindu law. Such a family arrangement once made is final, and cannot be re-opened on the ground of the inequality of shares—*Moro* v. *Ganesh* (2). In *Yekeyamian* v. *Agniswarian* (3), a father had adopted a son, and then a son was born to him. To prevent disputes between the adopted and natural born son, he allotted a certain portion of his property to the adopted son. More sons were born to him by another wife subsequently, and these sons sued the father and the adopted son and the first **[643]** natural born son for a share in the property. The claim was allowed as against the father and natural born son, but the High Court of Madras refused to disturb the arrangement made by the father in favour of his adopted son on the express ground that the evidence showed that the father had ample property to provide for all his after-born sons.

Even if the partition of 1875 had been between the three brothers, the Madras decisions would not apply to this case. The general rule of Hindu law, as expounded by the Mitakshara, Mayukha and the Smriti Chandrika, is that a son born after partition has no claim on the wealth of his separated brother. He has a preferential claim on the wealth of his parents. He can have a share of it with those brothers who lived in union with the father, or were reunited with him. The separated brothers have no claim over this distributed parental share. A partition is limited to the interests of the person demanding it, and has no enforced general operation against those who desire to live in union (4).

The somewhat vague texts of Vishnu and Yajnyavalkya, which direct separated brothers to give a share to an after-born son, apply to sons who have no provision made for them, and have further been explained by the commentators as applicable only to the case of posthumous sons. In the present case, there has been no partition between the brothers The father only cut off one of his sons with a separate provision, and retained the rest of the property in his own charge and management for the sons of his younger wife. All branches of the family gave effect to this understanding for over twelve years, and it cannot now be disturbed at appellant's instance. His claim can only be made against respondents Nos. 2 and 3, who lived with their father in union, and with whom he himself has been all along living as a member of a joint family. For these reasons, which are not exactly those assigned by the lower Court, we confirm the decree with costs.

Decree confirmed.

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(1) 2 M. 317. (2) 10 B.H.C.R. 444. (3) 4 M. H.C.R. 307.
(4) Brihaspati ; Manu, Chapter 9, verse 216. Gautama. W. and B., p. 366.

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[644] APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

BHAGAWAN RAMJI MARWADI (*Plaintiff*) *v.* GANU (*Defendant*).*

[27th February, 1899.]

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 44—Agreement filed under section and becoming a decree—Default in payment of instalments due under decree—Application to make decree absolute under s. 89 of Transfer of Property Act (IV of 1882)—Limitation Act (XV of 1877) sch. II, art. 179.

On the 21st October, 1894, the plaintiff and the defendant entered into an amicable agreement before a conciliator for payment of a mortgage debt due to the former by annual instalments. The agreement was forwarded to the Court on the 21st December, 1894, to be filed under s. 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). Default having been made in the payment of the instalments, the first of which became due on the 25th January, 1895, and which also was not paid, the plaintiff applied for execution by sale of the mortgaged property. The application was made on the 6th September, 1897, and it was struck off the file for some formal defect on the 18th November, 1897. Subsequently on the 10th October, 1898, the plaintiff, having applied for an order absolute for sale under s. 89 of the Transfer of Property Act (IV of 1882), questions arose as to the applicability of the section to agreements filed in Court under s. 44 of the Dekkhan Agriculturists' Relief Act and as to limitation.

Held, that (1) agreements filed under s. 44 of the Dekkhan Agriculturists' Relief Act, if relating to sale of mortgaged property, are subject to the provisions of s. 89 of the Transfer of Property Act (IV of 1882).

(2) Article 179, sch. II, of the Limitation Act (XV of 1877) applies to applications under s. 89 of the Transfer of Property Act.

Held, further, that in the present case the application of September 1897 should be treated as a step in aid of execution.

[**Appl.**, 24 A. 542 (544); **R.**, 31 B. 120=8 Bom. L.R. 963 (966); 33 C. 867=4 C.L.J. 141 (148); 25 M. 244 (288); 6 O. C. 114 (115); **Expl.**, 10 C.L.J. 91 (99).]

REFERENCE by Rao Saheb Janardan Damodar Dikshit, Subordinate Judge of Khed in the Poona District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff and the defendant entered into an agreement under s. 44 (1) of the Dekkhan Agriculturists' Relief Act (XVII of [645] 1879)

* Civil Reference No. 1 of 1899.

(1) Section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) as amended by Act VI of 1895:—

44. When the agreement is one finally disposing of the matter, the conciliator shall forward the same in original to the Court of the Subordinate Judge of the lowest grade having jurisdiction in the place where the agriculturist who is a party thereto resides, and shall at the same time deliver each of the parties a written [645] notice to show cause before such Judge, within one month from the date of such delivery, why such agreement ought not to be filed in such Court.

(2) The Court which receives the agreement shall in all cases scrutinize the same, and if it thinks that the agreement is a legal and equitable one finally disposing of the matter and that it has not been made in fraud of the stamp or registration laws, it shall, after the expiry of the said period of one month, unless cause has been shown as aforesaid, order such agreement to be filed; and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed, and from which no appeal lies.

(3) If the said Court thinks that the agreement is not a legal or equitable one or that it does not finally dispose of the matter, or that it has been made in fraud of the stamp or registration laws, it shall of its own motion issue process for the attendance of the parties, and if after such inquiry as may be deemed necessary the Court finds that such agreement is a legal and equitable one finally disposing of the matter, and

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before the conciliator of Khed on the 21st October, 1894. The circumstances under which the agreement was made were as follows :—On the 12th June, 1895, the defendant passed a mortgage-bond to the plaintiff for fifty rupees. The bond was payable on the 12th June, 1887. The debt not having been paid as agreed, the parties appeared before the conciliator and entered into the aforesaid agreement, which ran thus :—

"That the defendant should pay to the plaintiff Rs. 100 by instalments, that the first instalment of Rs. 16 should be paid at the end of the month of Poush Shak 1816 (25th January, 1895), and that the remaining amount should be paid in six yearly instalments of Rs. 14 each, payable at the end of Poush of every subsequent year; that, in default of payment of any of the instalments, the plaintiff should recover the whole amount due by sale of the mortgaged property, and that the deficiency, if any, should be recovered from the defendant personally."

The agreement was submitted to the Subordinate Judge, and the necessary steps having been taken as laid down by the Dekkhan [646] Agriculturists' Relief Act, it was filed on the 21st December, 1894, and under s. 44 *took effect as a* decree passed by the Court.

The defendant not having paid any of the instalments, the plaintiff on the 6th September, 1897, applied for the sale of the mortgaged property by presenting an application for execution in the form prescribed by s. 235 of the Civil Procedure Code (Act XIV of 1882). The application was registered, and a notice under s. 248 of the Civil Procedure Code was served on the defendant, but the plaintiff having failed to produce an extract from *Vasulbaki Patrak*, the application was struck off the file on the 18th November, 1897. Though the Transfer of Property Act (IV of 1882) came into force in the Bombay Presidency in January 1893, the practice of making an application for a decree absolute under s. 89 of the Act was not observed in the Court of the Subordinate Judge at the time when the darkhast was struck off. That practice having been subsequently introduced, the plaintiff on the 10th October, 1898, applied to have his decree made absolute.

The Subordinate Judge, being doubtful as to whether s. 89 of the Transfer of Property Act was applicable and also as to whether the application was within time, as no application of the kind was made within three years since the whole amount became payable on default in the payment of instalments, he submitted the following questions to the High Court :—

1. Are agreements filed under s. 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), if relating to sale of mortgaged property, subject to the provisions of s. 89 of the Transfer of Property Act ?

2. Does art. 178 or 179 of sch. II of the Limitation Act or any other rule of limitation apply to applications under s. 89 of the Transfer of Property Act ?

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that it has not been made in fraud of the stamp or registration laws, it shall order such agreement to be filed ; and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed, and from which no appeal lies.

(4) If, on the other hand, the said Court finds that the agreement does not constitute a legal or equitable agreement, or that it does not finally dispose of the matter, or that it has been made in fraud of the stamp or registration laws, it shall return the said agreement to the conciliator, and such conciliator shall thereupon be bound to furnish on demand to the parties or any one of them a certificate under s. 46.

(5) The Court may in any case, for reasons to be recorded by it in writing, from time to time extend the period of one month allowed for showing cause under this section.

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3. Can the darkhast of September, 1897, be considered as an application for execution, or a step in aid of execution, for the purposes of cl. 4 of art. 179 of sch. II of the Limitation Act ?

4. Can the execution of decrees proceed on applications for making decrees absolute? If not, what is the period of limitation for presentation of darkhasts, after the order absolute is made under s. 89 of the Transfer of Property Act ?

The opinion of the Subordinate Judge on the first question was in the affirmative, on the second in the negative, on the third in the negative, and on the fourth as follows :—

[647] The execution cannot proceed upon an application for making a decree absolute under s. 89, and that the period of limitation for presenting first darkhast for execution after the decree absolute is made is three years from its being made absolute under art. 178 of sch. II of the Limitation Act or art. 179 of the said Act.

Shivram V. Bhandarkar (*amicus curiæ*) for the plaintiff.—As to the first question we contend that the agreements mentioned therein are not subject to the provisions of s. 89 of the Transfer of Property Act. The question as to the applicability of the section becomes important on the point of limitation. If s. 89 applies, then the question arises, what is the period of limitation applicable to such an application as this. Under s. 44 of the Dekkhan Agriculturists' Relief Act the agreement itself becomes a decree. No fresh decree need be passed as contemplated by s. 89 of the Transfer of Property Act. The agreement in this case, which was filed and became a decree, was neither a suit for foreclosure nor for sale, while s. 89 of the Transfer of Property Act clearly contemplates such a suit.

[PARSONS, C. J. (Acting).—The plaintiff now asks that the property should be sold.]

No doubt the plaintiff asks for a sale, but we contend that the property can be sold by virtue of s. 44 of the Dekkhan Agriculturists' Relief Act and not under s. 89 of the Transfer of Property Act, because there was no decree absolute and there was no suit for sale.

Next as to limitation. If s. 89 of the Transfer of Property Act applies, then there is no period of limitation provided for such an application. It has been held that applications under s. 89 of the Transfer of Property Act are not applications under the Civil Procedure Code, and consequently they are not applications in execution of decrees.

Vasudev G. Bhandarkar (*amicus curiæ*), for the defendant.—As the decree was passed after the Transfer of Property Act came into force, s. 89 of the Act is applicable. Proceedings held before a conciliator stand on the same footing as an award made by arbitrators. It has been held that a decree passed on an award is governed by the provisions of s. 89 of the Act. Unless a decree is made absolute, there can be no execution of it. The **[648]** mortgagee must apply to the Court to pass an order for sale. Under s. 235 of the Civil Procedure Code, the mortgagee cannot at once ask for an order for the sale of the property. When an order absolute is made under s. 89 of the Transfer of Property Act, the mortgagor's right to redeem becomes extinguished.

As to limitation, we contend that the Allahabad rulings should be followed. An application to pass an absolute order would be a proceeding in execution, and, therefore, it would be governed by art. 179, sch. II of the Limitation Act. The term " execution " should be construed in reference to the provisions of the Civil Procedure Code, s. 244. The

original decree is merely a decree *nisi*. Under it the mortgagor may offer to redeem at any time before an order absolute is passed. The former application being not in accordance with s. 89 of the Transfer of Property Act, was not an application in accordance with law, and, therefore, it was not a step in aid of execution.

The following authorities were cited in argument:—*Bai Manekbai* v. *Manekji* (1); *Nandram* v. *Babaji* (2); *Hafizuddin* v. *Abdool* (3); *Ajudhia Pershad* v. *Baldeo* (4); *Tiluck Singh* v. *Parsotein Proshad* (5); *Tara Prosad* v. *Bhobodeb* (6); *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (7); *Elayadath* v. *Krishna* (8); *Ranbir Singh* v. *Drigpal* (9); *Chuni Lal* v. *Harnam Das* (10); *Muhammad Suleman Khan* v. *Muhammad Yar Khan* (11); *Ram Lal* v. *Narain* (12); *Oudh Behari Lal* v. *Nageshar Lal* (13).

JUDGMENT.

PARSONS, C. J. (ACTING).—The Subordinate Judge, in order to determine whether an application made to him was within time or not, has referred to this Court, under the provisions of s. 617 of the Civil Procedure Code, the following four questions:—

1. Are agreements filed under s. 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), if relating to sale of mortgaged property, subject to the provisions of s. 89 of the Transfer of Property Act?

[649] 2. Does art. 178 or 179 of sch. II of the Limitation Act or any other rule of limitation apply to applications under s. 89 of the Transfer of Property Act?

3. Can the darkhast of September, 1897, be considered as an application for execution, or a step-in-aid of execution, for the purposes of cl. 4 of art. 179 of sch. II of the Limitation Act?

4. Can the execution of decrees proceed on applications for making decrees absolute? If not, what is the period of limitation for presentation of darkhasts, after the order absolute is made under s. 89 of the Transfer of Property Act?

I am of opinion that such a general question as the 4th could not be referred, and that no one of the other questions can be said really to arise in the case.

The facts are these. The defendant had mortgaged his property to the plaintiff, and the plaintiff wanted his money. They applied to the conciliators, as they were bound to do under the provisions of the Dekkhan Agriculturists' Relief Act, and he effected an amicable settlement between them, the terms of which were as follows:—

"That the defendant should pay to the plaintiff Rs. 100 by instalments; that the first instalment of Rs. 16 should be paid at the end of the month of Poush Shak 1816 (25th January, 1895), and that the remaining amount should be paid in six yearly instalments of Rs. 14 each, payable at the end of Poush of every subsequent year; that, in default of payment of any of the instalments, the plaintiff should recover the whole of the amount due by sale of the mortgaged property; and that the deficiency, if any, should be recovered from the defendant personally."

The Court to which this agreement was forwarded under s. 44 of the said Act ordered it to be filed, and it then took effect as if it were a decree

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(1) 7 B. 213. (2) 22 B. 771. (3) 20 C. 755. (4) 21 C. 818.
(5) 22 C. 924. (6) 22 C 931. (7) 16 C. 246. (8) 13 M. 267.
(9) 16 A. 23. (10) 20 A. 302. (11) 17 A. 39. (12) 12 A. 539.
(13) 13 A. 278.

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of the said Court. The defendant made default in payment of the first instalment, and the plaintiff, on the 6th September 1897, asked for the sale of the property. Notice under s. 248 of the Civil Procedure Code was given to the defendant, but in consequence of some formal defect the application was struck off the file on the 18th November, 1897. On the 10th October, 1898, the plaintiff made the present application to obtain an order absolute for sale under s. 89 of the Transfer of Property Act, 1882.

The Subordinate Judge thinks that the application is within time, but, in order to know if he is right or not, he asks this **[650]** Court, first, whether agreements filed under s. 44 of the Dekkhan Agriculturists' Relief Act are subject to the provisions of s. 89 of the Transfer of Property Act. The only argument addressed to us against the operation of the section was based on the fact that there has been no suit for sale. I do not, however, see that that is a very important distinction. The case of *Tara Prosad* v. *Bhobodeb* (1) shows that the section applies to a decree passed on an award of arbitrators filed in Court, and there seems to me no reason why it should not apply to the award of a conciliator. The point, however, important as it may be on the question as to when the defendant's right to redeem becomes extinguished, has no bearing on the question of limitation which arises in this suit.

He next asks whether art. 178 or 179 of sch. II of the Limitation Act or any other rule of limitation applies to applications under s. 89 of the Transfer of Property Act. There is a consensus of authority that art. 178 does not apply—*Tiluck Singh* v. *Parsotein Proshad* (2); *Ranbir Singh* v. *Drigpal* (3) and *Bai Manekbai* v. *Manekji* (4). The Allahabad High Court held that art. 179 applies—*Oudh Behari Lal* v. *Nageshar Lal* (5) and *Chunni Lal* v. *Harnam Das* (6); while the Calcutta High Court held that there is no period of limitation for such applications (*Tiluck Singh* v. *Parsotein Proshad*). If I had to decide the point I should be inclined to agree with the Allahabad High Court and hold that the application to obtain an order absolute was a proceeding in execution falling within art. 179, and had, therefore, to be made within the time allowed by that article, counting from the date of the decree. Any positive decision, however, on the point is unnecessary.

The third question—"Can the darkhast of September, 1897, be considered as an application for execution, or a step-in-aid of execution, for the purposes of cl. 4 of art. 179 of sch. II of the Limitation Act?"—is based upon a misconception of the darkhast itself. If the Subordinate Judge had only avoided technicalities and treated it as what it really is, namely, an **[651]** application to the Court for an order for sale of the mortgaged property, all his difficulties would have disappeared. There is no particular magic in the word "absolute," and it is not necessary that the application for the order should state the Act or the section thereof under which it is made. In the case of *Ajudhia Pershad* v. *Baldeo* (7), the application was in words identical with the present one, and it was held to be a good one. I would hold the same in the present case. The application of October, 1898, therefore, made within three years of the former one, is not time barred even if art. 179 be held to apply to it. If that article does not apply, then no limitation whatever

(1) 22 C. 931. (2) 22 C. 924. (3) 16 A. 23. (4) 7 B. 213.
(5) 13 A. 278. (6) 20 A. 302. (7) 21 C. 818.

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applies, and the application cannot be time-barred. The above is, I think, a sufficient reply to all the questions put by the Subordinate Judge.

RANADE, J.—The first question contained in this reference relates to the point whether agreements under s. 44 of Act XVII of 1879, when filed in Court, are subject to the provisions of s. 89 of Act IV of 1882. The Subordinate Judge was of opinion that s. 89 of Act IV of 1882 was applicable, and I think his view is correct. It is true s. 2 of Act IV of 1882 expressly provides that nothing herein contained shall be deemed to affect the provisions of any enactment not hereby expressly repealed. Act XVII of 1879 is not among the repealed enactments, and, therefore, its provisions are not repealed. Section 74 of Act XVII of 1879, however, provides that, except in so far as it is inconsistent with the provisions of the Civil Procedure Code, that Code shall apply to all suits and *proceedings* under the Act. Act IV of 1882 and Act XIV of 1882 have to be read together as far as they relate to procedure. The provisions of Chap. XXXI of the Civil Procedure Code apply to the service of notice under s. 103 of Act IV of 1882. The prohibition contained in s. 43 of the Civil Procedure Code is controlled by the special provision of s. 67 of Act IV of 1882. Other parallel instances may be cited of the close relation that exists between the two Codes. (See ss. 6, 136, 97 of Act IV of 1882, and ss. 266, 292, 295 of Act XIV of 1882). So far, therefore, as the provisions of Act IV of 1882 relate to procedure, and they are not inconsistent with the special enactment **[652]** of 1879, these provisions control proceedings under the special Act. Of course, where, as in ss. 15-A, 15-B, 15-C, 15-D, 16, 20, 22, 70, the Dekkhan Agriculturists' Relief Act contains provisions directly inconsistent with those of the Transfer of Property Act, they are saved by s. 2 (*a*) of Act IV of 1882.

There is no such inconsistency between s. 44 of the Dekkhan Agriculturists' Relief Act and s. 89 of the Transfer of Property Act. When an agreement effected by conciliators in respect of a mortgage-debt is filed in Court, it has the effect of a decree, and, as such decree, it is amenable to the provisions which relate to other decrees directing the foreclosure or sale of mortgaged property. The substantive effect of these ss. 85—99 is to make ordinary decrees for foreclosure and sale decrees *nisi*, which allow an interval to the debtor to make the payment by requiring the creditor to apply for an order absolute before the mortgagor's right to redeem is for ever extinguished. This kind of relief it is one of the main objects of the Dekkhan Agriculturists' Relief Act to afford. There is, therefore, nothing inconsistent in the two sets of provisions. I would accordingly answer the first question in the affirmative.

The second question contained in the reference is whether art. 178 or 179 applies to applications made by a judgment-creditor under section 89 for an order absolute. There has been no decision of this Court on the point. In *Bai Manekbai* v. *Manekji* (1), it was, however, held that art. 178 only applies to applications under the Civil Procedure Code. The Calcutta and Allahabad High Courts have ruled that art. 178 does not apply to applications under s. 89. As regards art. 179, there is an apparent conflict of opinion between the decisions of the Allahabad and Calcutta High Courts. After a careful consideration of the authorities which were cited before us, I am inclined to accept the view of the Allahabad Judges. The Calcutta High Court, while laying down in *Puran Chand* v. *Roy Radha*

(1) 7 B. 213.

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Kishen (1), that arts. 178 and 179 did not apply to applications which were not made under the Code, has itself been led to observe in *Tiluck Singh* v. *Parsotein Proshad* (2) that if there is undue delay, the [653] Courts will hold it to be a proof of laches, and disallow such applications. There seems to be no sufficient reason for holding that an application under s. 89 is not an application for, or a step-in-aid of execution, and, as such, it must be treated as an application to which art. 179 applies. In the present case this second question does not properly arise, as the application of September, 1897, was admittedly made within three years from the date of the decree, and it prevents the bar of limitation. It was indeed contended that as that application did not expressly pray for an order absolute, but was made under s. 235, Civil Procedure Code, it was an order which had no legal effect and did not save limitation. This contention seems too technical to be entitled to any support. The judgment-creditor's present application of October, 1898, is obviously within time by reason of the proceedings he took in September, 1897.

The third question has been answered above.

The fourth question is apparently of a speculative character, and does not arise from the facts of the case. It, therefore, calls for no answer. It may, however, be suggested that there is nothing to prevent applications for an order absolute and for the execution of the darkhast from being made together or at short interval.

Order accordingly.

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23 B. 653 = 1 Bom. L. R. 88.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice and Mr. Justice Ranade.

PRANSUKHRAM DINANATH, A LUNATIC, BY HIS NEXT FRIEND, HIS WIFE BAI FULKOR (*Original Plaintiff*), *Appellant v.* BAI LADKOR AND ANOTHER (*Original Defendants*), *Respondents.** [1st March, 1899.]

Lunatic—Suit by wife as next friend, alleging husband to be a lunatic—Husband not an adjudged lunatic—Civil Procedure Code (Act XIV of 1882), s. 462—Act XXXV of 1858—Practice—Procedure.

Where a wife, alleging her husband to be of unsound mind, brought a suit as next friend, the Court ordered an inquiry (1) as to whether the husband was of unsound mind and (2) as to whether the suit was for his benefit.

[F., 33 C. 1094 = 4 C.L.J. 306 (310) = 10 C.W.N. 719; 3 L.B.R. 169 (172); 31 P. R. 1905 = 54 P.L.R. 1905; U.B.R. (1905) C.P.C. 30 (31); R., 24 M. 504 (508).]

[654] SECOND appeal from the decision of R. J. C. Lord, Assistant Judge with full powers at Broach, confirming the decree of Rao Saheb G. R. Gokhale, Subordinate Judge of Vagra.

The plaintiff, who was alleged to be of unsound mind, brought this suit by his next friend, his wife Bai Fulkor, to recover possession of certain property.

The defendants contended (*inter alia*) that the next friend had no right to bring the suit under s. 463 of the Civil Procedure Code (Act XIV of 1882), that the plaintiff had not been adjudged a lunatic; and that no certificate of guardianship had been obtained under Act XXXV of 1858.

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* Second Appeal No. 529 of 1898.

(1) 19 C. 132.

(2) 22 C. 924.

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The Subordinate Judge dismissed the suit, holding that the next friend was not entitled to maintain it, as there had been no valid adjudication of lunacy and she had not obtained a certificate under Act XXXV of 1858.

The Judge having confirmed the decree in appeal, the plaintiff preferred a second appeal.

Gokuldas K. Parekh, for the appellant (plaintiff).—There is nothing in Act XXXV of 1858 to prevent a suit being brought by a wife as next friend of her lunatic husband. The husband's property is to be protected, and the suit is for his benefit. It is true that no declaration with respect to the plaintiff's lunacy has been made, but such a declaration can be made at any time. Section 463 of the Civil Procedure Code is not exhaustive. It is just and equitable that such a suit should be allowed —*Nabbu Khan* v. *Sita* (1); *Porter* v. *Porter* (2); *Venkatramana* v. *Timappa* (3).

Kalabhai Lallubhai, for the respondents (defendants).—A suit at the instance of a next friend can lie only when a person is adjudged to be a lunatic under Act XXXV of 1858—*Tukaram* v. *Vithal* (4). We do not admit that the plaintiff is a lunatic. There has been no adjudication upon that point— *Beall* v. *Smith* (5).

JUDGMENT.

[655] PARSONS, C. J. (ACTING).—The question raised in this appeal is whether Bai Fulkor had a right to file the suit as the next friend of her husband, who was alleged to be of unsound mind, but had not been adjudged to be so under Act XXXV of 1858 or under any other law for the time being in force. In *Tukaram* v. *Vithal* (4), a Bench of this Court expressed an opinion to the contrary on the strength of the rule stated in Daniell's Chancery Practice, 6th Edition, Vol. I, p. 116. In a more recent case, a Bench of the Allahabad High Court decided the point in the affirmative—*Nabbu Khan* v. *Sita* (1). Their decision is based on the case of *Porter* v. *Porter* (2), and they point out that the rule on the subject in England is no longer the rule stated in Daniell's Chancery Practice. We see no reason why the principles of equity as applied in the practice of the Courts of England should not be observed in the Courts of this country in cases in which there is no law existent which lays down a different procedure. The Code of Civil Procedure is silent upon the point at issue here, and we must, therefore, act upon general principles and in conformity with the practice of the Court of Chancery (see *Venkatramana* v. *Timappa* (3)). The practice of that Court is clearly set out in the case of *Porter* v. *Porter* and in the other cases there cited. In it Cotton, L. J., says: "What is the principle on which the Court allows a person of unsound mind to sue by a next friend? Where the person is incapable of acting for himself, the Court allows any one of the Queen's subjects to take proceedings on his behalf as regards that which is *prima facie* for his benefit." Bowen, L. J., says: "It seems to me to be this that when there is a person of unsound mind, who, although not found to be of unsound mind by inquisition, nevertheless stands in need of the protection or the intervention of the Court as regards his property, real or personal, or as regards any portion of his property, then, supposing he would, if sane, be entitled to the intervention of the Court, a third person,

(1) 20 A. 2.
(2) 37 Ch. Div. 420.
(3) 16 B. 132.
(4) 13 B. 656.
(5) L. R. 9 Ch. 85.

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a stranger, may come forward and do that which is clearly for the benefit of the person of weak mind;" and in applying the principle he says: "The Court ought to be satisfied, so to speak, of the [656] title of the next friend to intervene, and it ought to be satisfied that the person is of unsound mind and that he stands in need of protection as regards his property, and it ought to be shown that it would be for his true interest that the Court should exercise its jurisdiction."

In the present case, the suit has been summarily dismissed, so that we do not know whether Pransukhram, on whose behalf the suit has been brought, is a person of unsound mind or not. That point will, therefore, have to be enquired into. The suit is brought to set aside certain deeds said to have been executed by him when of unsound mind, and under undue influence; it is, therefore, *prima facie* founded on a good and beneficial cause of action. In *Beal* v. *Smith* (1) it is said that the more common case of the Court's interference is where the incompetent person by his next friend seeks to set aside instruments or other gifts obtained by persons taking fraudulent advantage of his mental weakness. The point is one on which we must order enquiry in the circumstances of the present case, and we think, in the words of Cotton, L.J., in the above cited case, that the *onus* must be placed on those who suggest that the action is not duly constituted to show that it cannot be really for the benefit of the person of unsound mind. We, therefore, frame these issues, namely:—Is Pransukhram a person of unsound mind? Do the defendants prove that the suit instituted by his wife as his next friend is not for his benefit? and ask the Judge of the lower appellate Court to take evidence and find on them, and certify his findings to this Court within two months.

Issues sent down.

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23 B. 657 = 1 Bom. L.R. 92.

[657] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Tyabji.

IN RE NARAYEN SADASHIV KALE.* [1st March, 1899.]

Regulation II of 1827, s. 54—Pleader and client—Pleader's absence from Court owing to his temporary appointment as a Subordinate Judge—"Necessary cause."

On the day fixed for the hearing of a suit, neither the plaintiff nor his pleader was present; the defendant not having been served was also absent. Plaintiff's pleader, however, sent intimation to the Court in writing that he had been appointed to act as a Subordinate Judge, and as he was going that day to join his appointment, he was unable to attend the Court. He, therefore, requested that the case should be adjourned till his return, or that a notice be issued to his client to enable him to make the necessary arrangements for the conduct of his case.

Held, that the pleader, having been temporarily appointed to act as a Subordinate Judge, was unable to attend the Court in consequence of a "necessary cause" within the meaning of s. 54 of Reg. II of 1827; and as he had sent the necessary notification in writing to the Court, the suit should not be dismissed, but adjourned for a reasonable time.

REFERENCE by Rao Bahadur Gangadhar Vishnu Limaye, First Class Subordinate Judge of Belgaum, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

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* Civil Reference No. 2 of 1899.

(1) (1873) L. R. 9 Ch. 85.

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The reference was as follows :—

"The plaintiff sued for rent of a house. When it came on for hearing, the plaintiff and his pleader were called, but both were absent. The defendants not being served were also absent. A report of the pleader was later submitted to the Court, stating that being appointed to act as Subordinate Judge, he was going away that day to join his appointment, and requesting that all his cases should either be adjourned till his return, or, if this could not be conveniently done, a notice should be issued in each case to the party concerned to enable him to make the necessary arrangements for the conduct of his case."

The questions referred for the High Court's opinion were :—

1. Whether the procedure laid down in s. 54, cl. 1, of Reg. II of 1827, should be followed in such a case, or whether the suit should be dismissed for default?

[658] 2. Whether, if the said section be applicable to the case, it is necessary to issue a notice to the party concerned?

His opinion on the second question was in the negative.

Section 54 of Reg. II of 1827 provides as follows :—

"If a pleader is unable to attend the Court in consequence of indisposition or *other necessary cause*, he shall notify the same to the Court in writing, in which case proceedings in the suit shall be stayed for such time as the Court deems reasonable, to enable the party to transfer by endorsement or otherwise his power-of-attorney (either temporarily or until the suit is determined) to another pleader."

The reference was argued before a Division Bench (Candy and Tyabji, JJ.).

Sadashiv R. Bakhle, as *amicus curiæ*, for plaintiff.

Dattatraya A. Idgunji, as *amicus curiæ*, for defendants.

ORDER.

CANDY, J.—We think that the pleader, who was temporarily appointed to be a Subordinate Judge, was unable to attend the Court in consequence of a "necessary cause." Section 54 of Reg. II of 1827 was, therefore, applicable, and in accordance with the provisions of that section the pleader sent the necessary notification in writing to the Court. He could, under the circumstances, have appointed another pleader in his behalf under Civil Circular 18 (*i*), but according to the practice, which is apparently at present prevailing in the Sub-Court, a pleader who is unable to attend the Court, owing to his temporary appointment as a Subordinate Judge of another Court, is not bound to appoint another pleader to conduct his cases in the Court in which he was practising. As it is also the present practice for the Court to issue notices to the parties in cases falling under s. 54 of Reg. II of 1827, we think that there were in the case, now referred by the Subordinate Judge, reasons, which he could have recorded under s. 98 of the Civil Procedure Code, for not dismissing the suit.

Order accordingly.

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[659] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

JUGALKISHORE (*Original Defendant*), *Appellant v.* LAKSHMANDAS RAGHUNATHDAS AND OTHERS (*Original Plaintiffs*), *Respondents.** [2nd March, 1899.]

Civil Procedure Code (Act XIV of 1882), *s.* 539—*Public, religious and charitable trust—Charity—Hindu temple, with a* dharmashala *and* sadavart *attached to it—Trustee—Constructive trustee—His liability—Right to sue—Limitation.*

A Hindu built a temple in honour of the deity Shri Pandurang, to which were attached a *dharmashala* and a *sadavart* for feeding travellers and giving alms to the poor. For the maintenance of the temple and the charities connected with it, he dedicated certain property by a deed of gift, under which he constituted himself a trustee for life and appointed a *panch* to act as his successors in the trust. During his life-time he managed the temple as provided in the deed. On his death in 1867, the *panch* did not take charge, but his son (the defendant) assumed the management. The temple was open to the Hindu community.

In 1894 the *pujari* of the temple and five other worshippers of the idol filed this suit under s. 539 of the Code of Civil Procedure (Act XIV of 1882) with the sanction of the Advocate General, for removing the defendant from the management of the temple on the ground of his misconduct and mismanagement of the trust property.

The defendant pleaded (*inter alia*) that the property was not a public, religious and charitable trust; that he was not a trustee: that the plaintiffs had no right to sue, and that the suit was time barred.

Held, (1) that having regard to the fact that a certain number of the public had always used the temple, that there was attached to it a *dharmashala*, and that the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadavart*, the intention of the founder was to devote the property to public, religious and charitable purposes;

(2) that although the defendant was not appointed a trustee, yet by taking charge of the endowment, and purporting to manage it as temple property, he made himself a constructive trustee, and was liable, as such, to the beneficiaries;

(3) that the plaintiffs were entitled to maintain the suit under s. 539 of the Code of Civil Procedure (Act XIV of 1882);

(4) that the suit was not time-barred, as with every fresh breach of the constructive trust, or whenever the direction of the Court was deemed necessary, a fresh cause of action arose.

[F., 33 C. 789=10 C.W.N. 581; 2 C.L.J. 460 (471); 7 Ind. Cas. 270=216 P.L.R. 1912=181 P.W.R. 1912; R., 35 B. 470=13 Bom. L.R. 690=12 Ind. Cas. 30; 9 A.L.J. 709; 1 C.L.J. 73 (76); 11 Ind. Cas. 166; 7 S.L.R. 129=24 Ind. Cas. 712.]

[660] APPEAL from the decision of W. H. Crowe, District Judge of Poona.

Suit under s. 539 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiffs sued, with the sanction of the Advocate-General, under s. 539 of the Civil Procedure Code (Act XIV of 1882), for the removal of the defendant from the management of a public charity, and for the settlement of a scheme under the directions of the Court for the future management of the charity.

Plaintiffs alleged that there was a temple of Shri Pandurang in Poona which was built by defendant's father Purshotamdas Ambaidas, for the use of the public, about fifty years ago. To this temple were attached a *dharmashala* and a *sadavart*.

* Appeal No. 49 of 1898.

For the maintenance of this temple, for feeding travellers, and for giving alms to the poor, the defendant's father assigned certain property by a deed of gift, dated 18th December, 1859, under which he constituted himself a trustee for life, and appointed a *panch* to act as his successors in the trust after his death.

On 18th January, 1867, Purshotamdas executed another deed of gift by which he confirmed and ratified the provisions of the former deed, and appointed a *sarpanch* or head trustee, under whose advice and guidance the other trustees were to act in the management of the trust after his death.

Purshotamdas managed the trust property during his lifetime in accordance with the provisions of the deed of gift. He died in 1867.

On his death none of the trustees appointed by him took charge of the temple property. The defendant (the son of Purshotamdas) took possession of the property and continued in management till 1894, when the present suit was brought.

Plaintiffs alleged that the defendant was wasting and mismanaging the trust property, and was acting in total disregard of the interests of the charity. They, therefore, sought to remove him from the management.

Plaintiff No. 3 was the *pujari* of the temple, and plaintiffs Nos. 1, 2, 4, 5 and 6 were devotees and worshippers of the idol.

[661] Defendant pleaded (*inter alia*) that the property in dispute was not a public, religious and charitable trust; that the plaintiffs had no right to sue; that the suit was time-barred; that he was not a trustee of a public charity; and that s. 539 of the Civil Procedure Code (Act XIV of 1882) did not apply.

The District Judge overruled these objections, and held that the defendant's conduct was such that it was necessary, in the interests of the charity, to appoint trustees and settle a scheme for the future management of the trust. A scheme was accordingly framed under the directions of the Court, which was incorporated in the decree.

Against this decree defendant appealed to the High Court.

Dattatrya A. Idgunji, for appellant.

Nagindas Tulsidas for respondent.

JUDGMENT.

FULTON, J.—The circumstances out of which this suit has arisen are as follows :—

On the 18th December, 1859, one Purshotamdas executed a deed, the material portions of which are translated as follows :—

"I am become old and am aged about 71 years. As my first wife's son Jugalkishore *alias* Bapubhai does not conduct himself in obedience to me, I do not feel confident either that he will perform the service of the deity after my death or that he will be of any service to me. For these reasons, and because the property which I gave away in gift is my self-acquisition, I had no ancestral estate; all my belongings are my own acquisition—Knowing this, with the object that the estate should be devoted to good purposes for securing salvation, I give away in the name of Krishna to Shri Pandurang Murti, god of Gods, of my free-will and accord, the property moveable and immoveable, as set out below :—

"1. The temple which I have built.

* * * *

"All the above property is dedicated to Shri Pandurang Dev, the god of Gods. Neither I, nor any descendants, nor my creditors, nor anybody

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else has a right or claim to it. In the said temple there is a two-storied sopa for the *pujari* to lodge in. Now, the priests Keshavbhat and Bhaubhat and their mother Rajabai and Vithal live there whom I had appointed as the priests. But if they misconduct themselves, others are to be appointed in their stead. To defray the expenses of offerings to the deity and the light near the idol Rs. 3-8-0 are to be given away every month, and a *dhotarjoda* with Rs. 4 a year and to Rukhmini Rs. 5 and a *patal*. Thus with these items to defray [662] the expenses, the god's *nevadya* and *trikal puja* is performed. The *pujari* has no concern in the other things.

"The other expenditure to be incurred is as follows :—

"These are to be met by the rent realised from the houses mentioned above. After my death, the *panch* named below are to realise the rents of the houses and after incurring the expenses necessary for repairs, &c., to apply them to the above purposes. Out of the balance, travellers are to be fed and a *sadavart* is to be kept which I shall do during my life. After my death, the *panch* mentioned below are to conduct it.

"I have kept a shop in the name of Vithoba in the shop in which I live. The house is dedicated to Nathji, god of gods of Udeypur. The capital of the shop has been credited in the name of the gods. I have been serving as gumasta in this shop.

"The remuneration for that is Rs. 225, which I shall take and manage the shop with honesty and serve its interests. Shri Vithoba, god of gods, is the owner of the profits made in the business. I shall accordingly manage the shop during my life-time. And during my life-time I shall manage the property, both immoveable and moveable. After that the *panch* named below are to continue such management for ever. With this object, I have named the *panch*. * * The said *panch* are to realize the rent and to continue the *dharmakritya* for ever. After my death the above named *panch* should take the rent and spend the money with economy. None of them should misappropriate the amount or apply any part of it to his own use. The *panch* are to supervise the estate and its income and to spend as above detailed. This is all the right of the *panch*. Shri Pandurang is the owner of the whole estate including the shop.

* * * *

"During my life-time I shall manage the said houses, sites and the temple, realize the rents and spend them as above. After my death, the *panch* are to deal with them as owners. To the said houses, sites, temple, money, and jewellery and pots, neither I nor my heirs, descendants, creditors, or executors or wife or anybody else has any right. Shri Pandurang, god of gods, is the owner for ever. The *panch* are appointed to carry on the vahivat.

"The maintenance and support of my Jugalkishore *alias* Papubhai and my wife is provided for in my vyavasthapatra. All the details are set out therein.

Again on the 18th January, 1867, Purshotam executed another deed or vyavasthapatra to the following effect :—

"As the temple of Shri Pandurang has been built together with the out-house, &c., the same should be in working order. I, therefore, gave over in charity to Shri Pandurang three houses, together with the compound site. The said deed of gift was executed on Margshirsh Shud 9,

Shake 1781. I have no ownership over them. In order that the worship of the deity may be duly **[663]** performed and that there may be *naivedya*, &c., a sopa with two storeys has been built, &c.

In the deed of gift a *panch* is appointed to manage. Of these Shaligram is dead. Thus there are only four members of the *panch* and there is no *sarpanch*. I, therefore, appoint Viziarangam Aya the 5th *sarpanch*. The following gentlemen with the addition of Viziarangam as *sarpanch* are competent to realize the rents, remove tenants, &c. During my life-time I shall look to the management myself. After me the said *panch*, with the advice of *sarpanch*, shall continue the management. Nobody else is to have any voice in it."

Purshotam died in 1867. During his life-time he managed the temple as provided in the deed, but on his death the *panch* did not take charge, and his son Bapubhai assumed the management. In 1889, the members of the *panch* filed a suit to eject Bapubhai, but it was rejected as time-barred. However, in their decision on appeal, the High Court remarked that the question whether the defendant could in fact be regarded as a trustee for the temple and be removed for misconduct was not before them —*Kupuswami* v. *Jugalkishore* (1).

The present plaintiffs have now filed this suit as relators under s. 539 of the Civil Procedure Code, with the sanction of the Advocate General, and in the interlocutory judgment of the 15th April, 1896, this Court held that the claim was not barred by the decision in the former suit. We agree with the District Judge in thinking that, if there is a validly constituted trust created for religious purposes, the plaintiffs have such an interest therein as entitles them to sue with the consent in writing of the Advocate General. On this point we have nothing to add to Mr. Crowe's remarks.

The next question to be considered is whether Purshotam was competent to create the trust. In the deed of 1859 it is recited that the property is self-acquired, and the only evidence to contradict this statement is that of the defendant himself. This evidence is not, we think, sufficiently reliable to justify us in disbelieving the statement in the deed which more probably represents the real facts of the case. The defendant has never disputed the fact of the endowment, and in this appeal it has not been disputed that both the deeds are genuine. He admits that the **[664]** temple was built by his father fifty-five years ago and that the rent of certain houses is to be spent on it, and his acquiescence for so long a period in the principal provisions of the endowment furnishes a strong ground for believing that in making it the father was dealing with his own funds and not with joint funds or property.

The endowment itself, we think, has rightly been treated as for public, religious and charitable purposes. It was contended that under the deed it was only intended to endow a private temple for the use of the family and not for the public. But having regard to the fact that a certain number of the public have always used the temple, that there is attached to it a *dharmashala*, and that the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadavart*, we think it is clear that the intention of the founder was to devote the property to public, religious and charitable purpose.

(1) P.J. (1892), p. 155.

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Lastly, we think that although the defendant was not appointed a trustee by the deceased, yet by taking charge of the endowment and purporting to manage it as temple property, he made himself a constructive trustee or, to adopt the phrase occasionally used in English decisions, a trustee *de son tort*(1). His deposition shows that he knew the property was devoted to the temple and he applied to the Municipality to exempt it from taxation on the ground that it was devasthan. In *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (2), West, J., in discussing the position of persons who, while holding property dedicated to religious purposes, denied their liability as trustees, said: "Those who take physical possession of the one as of the other kind of property (cash jewels or land) incur thereby a responsibility for its due application to the purposes of the foundation—compare *Griffin* v. *Griffin*(3); *Mulhallen* v. *Marum*(4); *Aberdeen Town Council* v. *Aberdeen University*(5). They are answerable as trustees even though they have not consciously accepted a trust, and a remedy may be sought against them for maladministration by a suit open to **[666]** any one interested as under the Roman system in a like case by means of a *popularis actio*." The principle contained in this passage seems applicable to the present case. The property appropriated to this devasthan remains the subject of a trust, and the defendant who, without authority, undertook its management is liable to the beneficiaries. An express decision on this point will be found in the case of *Rackham* v. *Siddall* (6) in which a lady who, without authority, had assumed the duties of trustee was held liable. In that case Vice-Chancellor Shadwell said as follows (p. 305):—"Now I must say that it would be a most glaring violation of justice if I were to decide that she was not answerable. If she had pleased, she might have refused to act: but, as she assented to act she was bound to act properly, and she cannot screen herself from the consequences of her acts, merely by saying that she was not authorized to act."

On appeal the same doctrine was enunciated equally clearly by Lord Cottenham, L.C., as follows (7):—"There is indeed no question about it: she took on herself, as the decree recites, to act as trustee; and if a party takes on himself to act as trustee and to sell a trust estate and receives the purchase-money, it will not do for that party, whether the purchase-money remains in his pocket, or he hands it over to somebody else, under circumstances that leave him liable, to say 'I do not think that, under the circumstances, I was, strictly speaking, a trustee; somebody else was, and, therefore, you, the party who is *cestui que trust*, cannot call on me for the payment of the purchase-money.' It is quite clear that could not be listened to."

We think, then, that the plaintiffs are entitled to maintain this suit under s. 539 against the defendant. We are also of opinion that it is not time-barred, for we consider that with every fresh breach of the constructive trust, or whenever the direction of the Court was deemed necessary, a fresh cause of action arose. The wording of s. 539 is clear. The public may tolerate for a time irregularities in the management of the endowment in which they are interested, but they do not thereby lose their rights, for the law expressly provides that whenever the direction

(1) *Hope* v. *Liddell* (1856) 21 Beav. 183.
(2) 12 Bom. 247 (265).
(3) (1804) 1 Sch. & Lef. 352.
(4) (1813) 3 Dr. & War. 317.
(5) (1877) 2 App. Cas. 514.
(6) (1848) 16 Sim. 297 (305).
(7) (1849) 1 M. and G. 607 (621).

[666] of the Court is deemed necessary they may with the proper sanction institute a suit. In the present case directions are clearly necessary, as the defendant disputes his obligations and has mismanaged the property as explained by the District Judge. No objection was taken in argument to the details of the scheme. We confirm the decree with costs.

Decree confirmed.

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23 B. 666. = 1 Bom. L.R. 170.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

MOHIDIN AND OTHERS (*Original Defendants*), *Appellants v.* SHIVLINGAPPA (*Original Plaintiff*) *Respondent.** [2nd March, 1899.]

Easement—Customary rights—Custom of burial—Local custom—Right claimed by a certain section of Mahomedans to bury their dead in a certain locality—Right of burial.

Where a certain section of the Mahomedan community had been for many years in the habit of burying their dead near a darga in plaintiff's land, and the plaintiff sued for an injunction restraining them from exercising this right in future.

Held, that the right of burial claimed by the defendants was not an easement, but a customary right, which being confined to a limited class of persons and a limited area of land, was sufficiently certain and reasonable to be reconized as a valid local custom.

[R., 28 A. 484 (485) = 26 A.W.N. 80 ; 26 B. 379 (387) ; 6 Bom. L.R. 288 (289) ; 2 S.L.R. 65 (67).]

SECOND appeal from the decision of L. Crump, Assistant Judge of Sholapur-Bijapur.

The plaintiff sued for an injunction restraining a certain division of the Mahomedan community at the village of Bagevadi from burying their dead in his land.

The defendants pleaded that they had been burying their dead in the land in dispute for over a 100 years ; and that they had acquired an easement by such continued user.

The Subordinate Judge found that there was a darga in the land in suit, that there were several tombs round about the darga, and that the defendants had been exercising the right of burial for a long time beyond the memory of any living man. **[667]** He, therefore, held that the easement claimed by the defendants was proved, and dismissed the suit.

On appeal, the Assistant Judge reversed the first Court's decree. In his judgment he said :—

"I do not, however, think that defendants can be held to have acquired any prescriptive sight. The right which they claim is clearly not an easement ; in fact, it does not bear the smallest resemblance to an easement, neither can it be said to be a '*profit a prendre.*' The reasons which lead me to hold that such a right as defendants claim cannot be acquired by prescription are these : *First* they do not set any limit whatever to the space which they wish to use as a burial-ground; they say, 'we are entitled to bury our dead in Survey Nos. 1134 and 1135' (for the latter

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* Second Appeal No. 411 of 1898.

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see companion appeal No. 100 of 1896). It is impossible that any right can have been acquired by immemorial usage to bury corpses in areas which are only modern conventions. There is not the smallest attempt to limit their right in any way, and it is obvious that serious injury must result to plaintiff if the whole of his land is to be used for this purpose.

"*Secondly* it is perfectly clear that the exercise of this so-called right, if persisted in, will ultimately destroy all the profits to be derived from plaintiff's land, as the whole survey number will, in the course of time, be covered with tomb-stones * * *

"I find no instance of any similar right being recognized by a Court of Law in India. The case which appears most similar is that of *The Secretary of State for India* v. *Mathurabhai* ((1889) 14 B. 213), but the circumstances there are different; in that case it was held that the inhabitants of a village could acquire a right to graze cattle by prescription as against the Crown. The inhabitants of a village form a corporate unit, and the right of pasture is not one which entirely destroys the produce of the ground. Here we have an undefined number of persons belonging to a particular division of the Mahomedans of the village asserting a prescriptive right which, as I have shown, must eventually destroy plaintiff's profit of his land. In other respects, the case I have quoted is in authority for holding that the plea set up by the defendants is bad on account of its vagueness, as they have entirely failed to point out over how much of the land they have acquired the right which they claim.

" I, therefore, reverse the decree of the lower Court and order that a perpetual injunction, issue to defendants, restraining them from burying their dead in the land."

Against this decision defendants preferred a second appeal to the High Court.

R. A. Desai for appellants (defendants).—It is found as a fact that the defendants have been burying their dead in the land in **[668]** suit from time immemorial. They have thus acquired a right in the nature of a customary easement. That such a right can be acquired by prescription is shown by s. 18 of the Easement Act (V of 1882)—*Mamman* v. *Kuar Sen* (1). *Kuar Sen* v. *Mamman* (2); *Fitch* v. *Rawliny* (3): *Earl of Coventry* v. *Willes* (4); Mitchell on Easement Act, p. 163; Mitra on Limitation and Prescription, pages 400, 401 (3rd edition).

D. P. Kirloskar for respondent (plaintiff).—The right claimed by the defendants cannot be acquired by prescription. It is not a customary right. The alleged custom of burial is both uncertain and unreasonable. The defendants do not set any limit to the space which they want to use as a burial-ground. If such a right were allowed, the whole of our land will in course of time become quite unfit for agricultural purposes. It will be all covered over with tombs. Such an unreasonable custom will not be recognized in a Court of justice—*Kuar Sen* v. *Mamman* (2); *Lutchmeeput Singh* v. *Sadaulla* (5).

JUDGMENT.

FULTON, J.—In this case the learned Assistant Judge has found that it is satisfactorily established that a certain division of the Mahomedans of the village (of Bagevadi) have been for many years in the habit of burying their dead, as occasion arose, round about the darga in

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(1) 16 A. 178. (2) 17 A. 87 (91). (3) (1795) 3 R. R. 425.
(4) (1863) 9 L.T. (N.S.) 384. (5) 9 C. 698.

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the land in dispute. But he has granted the plaintiff's claim for an injunction restraining the defendants from burying their dead in future in any part of Survey No. 1134, first, because the defendants do not set any limit whatever to the space which they wish to use as a burial-ground, and, secondly, because it is perfectly clear that the exercise of this so-called right, if persisted in, will ultimately destroy all the profits to be derived from plaintiff's land, as the whole survey number will, in course of time, be covered with tomb stones.

Now we agree with the Assistant Judge that the right claimed by the defendants is not an easement, as it is not dependent on the possession of any dominant heritage. But by s. 26 of Reg. IV of 1827 the Courts are bound, in the absence of **[669]** Acts and Regulations, to decide according to the usage of the country, and the validity of customary rights other than easements is preserved by s. 2 of the Easements Act. We fully concur in the remarks of the Allahabad High Court in *Kuar Sen* v. *Mamman* (1) on the subject of customary rights. As they appear to state the law very clearly, we think it advisable to quote the passage (p. 91) at length :—

"As such a local custom as is now set up on behalf of the defendants" (the right of using a certain chabutra as a sitting place and during the Moharram of exhibiting thereon the 'tazias' and 'alums' and placing a 'takht' on it) "excludes or limits the operations of the general rule of law that a proprietor or other person lawfully in the possession of land, and whose rights are not controlled or limited expressly or impliedly by Statute law, by grant, or by contract, has an exclusive right to the use or enjoyment of his land for all purposes not injurious to the rights of his neighbours, it is necessary that those setting up such a custom as that in the present case should be put to strict proof of the custom alleged by them. A local custom to have the effect of excluding or limiting the operation of the general rules of law must be reasonable and certain. A local custom as a general rule is proved by good evidence of a usage which has obtained the force of law within the particular district, city, mohalla or village, or at the particular place, in respect of the persons and things which it concerns. Where it is sought to establish a local custom by which the residents or any section of them of a particular district, city, village or place are entitled to commit on land not belonging to or occupied by them, acts which, if there was no such custom, would be acts of trespass, the custom, must be proved by reliable evidence of such repeated acts openly done, which have been assented and submitted to, as leads to the conclusion that the usage has, by agreement or otherwise, become the local law of the place in respect of the person or things which it concerns. In order to establish a customary right to do acts which would otherwise be acts of trespass on the property of another, the enjoyment must have been as of right, and neither by violence nor by stealth, **[670]** nor by leave asked from time to time. We cannot in these provinces apply the principle of the English Common Law that a custom is not proved if it is shown not to have been immemorial. To apply such a principle as we have been urged by the counsel for the appellant to do, would be to destroy many customary rights of modern growth in villages and other places. The Statute law of India does not prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed as by local custom was enjoyed. And in our opinion it would be inexpedient and fraught

(1) 17 A. 87.

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with the risk of disturbing perfectly reasonable and advantageous local usages regarded and observed by all concerned as customs to attempt to prescribe any such period. In our opinion, a Court should not decide that a local custom, such as that set up in this case, exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application."

Now that seems to us a very fair statement of the law on the subject, but when applying the tests of reasonableness and certainty we must look carefully to the circumstances of the case and not be led too easily to hold that a custom is bad because the parties have failed in their pleadings to define it with accuracy. Here the defendants have, it is true, failed to set any limit to the space which they wish to use as a burial ground. But we must not confuse their wishes and their rights. They wish for the privilege of burial all over Survey No. 1134. Their right according to custom as found by Assistant Judge seems to be to bury round about the darga. Because they fail to prove all they wish, there seems no reason for denying them the rights whichth ey establish. A plaintiff may claim Rs.1,000, but if the evidence shows that he is onlyentit led to Rs.100, he will get a decree for the latter sum albeit his claim as stated is not fully proved. What then is the uncertainty connected with this right of burial? There is no uncertainty as to the class of persons who have been in the habit of burying near the darga. It is not denied that the defendants belong to that class. There is no uncertainty as to the nature of the custom which is to bury as occasion arises near the darga—no tof course in the tombs [671] previously occupied—but in the land described by the Assistant Judge as round about the darga. The only point which can be said to be uncertain relates to the limits within which burials must be made. Those limits have not been defined. But we think that they are sufficiently indicated by the restriction of the right to a limited class and by the obligation to bury near the darga. As some definition now seems necessary owing to the unreasonable claims set up by the defendants, we think that it can fairly be drawn from considerations of necessity and proximity to the darga. It is easy, of course, to see that there is no custom of burial at a distance from the darga. It is equally easy to see that there is a custom of burial near the darga which the plaintiff is not entitled to disregard. The right then may be defined as that of the burial of members of the class as near the darga as may be. On this point the remarks of Baron Cleasby in *Hall* v. *Nottingham* (1) seem applicable: "Looking to the nature and origin of such customs it would be unreasonable to expect any precise certainty as to what should be enjoyed as a matter of right. If at the present time the inhabitants all met to discuss and determine such a matter, it would be unreasonable to expect them to be very precise as to the enjoyment which they were to have." In the present case if the elders of the village met, all they could say would be that a certain number of Mahomedan families had long been in the habit of burying near this darga. But we think that would be enough. It would be unreasonable to expect of the defendants greater certainty. The plaintiff, however, may fairly claim an injunction restraining them from using their right of burial in a manner to do more injury to him than the nature of that right requires, or, in other words, he may ask that they may be compelled to bury as near the darga as possible.

(1) (1875) 1 Ex. D. 1.

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Next we have to consider the second objection and say whether this custom of burial can be disallowed as unreasonable. We hesitate to arrive at such a conclusion. Amongst all races that bury their dead, this right of burial in a particular locality is one that is most dearly prized, and although the plaintiff's land may be rendered practically useless, if these tombs are [672] multiplied exceedingly, the contingency seems too distant to justify the Courts in summarily putting an end to the right. In *Hall* v. *Nottingham* the possibility that the custom there set up might have the effect of taking away from the owner of the freehold the whole use and enjoyment of his property, was not thought a sufficient ground for disallowing it. If a custom which allows all lawful games to be played on another person's land at all times of the year is not an unreasonable custom, it seems impossible to hold that the limited custom established by the defendants is bad. The criterion of "reasonableness" by which the case of *Lutchmeeput Singh* v. *Sadaulla Nushyo* (1) was decided, may have been a good one as regards the alleged right of an indefinite number of persons to fish in the Bhils of a private owner; but it cannot be extended as a matter of law to all customs; for, as shown in *Hall* v. *Nottingham*, a custom may be good though its exercise may have the effect of depriving the owner of the soil of the whole use and enjoyment of his property. Here the defendants are entitled to claim for a limited class the right of burial in one corner of a field near a darga. The mere possibility that after many years the number of tombs may have increased so much as to deprive the owner of the use of his field, or of a large portion of it, seems too remote to enable us to describe as unreasonable the custom in dispute.

We, therefore, amend the decree by directing that a perpetual injunction issue to defendants restraining them from burying their dead in Survey No. 1134 otherwise than as authorized by custom, namely, of burying near the darga. The parties severally to pay their own costs throughout.

Decree amended.

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23 B. 673=1 Bom.L.R. 167.

[673] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

MANGALDAS (*Original Plaintiff*), *Applicant v.* JEWANRAM AND OTHERS (*Original Defendants*), *Opponents.** [2nd March, 1899.]

Specific Relief Act (I of 1877), s. 9—Right of way—Immoveable property,—Right of way is not immoveable property within the meaning of s. 9 of the Act.

A right of way is not "immoveable property" within the meaning of s. 9 of the Specific Relief Act (I of 1877).

[R., 12 Ind. Cas. 190=5 S.L.R. 42; Expl., 9 C.L.J. 336=13 C.W.N. 451 (452)=4 Ind. Cas. 116.]

APPLICATION under s. 622 of the Civil Procedure Code (Act XIV of 1882) against the decision of Rao Saheb S. B. Gadgil, Subordinate Judge at Bassein.

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* Application No. 209 of 1898.

(1) 9 C. 698.

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23 B. 673 = 1 Bom. L.R. 167.

The applicant filed a suit under s. 9 of the Specific Relief Act (I of 1877) to be restored to the possession of a right of way, which, he alleged, was obstructed by the defendant's erecting a wall across the way in dispute.

The Subordinate Judge of Bassein dismissed the suit, holding that a right of way was not included in the term "immoveable property" in s. 9 of Act I of 1877.

Against this decision plaintiff applied to the High Court under its Revisional Jurisdiction.

A rule *nisi* having been granted.

Inverarity (with him *Manekshah Jehangirshah*) showed cause.

Macpherson (with him *R. R. Desai* and *B. F. Dastur*) *contra*.

JUDGMENT.

CANDY, J.—The question is whether a right of way is "immoveable property" within the meaning of s. 9 of the Specific Relief Act according to the definition in the General Clauses Act. I agree with the Subordinate Judge that a right of way is not a "benefit to arise out of land" but it does not, therefore, follow that a right of way is not immoveable property. The word 'include' in s. 2 of the General Clauses Act is enumerative, not exhaustive. A right of way would certainly seem to be an interest in immoveable property. But whether an easement proper (such as is the right of way claimed in this case) can be strictly said to come within the definition of immoveable [674] property or not, there is, in my opinion, something repugnant in the subject or context of s. 9 of the Specific Relief Act which prevents such an effect being given to the definition. The repugnancy arises because it appears that the nature of the relief provided by the Act is repugnant to the character of the property in question. The nature of the relief here must be by injunction. In a case like the present one, if the suit will lie, and if the Subordinate Judge finds that the plaintiff has been dispossessed of his property (his right of way) within six months, then the Subordinate Judge is bound to give a decree awarding him possession of the property, that is, the Subordinate Judge is bound to grant an injunction, *viz.*, by preventing defendant from obstructing the right of way. But the granting of an injunction is, under Part III of the Act, subject to certain restrictions. It is subject to the discretion of the Court (s. 52). It can only be granted where the invasion of the right is such that pecuniary compensation would not afford adequate relief. It is possible to imagine a case where a right of way has been obstructed, but there still exists a right of passage for plaintiff, though over a longer way, and the Court may deem it proper to allow the obstruction to remain and to award pecuniary compensation for the diversion. In the case of another easement, *viz.*, right of light and air, there is a course of decisions holding that, if possible, pecuniary compensation should be awarded instead of an injunction to remove the obstruction. But the only decree available under s. 9 is a decree for recovery of possession, that is, the Court has no option but to grant an injunction. This difficulty does not arise in the case of a right of fishing. In the case of such an incorporeal right, possession, though given by means of an injunction, is, in practice, habitually awarded to a successful plaintiff (see remarks of Pigot, J., at bottom of p. 559 of I. L. R., 19 Calc.). Admitting, therefore, that a right of way is, speaking generally, immoveable property, I hold that it is not such within the terms of s. 9 of the Specific Relief Act. Rule discharged with costs.

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FULTON, J.—I concur with my learned colleague in thinking that s. 9 of the Specific Relief Act is not applicable to the removal of an obstruction to the enjoyment of a mere easement [675] such as a right of way. It is unnecessary for the purpose of deciding this case to express any opinion as to its applicability where a person entitled to a right of fishery has been deprived of its use, for there seems to be little analogy between such a right, which can be enjoyed independently of other property, and an easement which is appurtenant to other property. The phraseology of Indian legislation and decisions has for a long time sanctioned the use of the words "possession" and "dispossession" in connection with incorporeal rights capable of independent enjoyment, and it may, therefore, fairly be argued that such rights come within the scope of s. 9. But it seems to me that when a person is obstructed in his right of access to his property or in the enjoyment of light and air or of other amenity connected with that property, it would be an abuse of language to say that he was dispossessed of immoveable property. Such a right, which cannot be transferred apart from the dominant heritage, does not appear to come within the term "property" as used in s. 9. It was argued that this right of way, which is described as an easement, was an interest in land, but, if so, it is an interest entirely dependent on the possession of the property to which it appertains, and cannot be possessed apart from it. It is a right appurtenant to property, but, taken by itself, does not seem to me to come within the term property which, under the section, must be property capable of separate enjoyment as an independent right. It has never, so far as I am aware, been held that the enjoyment of such a right can be enforced by a suit under s. 15 of Act VIII of 1859 or under s. 9 of the Specific Relief Act, and I agree with Mr. Justice Pigot's remarks in *Fadu Jhala* v. *Gour Mohun Jhala* (1), that the decision in *Haro Dyal Bose* v. *Kristo Gobind Sein* (2) is correct, and that the section is inapplicable to easements. In Guzarat, by the custom of the country, a right of privacy can be acquired by a house-owner, and if some one opened a window in his wall and thereby in violation of that right overlooked his neighbour's premises, it would hardly be argued that that neighbour had been dispossessed of property. But if the phrase be clearly inapplicable to a negative easement of this kind, it is difficult to see why it should be more applicable to a positive easement such [676] as a right of way. In the one case as in the other a right affecting another person's property exists, and the fact that s. 9 cannot be used for the vindication of one kind of easement leads to the belief that it was not intended to apply to any easement. Had there been such intention, language more suited for the purpose would, I think, have been used.

I would discharge the rule with costs.

(1) 19 C. 544 (559).

(2) 17 W. R. 70.

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23 B. 676=1 Bom. L.R. 184.

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Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

BHIMBHAT GOTKHANDI (*Original Defendant*), *Appellant v.* BHIKAMBHAT AND ANOTHER (*Original Plaintiffs*), *Respondents.** [13th March, 1899].

Pensions Act (XXIII of 1871), ss. 6 and 14 (1)—Rule (6) (2) framed under the Act—Suit for recovery of varshasan *allowance—Collector's certificate—Cancellation of certificate by Revenue Commissioner.*

When a certificate is granted by the Collector under s. 6 of the Pensions Act (XXIII of 1871), the presumption is, until the contrary is shown, **[677]** that the order for granting the certificate was made, as is contemplated by the 6th rule framed under the Act, with the previous sanction of the Revenue Commissioner by the Collector himself. But the Revenue Commissioner has no power vested in him to cancel a certificate granted by the Collector, and there is no rule which provides for the revision by the Revenue Commissioner of the Collector's action in granting certificates or for the cancellation by him of the certificates granted by the latter.

[R., 25 M.L.J. 374=(1913) M.W.N. 374=18 Ind. Cas. 353.]

SECOND appeal from the decision of L. Crump, Assistant Judge of Bijapur.

The two plaintiffs sued the defendant to recover a share in a certain *varshasan* allowance which the defendant received from Government. The first plaintiff obtained from the Collector and produced to the Court the certificate required by s. 6 of the Pensions Act (XXIII of 1871).

The Subordinate Judge passed a decree in the following terms:—

"I, therefore, declare that plaintiffs Nos. 1 and 2 are each entitled to receive $\frac{1}{6}$th share in the cash allowance of Rs. 57 by executing this decree from time to time."

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* Second Appeal No. 396 of 1898.

(1) Sections 6 and 14 of the Pensions Act (XXIII of 1871):—

6. A Civil Court, otherwise competent to try the same (suits relating to pensions or grants), shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner, or other officer authorized in that behalf that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly.

14. The Chief Controlling Revenue Authority may, with the consent of the Local Government, from time to time make rules consistent with this Act respecting all or any of the following matters:—(1) The place and times at which, and the person to whom, any pension shall be paid, (2) inquiries into the identity of claimants, (3) records to be kept on the subject of pensions, (4) transmission of such records, (5) correction of such records, (6) delivery of certificates to pensioners, (7) registers of such certificates, (8) reference to the Civil Court under section six, of persons claiming a right of succession to, or participation in, pensions or grants of money or land revenue payable by Government, and generally for the guidance of officers under this Act.

All such rules shall be published in the local official gazette, and shall thereupon have the force of law.

(2) Rule (6) framed underthe Pensions Act:—

(6) Any claim preferred to a Collector under s. 5 of the (Pensions) Act may be **[677]** referred by him for inquiry to any Assistant or Deputy Collector or other officer subordinate to him, and every Assistant or Deputy Collector in charge of talukas may receive claims on behalf of the Collector and forward the same with his opinion, after inquiry, to the Collector; but every order for disposing of a claim or for granting a certificate under s. 6, that a case against Government only or against Government and one or more private persons jointly may be tried, shall be made with the previous sanction of the Commissioner by the Collector himself.

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The defendant appealed. Pending the appeal, the Revenue Commissioner cancelled the certificate which the Collector had granted to the first plaintiff. At the hearing of the appeal it was objected that the plaintiff, being now without the necessary certificate, could not maintain his claim. The District Judge confirmed the decision of the lower Court, and as to the certificate he said :—

"It is not disputed that plaintiff No. 1 obtained a certificate under s. 6 of the Pensions Act. As far as he was concerned, the suit was properly entertained and the alleged cancellation or revocation of the same, after the decree had been passed, cannot oust the Court's jurisdiction. I am not aware of any provision of the law which allows a certificate to be cancelled or revoked. Plaintiff No. 2, however, never obtained any certificate at all, and the Court had no jurisdiction to try the case as far as she was concerned, but as plaintiff No. 1 comes in as her [678] heir, and as the certificate authorizes him to sue defendant for a share of one-third in the *varshasan* allowance, the defect, if any, is cured."

The defendant preferred a second appeal.

Narayan G. Chandavarkar, for the appellant (defendant).

Gokuldas K. Parekh, for the respondents (plaintiffs).

JUDGMENT.

PARSONS, C. J. (Acting).—This suit was filed by the plaintiff with the certificate of the Collector as required by s. 6 of the Pensions Act, 1871. The contention of the appellant (or defendant) is that this certificate has been cancelled by the Revenue Commissioner since the decree of the lower Court, so that it is no longer in force, and that this Court, therefore, cannot take cognizance of the claim. We might be able to give effect to this contention if it were shown that the Revenue Commissioner had any power vested in him to cancel the certificate of the Collector, but this is not done. Section 6 requires the certificate of the Collector only. Section 14 gives power to the Chief Controlling Revenue Authority, with the consent of the Local Government, to make rules respecting the reference to the Civil Court of claims, but no rule has been made which provides for the revision by the Revenue Commissioner of the Collector's action in granting certificates or for the cancellation by him of certificates granted by the latter. There is a rule (6) which requires that every order for granting a certificate under s. 6 shall be made with the previous sanction of the Commissioner by the Collector himself. We must presume in this case that the certificate was originally granted with this sanction, since there is nothing on the record to show the contrary. This being so, no power has been given to the Revenue Commissioner to revoke the certificate given by the Collector, and we must treat the alleged revocation order as null and void.

On the merits, therefore, the decree must stand. A slight alteration is required in its language, since the defendant's liability only accrues when he has received the allowance from Government; this can be made by adding after the words "from time to time" the words "when the said amount is received." We amend the decree by the insertion of these words. The appellant must bear the costs of this appeal.

Decree amended.

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APPELLATE CIVIL.

23 B. 679 = 1 Bom. L.R. 176.

23 B. 679 = 1 Bom.L.R. 176.

[679] APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

LADHAJI NATHAJI (*Original Plaintiff*), *Appellant v.* HARI AND OTHERS (*Original Defendants*), *Respondents.** [8th March, 1899.]

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 11 (1)—Civil Procedure Code (Act XIV of 1882), s. 57—Jurisdiction—Practice—Procedure when suit filed in wrong Court.

Under s. 11 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), a suit in which there are several defendants who are agriculturists may be instituted and tried in a Court within the local limits of whose jurisdiction any one of such defendants resides and not elsewhere.

Where a suit was brought in the Court at Haveli, the plaintiffs alleging that some of the defendants who held lands within the jurisdiction of that Court were agriculturists, and the suit was dismissed because those defendants were found not to be agriculturists.

Held, that the proper procedure to be adopted in such a case was not to dismiss the suit, but to return the plaint for presentation to the proper Court.

SECOND appeal from W. H. Crowe, District Judge of Poona, confirming the decision of the Subordinate Judge of Haveli.

Plaintiffs sued to recover money alleged to be due on an account.

[680] They alleged that the fifth and sixth defendants were agriculturists holding lands within the jurisdiction of the Subordinate Judge's Court of Haveli, and they, therefore, having regard to ss. 3 and 11 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), filed this suit in that Court. The Subordinate Judge of Haveli found that the fifth and sixth defendants were not agriculturists, and that the suit ought to have been brought in the Court of the Subordinate Judge of Sasvad, within the jurisdiction of which Court some of the other defendants who were agriculturists resided. He dismissed the suit, holding that he had no jurisdiction to hear it. He refused to return the plaint for presentation to the Court at Sasvad, holding that s. 57 of the Civil Procedure Code (Act XIV of 1882) did not apply.

On appeal by the plaintiffs, the District Judge confirmed the decision, observing :—

"It has been contended that the Court should have returned the plaint, but the circumstances do not fall within the four corners of s. 57 of

* Second Appeal No. 538 of 1898.

(1) Section 11 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) :—

Every suit of the description mentioned in s. 3, cl. (*w*), may, if the defendant, or, when there are several defendants, one only of such defendants is an agriculturist, be instituted and tried in a Court within the local limits of whose jurisdiction such defendant resides and not elsewhere.

Every such suit in which there are several defendants who are agriculturists may be instituted and tried in a Court within the local limits of whose jurisdiction any one of such defendants resides and not elsewhere.

Nothing herein contained shall affect ss. 22 to 25 (both inclusive) of the Code of Civil Procedure.

3. The provisions of this chap. (II) shall apply to—

(*w*) Suits for the recovery of money alleged to be due to the plaintiff—

on account of money lent or advanced to, or paid for, the defendant, or as the price of goods sold, or

an account stated between the plaintiff and defendant, or

on a written or unwritten engagement for the payment of money not hereinbefore provided for.

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the Civil Procedure Code, as option as to the selection of the Court is allowed by law as far as the grade of the Court is concerned."

The plaintiffs appealed to the High Court.

Mahadeo B. Chaubal, for the appellants (plaintiffs):—The case was not heard on the merits. It was dismissed on a point of jurisdiction. A new suit would be barred by limitation. We asked the Court to return the plaint in order that it might be presented at the Court at Sasvad which has jurisdiction, but our application was not granted. Section 57 of the Civil Procedure Code is applicable, and the plaint should have been returned—*Muttirulandi* v. *Khottayan* (1); *Prabhakarbhat* v. *Vishwambar Pandit* (2); *Babaji* v. *Lakshmibai* (3).

Daji Abaji Khare, for respondents (defendants).—Section 57 of the Code does not apply, and the lower Courts were right in refusing to return the plaint and in dismissing the suit.

JUDGMENT.

PARSONS, C. J. (Acting).—Under s. 11 of the Dekkhan Agriculturists' Relief Act a suit in which there are several defendants who are agriculturists may be instituted and tried in a Court **[681]** within the local limits of whose jurisdiction any one of such defendants resides, and not elsewhere. Residence under the Act is defined in s. 2, expl. 3. In the present case the suit was brought in the Subordinate Court of Haveli on the allegation that defendants Nos. 5 and 6 were agriculturists and held lands within the jurisdiction of that Court. The Subordinate Judge found that defendants Nos. 5 and 6 were not agriculturists, and that the suit ought to have been brought in the Subordinate Court of Sasvad, within whose jurisdiction the other defendants, who were agriculturists, resided. He rejected the suit, but refused to return the plaint for presentation to the Sasvad Court, on the ground that the case did not fall within the provisions of s. 57 of the Civil Procedure Code. The District Judge on appeal confirmed that order.

We think that the plaint ought to have been returned. It seems to us that the provisions of s. 57 must be held to apply to the circumstances of the present case, because (*a*) no option as to the selection of the Court was allowed by law (which is the construction of the clause adopted by the Madras High Court in *Muttirulandi* v. *Khottayan* (1)); and (*b*) none of the defendants are dwelling within the local limits of the Haveli Court, for defendants Nos. 5 and 6 have their actual residence in the City of Poona. Even otherwise the fact remains that the Court in which the plaint had been presented had no jurisdiction to try the suit, and in every such case the proper procedure to be followed would be that laid down in *Khandu Moreshvor* v. *Shivji Gorkoji* (4), *viz.*, to return the plaint.

We, therefore, reverse the orders of the lower Courts and direct the Subordinate Judge to return the plaint to be presented to the proper Court with the endorsement required by s. 57. The costs in the Court of first instance are to be borne by the plaintiff. Each party will bear his own costs in the other Courts.

Order reversed.

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(1) 10 M. 211.
(2) 8 B. 313.
(3) 9 B. 266.
(4) 5 B.H.C.R. A.C.J. 212.

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[682] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Tyabji.

ISMAL AND OTHERS (*Original Plaintiffs*), *Appellants v.* RAMJI SAMBHAJI AND OTHERS (*Original Defendants*), *Respondents.**

[8th March, 1899.]

Mahomedan law—Gift—Gift if not perfected by possession is invalid—Delivery of possession—Possession—Registration.

Under the Mahomedan law a registered deed of gift is not valid if it is never perfected by possession.

The Mahomedan law requires that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession to the donee.

Registration is not equivalent to possession.

[Diss., 8 Ind. Cas. 307=86 P.R. 1910=171 P.L.R. 1910=130 P.W.R. 1910; **Rel.**, 17 C.L J. 173=15 Ind. Cas. 698; **F.**, 8 Ind. Cas. 717=13 O.C. 347 (350); **R.**, 29 B 468 (478)=7 Bom. L.R. 443; 30 M. 519 (521)=17 M.L.J. 562; 26 Ind. Cas. 466.]

SECOND appeal from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge, A. P., at Satara.

Suit for redemption. The lands in dispute originally belonged to one Mahomed Mahabu.

On Mahomed's death, his widow Kulsum and his two daughters succeeded to the property.

In 1873 Kulsum alone mortgaged it to the father and grandfather of the defendants, and the mortgagees were put in possession. In 1883 she mortgaged it again to the father of the defendants.

In 1884 Kulsum and her two daughters made a gift of the property to one Jamat. The deed of gift was duly registered.

In 1886 Kulsum mortgaged the property again to the defendants.

On 28th July, 1892, Kulsum and her daughter sold the property to one Raju, and on the 16th August, 1892, they revoked the gift to Jamat by a notice in a local newspaper.

The plaintiffs were the brothers and heirs of Raju (the vendee), and they now sued the defendants to redeem lands from the above mortgages.

The defendants pleaded (*inter alia*) that the plaintiffs were not entitled to sue, having no interest in the property. They contended that the property having been given in 1884 to Jamat, Raju acquired nothing by his purchase in 1892.

[683] The Court of first instance held that the gift to Jamat was valid under the Mahomedan law; that the donor had no authority to revoke the gift after the death of the donee; that the sale to Raju conveyed no title to him or his heirs; and that, therefore, plaintiffs had no right to redeem. The suit was, therefore, dismissed.

This decision was substantially confirmed on appeal by the First Class Subordinate Judge, A. P.

Against this decision plaintiffs preferred a second appeal to the High Court.

Macpherson (with him *B. A. Bhagvat*), for appellants.

Scott (with him *S. R. Bakhale*), for respondents.

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The following authorities were referred to in argument :—*Mohinudin* v. *Manchershah* (1) ; *Shaik Ibrahim* v. *Shaik Suleman* (2) ; *Meherali* v. *Tajudin* (3) ; *Kali Das Mullik* v. *Kanhya Lal* (4) ; *Mahomed Buksh Khan* v. *Hosseini Bibi* (5).

JUDGMENT.

CANDY, J.—The only question argued before us in this appeal was as to the validity of the deed of gift (Ex. 53) executed by Kulsum and her daughters in favour of Jamat. It is admitted that the donors were not in possession of the property at the time of the execution of the deed of gift. The property had already been mortgaged by Kulsum alone in 1873 by the mortgage-deed (Ex. 32). It was further mortgaged by Kulsum in 1883. At the time of the execution of the deed of gift in 1884 the mortgagees were in possession under their deeds as usufructuary mortgagees. Kulsum not being herself in possession could of course deliver no possession to the donee, and it is not alleged that any such possession was or could have been given. It is the fact, however, that, after the execution of the deed, she applied to the Revenue authorities to transfer the property into the name of the donee, but this was refused by the order (Ex. 12) on the ground that no transfer could be made in her lifetime.

In favour of the validity of the gift it was argued that, inasmuch as this was all that Kulsum could do to give possession to **[684]** the donee, the requirements of the Mahomedan law have been complied with. This argument was accepted by both the lower Courts, which have accordingly held the gift to be valid. We are, however, of opinion that the contention is unfounded. The Mahomedan law requires that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession of this property to the donee—see *Mohinudin* v. *Manchershah* (1) ; *Shaik Ibrahim* v. *Shaik Suleman* (2); *Meherali* v. *Tajudin* (3).

On behalf of the respondents, however, reliance was placed upon *Kali Das Mullick* v. *Kanhya Lal Pandit* (4). This was, however, a case of Hindu law, and as such has no direct application to the case of gift by a Mussalman donor as was pointed out by the Court in *Meher Ali* v. *Tajudin* above referred to. Moreover, the donor in that case, so far from repudiating the gift, actually supported it. It is true that this case was referred to in *Mahomed Buksh Khan* v. *Hosseini Bibi* (5), which was a case between Mussalmans. In this last case, however, their Lordships of the Privy Council held the gift to be valid on the ground that it had been perfected by possession having subsequently been actually taken by the donee. In the present case, however, not only was no possession ever given to the donee, but the gift was practically revoked in 1886 by Kulsum having executed a third mortgage (Ex. 34) and was afterwards expressly revoked on 16th August, 1892.

Under these circumstances we hold that the deed of gift is not valid, as it was never perfected by possession, and that the inchoate or ineffectual gift was validly revoked by the donor. It is of course clear that registration is not equivalent to possession (*vide Mogulshu* v. *Mahamad Saheb* (6).

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(1) 6 B. 650 (F.B). (2) 9 B. 146. (3) 13 B. 156 (159).
(4) 11 I. A. 218. (5) 15 I.A. 81 (85). (6) 11 B. 517.

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We, therefore, reverse the decree of the Appellate Court, and remand the case to be disposed of on the fourth and fifth issues. Plaintiffs to have the cost of this appeal. The costs in the lower Courts already incurred and to be incurred to be disposed of by the lower Appellate Court.

Decree reversed.

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[685] ORIGINAL CIVIL.

Before Mr. Justice Starling.

IN THE MATTER OF THE NEW GREAT EASTERN SPINNING AND WEAVING COMPANY, LIMITED. RAMDAS KESSOWJI, *Applicant.**

[8th April, 1899.]

***Company**—Transfer of shares—Approval of transfer by directors—Such power of approval a fiduciary power—Resolution of directors to approve of future transfers* ultra vires.

By the articles of association of the New Great Eastern Spinning and Weaving Company transfers of shares in the company were subject to the approval of the directors. On the 18th October, 1898, the directors passed a resolution "that up to the time of the next ordinary general meeting the Board approve of all transfers of shares made by Dwarkadas Shamji and Ramdas Kessowji (two of the share-holders) or either of them, and.....will transfer shares standing in the name of Dwarkadas Shamji and in the name of Ramdas Kessowji to their or his transferees without claiming any lien or raising any objection."

Held, that the above resolution was *ultra vires* and not binding on the company. The power conferred on the directors by the articles of asscciation was a fiduciary power to be exercised for the benefit of the company, and could not be exercised until the question of each transfer, together with the names of the transferor and the transferee, was before them and they had an opportunity of considering each case.

IN chambers. Summons obtained by Ramdas Kessowji on the 23rd December, 1898, calling on the New Great Eastern Spinning and Weaving Company, the directors, and secretaries and agents thereof to show cause "why the register of the said company should not be rectified by entering therein the fact that the respective registered holders of the shares, the numbers whereof are stated in a list annexed to the applicant's affidavit, have ceased to be members of the said company in respect of the said shares, and by substituting in the said register as holders of the said shares the names of the respective transferees thereof as stated in the said list, and why the said company and its directors, and secretaries and agents or some or one of them should not pay the costs of the application, and such damages as the said Ramdas Kessowji and Dwarkadas Shamji or the registered holders of the said shares may have sustained by reason of the delay in rectification of the said register."

[686] One of the articles of association was as follows :—

"22. The Board may decline to register any transfer of shares whilst any share-holder executing the same is either alone or jointly with any person indebted to the company on any account whatsoever or unless the transferee is approved by the Board, who are in every case to have the right of pre-emption at the market rate of the day, and the registration of a transfer shall be conclusive evidence of the approval by the directors of the transferee."

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The applicant Ramdas Kessowji and one Dwarkadas Shamji were share-holders and directors of the above company and were also partners in the firm of Vanmalidas J. Shamji & Co., the said firm being the secretaries and treasurers and agents of the company.

On the 30th June, 1898, Ramdas and Dwarkadas agreed to sell certain shares in the company to Jugmohundas Varjivandas and Fakirchand Premchand and to retire from the agency.

Disputes arose between the vendors and purchasers of the shares, with regard to the purchase, as the agent's account for 1897 had not yet been passed by the board, and the company, under the articles of association, had a lien upon shares in respect of which there was any liability and the directors had power to refuse to register transfers.

On the 18th October, 1898, there was a meeting at the office of the company, at which the directors (including the vendors), the secretaries, treasurers and agents and the purchasers were present, and the disputes were settled; two of the terms of the settlement being that the vendors consented to receive Rs. 25,000 less for the shares than the sum originally agreed upon, and that the directors of the company should accept and pass, up to a certain date, all transfers of shares executed by the vendors or their nominees. Subsequently on the same day a meeting of the directors was held, at which the two vendors resigned their position as directors, and the two purchasers were thereupon elected directors in their place. Immediately afterwards the newly constituted board of directors passed the following resolution :—

"That up to the time of the next ordinary general meeting, the board approve of all transfers from Messrs. Dwarkadas Shamji and Ramdas Keseowji, or either of them and their or his mortgagees or nominees, and the company will transfer shares standing in the name of Dwarkadas Shamji or his nominees or mortgagees [687] and shares standing in the name of Ramdas Kessowji and his nominees or mortgagees to their or his transferees without claiming any lien or without raising any objection, and this resolution be communicated to the said Dwarkadas Shamji and Ramadas Kessowji."

This resolution was formally communicated to Ramdas and Dwarkadas, who subsequently sold a large number of shares and tendered the certificates and transfer paper, &c., at the office of the company in order that the shares might be duly transferred. The applicants, however, refused to leave the papers at the office unless they were given a "clean receipt" for them, *i.e.*, a receipt not containing the usual words "subject to the sanction of the directors." The clerk refused to give such a receipt, and the shares were, therefore, not transferred.

On the 17th December, 1898, the directors rescinded the above resolution of the 18th October, and caused information of the recission to be given to Ramdas and Dwarkadas. On the 23rd December, 1898, the above summons was taken out against the company by Ramdas Kessowji.

Two points were raised in the affidavits filed in opposition to the summons, *viz.* :—

(1) That at the meeting of the 18th October, at which the above resolution was passed, there was not a quorum of directors present, inasmuch as the newly appointed directors Jugmohundas Varjivandas and Fakirchand Premchand were not qualified, the shares which they had purchased not having then been transferred to their names in the company's register.

(2) That in any event the resolution was *ultra vires*.

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At the hearing the Judge decided that the first question could not be decided on affidavit, and that, if necessary, oral evidence should be given. The second question only was, therefore, argued.

Macpherson and *Scott*, in support of the rule.—They cited ss. 83 and 92 of the Companies Act (VI of 1882); *Barber's case* (1) *Jenner's case* (2); *In re Portuguese Consolidated Copper Mines* (3); **[688]** *Murray* v. *Bush* (4); *In re Cawley & Co.* (5); *Mothoor Mohun* v. *Bank of Bengal* (6); *In re Stockton Malleable Iron Co.* (7); *Gilbert's case* (8); *Weston's case* (9); *In re Bell Brothers* (10); *In re Ceylon Land and Produce Company* (11); *Reg.* v. *Inns of Court Hotel Company* (12).

Lowndes (for the company), *Raikes* (for the directors) and *Kirkpatrick* (for the secretaries and agents) *contra*.—They cited s. 58 of the Indian Companies Act (VI of 1882); *Dawson* v. *African Consolidated Land Trading Company* (13); *In the matter of the petition of Luchmee Chund* (14); *Kaikhosro Heeramaneck* v. *Coorla Spinning and Weaving Company* (15); *Bennett's case* (16); *In re Coalport China Company* (17); *Head* v. *Gould* (18).

JUDGMENT.

STARLING, J.—Ramdas Kessowji and Dwarkadas Shamji, whom I shall call the applicants, although the former is the only applicant in the matter, were directors of the New Great Eastern Spinning and Weaving Company, Limited, and also partners in the firm which carried on the duties of secretaries, treasurers and agents of the company. They were and are also share-holders in the company. On the 30th June, 1898, for certain considerations, they agreed to sell their interest in the agents' firm and 400 shares in the company to Jugmohundas Varjivandas and Fakirchand Premchand. Subsequently certain disputes arose, which, on the 18th October, 1898, were settled, and two of the terms of settlement were that the purchasers were to have a reduction of Rs. 25,000 in the price paid by them, and the directors of the company were to accept and pass up to a certain date without any question all transfers of shares executed by the applicants or their nominees, the directors having under art. 22 of the articles of association power to refuse to register transfers.

On the last mentioned day there was a long and continuous meeting, lasting from 3 to 8 P.M., at which the settlement **[689]** mentioned above was come to, at which the directors, secretaries, treasurers and agents and the purchasers were present. About 6 P.M., the directorial members of the meeting became a meeting of the directors of the company, and the two applicants resigned their position as directors. Thereupon the two purchasers were elected directors in their place, and immediately afterwards the newly-constituted board of directors passed a resolution that, up to the then next ordinary general meeting of the company, the board would approve of all transfers of shares by the applicants and their nominees, and transfer the same to their transferees without claiming any lien on them, or raising any objection to the transferees. At that time, it is alleged by the respondents to this application that the purchasers were

(1) (1877) 5 Ch. D. 963.
(2) (1877) 7 Ch. D. 132.
(3) (1891) 3 Ch. 28.
(4) (1872) L.R. 6 H.L. 37 (69).
(5) (1882) 42 Ch. D. 209.
(6) 3 C. 392.
(7) (1875) 2 Ch. D. 101.
(8) (1870) L.R. 5 Ch. 559 (565).
(9) (1868) L.R. 4 Ch. 20.
(10) (1891) 65 L.T. (N.S.) 245.
(11) (1891) 7 Times Law Rep. 692.
(12) 11 W.R. 806.
(13) (1898) 1 Ch. 6.
(14) 8 C. 317.
(15) 16 B. 80.
(16) (1854) 5 DeG. M. & G. 281.
(17) (1895) 2 Ch. 404.
(18) (1898) 2 Ch. 250.

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not qualified to act as directors, because they were not possessed of the requisite number of shares. I decided that in the present case that question could not be conveniently tried on affidavit, but that, if necessary, the parties could adduce evidence on the point, and, so far as any assumption was necessary, it was assumed in argument that they had not qualified by getting the requisite number of shares transferred into their names.

Subsequently to the 18th October, a number of share certificates and transfers were tendered by the applicants in order that the shares might be transferred to the names of the transferees; but the company refused under the circumstances to receive them, it being admitted by Mr. Macpherson that these were not left at the company's office even for examination, and it is apparent from the affidavits and correspondence that they would not have been so left unless a clean receipt had been given for them, *i.e.*, one not containing any reservation "subject to the sanction of the directors" or words to that effect.

On the 17th December, 1898, the directors rescinded their resolution of the 18th October and communicated such rescission to the applicants. On the 23rd December the applicants took out the present summons, calling upon the company, the directors and the secretaries, treasurers and agents to show cause why the register of share-holders should not be rectified by removing the names of the applicants from the register of share-holders inserting the names of their transferees.

[690] The points argued before me were: (1) was the board (assuming that two of the directors had not the qualifying number of shares) competent to pass any resolution binding on the company on the 18th October; (2) supposing it was so competent, was the resolution passed *ultra vires*; (3) did the applicants take such steps as were necessary to entitle them to an order of this Court directing the company to rectify the register?

I will discuss the second point first. Counsel for the respondents argued that the resolution was *ultra vires* on the ground that the directors could not by a general resolution hinder themselves from carrying out the trust imposed upon them by art. 22 of the articles of association of the company to consider the circumstances of each separate transfer in order that no improper or undesirable person might be admitted as a member of the company and that the lien of the company on the shares of its debtors might be preserved. In *In re Coalport China Company* (1) Rigby, L. J., describes such a power as "a fiduciary power; it is to be exercised for the benefit of the company and with due regard to the interests of the transferee; consequently it cannot be exercised until the transfer with the names of the transferor and the transferee are before them and they have had an opportunity of considering each case.

That being so, can the directors, by a resolution, bind themselves or the company not to exercise that fiduciary power? *Bennett's case* (2) was on all fours with the present, except that there the resolution passed was in consideration of a large sum of money being paid to and for the benefit of the company; while here it was in consideration of the remission of a large sum of money to two of the directors in their personal capacity, which makes the case much stronger against the present applicant. In that case Knight Bruce, L. J., at p. 295 said: "How could it have been consistent with the true meaning of the deed regulating the administration

(1) (1895) 2 Ch. 404 (410).

(2) (1854) 5 DeG. M. and G. 284.

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of the affairs of the company, or with the duty of the directors, to sell their right of objecting to a person proposed to become a new share-holder by a transfer from an existing share-holder, even though the money to be thus obtained was not to be corruptly applied. * * * The arrangement [691] was a combination to defeat one material and important provision of the deed and was, therefore, in effect a fraud upon the Company." Turner, L.J., at p. 300 also says: "The powers given by this deed to the directors to give or withhold their consent to transfers have been wrested to the purpose of enabling the directors to carry out an arrangement contrived and disguised for effecting the retirement of a large body of share-holders. * * I am of opinion that such a use of these powers was not warranted." I have no doubt that the learned Judges who decided that case would have come to the same conclusion in the present case, and I must, therefore, hold that the resolution of the 18th October was *ultra vires* and is not binding on the company, and consequently the applicant is not entitled to have the transfers presented by him registered without the directors being permitted to consider each separate transfer. As I have decided against the validity of the resolution, even if passed by a properly constituted board, I need not consider the first point argued before me.

As to the third point, it is clear from the affidavits that, up to the time this summons was issued, the applicants had not furnished the names even of the transferees to the directors, though they did on the 18th December furnish the names of the transferors (nominees of the applicant, and they would not at any time up to the present have lodged the share certificates and transfers unless a clean receipt had been given for them; consequently they have not put themselves in a position to ask this Court to order a rectification of the register in the manner asked for by them. When proper applications are made to the directors and they have had an opportunity of considering each of them, they may pass them all, or reject all, or pass some and reject the others, and the applicants will then be at liberty to act as they may be advised, but until the directors have had an opportunity of considering each transfer, there was no right in the applicants to take out this summons, which I accordingly dismiss.

The applicants must pay the costs of the company, but as I consider the dealings between the applicants and the purchasers as anything but creditable to either party and fraud upon the [692] company, all the other parties must bear their own costs. Counsel certified for.

Summons dismissed.

Attorneys for the applicants.—Messrs. *Thakurdas, Dharamsi, Cama* and *Hormasji.*

Attorneys for the opponents.—Messrs. *Ardesir, Hormasji* and *Dinsha.*

23 B. 692=1 Bom. L. R. 768.

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Before Sir L. Jenkins, Kt., Chief Justice, and Mr. Justice Tyabji.

HURGOVINDAS PRANJIVANDAS AND OTHERS (*Original Defendants*), *Appellants v.* JADAVAHOO AND ANOTHER (*Original Plaintiffs*), *Respondents.* * [16th June, 1899.]

Practice—Appeal by defendants—Objections to decree filed by plaintiff—Subsequent withdrawal of appeal—Application by plaintiff for leave to appeal—Sufficient cause—Limitation Act (XV of 1877), s. 5—Civil Procedure Code (Act XIV of 1882), s. 561.

The appellants (defendants) filed an appeal against the decree passed in this case on the 30th August, 1898, and on the same day gave notice thereof to the respondents (plaintiffs), who on the 28th September, 1898, filed cross-objections to the decree under s. 561 of the Civil Procedure Code (Act XIV of 1882). On the 2nd March, 1899, the appellants gave notice to the respondents that they would not proceed with the appeal. The respondents then applied to be allowed to appeal, alleging that they had from the first intended to appeal, but had not done so only because the other side had filed an appeal. That being so, they had merely filed cross-objections.

Held, that the application should be granted. It appeared that the applicants had intended to appeal, and would have appealed, but for the fact that an appeal in the suit was already on the file. Under these circumstances the applicants showed "sufficient cause" for not filing their appeal within section 5 of the Limitation Act (XV of 1877), and were therefore not barred by limitation.

RULE obtained by respondents (plaintiffs) calling on appellants (defendants) to show cause why they (the respondents) should not have leave to appeal.

The case was heard by a Division Court (Candy, J.), and a decree was passed on the 30th August, 1898. On the 7th September, 1898, defendants appealed, and on the same day gave notice of the fact to the plaintiffs, who thereupon on the 28th September **[693]** 1898, filed cross-objections under s. 561 of the Civil Procedure Code (Act XIV of 1882).

On the 2nd March, 1899 the appellants' solicitor by letter informed the respondents' solicitor that the appeal would not be proceeded with and that the appellants would allow it to be dismissed with costs. The respondents' solicitor replied to the notice by the following letter, dated 3rd March, 1899:—

"With reference to your letter of yesterday, I have to state that the respondents object to appeal filed by your clients being now dismissed, as my clients have filed their objections to the whole of the decree. The respondents will, therefore, proceed with the hearing of the appeal and their objections if the appellants decline to proceed with their appeal. My clients will insist upon your furnishing them three copies of the printed paper books of appeal at once and, in the meantime, if the appeal appears on the board for hearing, the same will have to be postponed until the said copy paper books are furnished by you to me."

On the 17th March, 1889, the appeal being on the board was called on for dismissal, when counsel for the respondents applied for and obtained a rule *nisi* calling on the appellants to show cause "why the respondents should not be allowed to appeal against the decree on the grounds see forth in their objections to the decree."

* Suit No. 652 of 1897.

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The question of the dismissal of the appeal was ordered to stand over till the hearing of the rule.

The rule now came on for hearing. The respondents' solicitor filed an affidavit in which he stated that his clients were dissatisfied with the decree of the 30th August, 1898, and had instructed him to file an appeal against it; that on the 31st August, 1898, he applied to the Prothonotary for a copy of the judgment, which he obtained on the 5th September; that on that day (5th September), he consulted counsel as to the appeal and was about to prepare instructions for counsel to draw the memorandum of appeal, when on the 7th September, 1898, he received a letter from the appellants' solicitor stating that the appellants had filed an appeal, and that, as such appeal was filed, the respondents were advised to file objections to the decree instead of appealing, which they did on the 28th September, 1898.

The last paragraph of the affidavit was as follows :—

"I say that the respondents (plaintiffs) were prepared to file an appeal before the 19th day of September, 1898, and would have filed the same against the said **[694]** decree within the prescribed time if the said appellants (defendants) had not filed their said appeal first. The plaintiffs-respondents, therefore, pray that they may be allowed to proceed with their objections or to file a fresh appeal against the aforesaid decree."

Starling in support of the rule.

Scott (Acting Advocate General) *contra*.

The following authorities were cited :—*Gour Hari Sanyal* v. *Prem Nath* (1) ; *Chudasama Manabhai* v. *Mahant Ishwargar* (2) ; *Jafar Husain* v. *Ranjit Singh* (3) ; *Surbhai* v. *Raghunathji* (4) ; *Jaita* v. *Balu* (5) ; *Ramjiwan* v. *Chandmal* (6) ; *In re Manchester Economic Building Society* (7).

JUDGMENT.

JENKINS, C. J.—In this case a rule has been obtained by the respondents (plaintiffs) calling on the appellants to show cause "why the said respondents should not be allowed to file a memorandum of appeal to the decree herein on the grounds set out in their objections to the said decree."

The facts which have given rise to this application for leave to appeal are these : A decree was passed in this suit with which the plaintiffs (respondents) were dissatisfied, and against which they determined and were prepared to appeal. Their appeal, however, was not presented, because the defendants filed an appeal against the same decree. Instead, therefore, of appealing, the respondents proceeded under s. 561 of the Civil Procedure Code (Act XIV of 1882) and filed cross-objections to the decree. No question is raised as to these objections. They were duly filed under the provisions of the section. The appellants have now however decided not to proceed with their appeal, and have informed the respondents of the fact. The appeal being thus abandoned, the respondents cannot proceed with their objections to the decree, and they, consequently, apply for leave to file an appeal against the decree. The appellants oppose the application on the ground that the time allowed for appeal by the Limitation Act (XV of 1877) has expired. The respondents on the other hand

(1) 9 C. 738. (2) 16 B. 249 (253-4). (3) 17 A. 518.
(4) 10 B.H.C.R. 397 (5) 3 B.H.C.R. (A.C.J.) 81. (6) 10 A. 587.
(7) (1883) 24 Ch. D. 488.

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23 B. 692 = 1 Bom. L.R. 768.

contend that the case comes within s. 5 of that Act, and [695] that, under the circumstances, the Court should hold that they had "sufficient cause for not presenting the appeal within the prescribed time."

It has been argued that in a series of cases, both in this Court and in the Allahabad High Court, it has been decided that the mere fact that an appeal has been withdrawn, does not amount to sufficient cause within s. 5 of the Act. I do not think that it was intended in these cases to lay down any general rule to be applied to every case. Each case must be decided upon its own special circumstances. None of the cases cited were on all points similar to this one. From the affidavit filed by the attorney for the respondents, it appears that they had fully intended to appeal and would have appealed if the other party had not already filed their memorandum of appeal. Having regard to the facts of this case, I think, the rule should be made absolute and that we should give leave to appeal.

TYABJI, J.—I agree. The only question is whether the facts amount to sufficient cause within s. 5 of the Limitation Act (XV of 1877). We have been pressed with the cases in which it has been held that mere withdrawal of an appeal is not *per se* sufficient cause. In deciding this case, I do not differ from these decisions. The question is, do the facts here show something more? I think they do. I am satisfied that the respondents intended to appeal. One reason for their not having done so was that the other side appealed. I think, under these circumstances, they were justified in not filing a separate appeal. To hold that they were bound to do so would be unnecessarily to add to the costs of litigation. When one appeal would be sufficient, why should two or three or perhaps more appeals be filed in one suit, merely to be held in reserve in case the first should be withdrawn? I think that if a party can show that he intended to appeal and would have appealed, only that one appeal in the suit was already on the file, the Court ought to be satisfied that there has been "sufficient cause" within s. 5 of the Limitation Act.

Rule absolute.

Attorneys for appellants:—Messrs. *Ardesir, Hormasji and Dinsha.*
Attorney for respondents:—Mr. *Shamrao Pandurang.*

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23 B. 696 = 1 Bom.L.R. 114.

[696] CRIMINAL REFERENCE.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

QUEEN-EMPRESS v. JEYRAM HARIBHAI.* [9th March, 1899.]

Criminal Procedure Code (Act V of 1898), ss. 269, cl. 3, and 307—Jury—Trial by jury of an offence triable with the aid of assessors—Practice.

The accused was tried by a jury on four charges: (1) forgery, (2) using a forged document, (3) criminal misappropriation, and (4) attempting to use a forged document as genuine. The jury returned a unanimous verdict of "not guilty" on all the charges. The Sessions Judge agreed with the jury in their verdict on the 1st, 2nd and 4th charges, but he differed from them on the 3rd charge, which was criminal misappropriation. This offence was not triable by a jury and ought, therefore, under clause 3 of s. 269 of the Criminal

* Criminal Reference No. 4 of 1899.

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23 B. 696 = 1 Bom. L.R. 114.

Procedure Code (Act V of 1898), to have been tried by the Sessions Judge with the aid of the jurors as assessors. Nevertheless the Judge took the verdict of the jury upon this charge, and differing from it, referred the case to the High Court under s. 307 of the Code.

Held, that although the procedure of the Sessions Judge was irregular, the trial by jury must be accepted as legal and the case as one that could be referred to the High Court under s. 307 of the Criminal Procedure Code.

[R., 3 Bom. L.R. 278 (280); 10 Bom. L.R. 632 (633)=8 Cr.L.J. 143.]

REFERENCE by E. H. Moscardi, Sessions Judge of Surat, under s. 307 of Criminal Procedure Code (Act V of 1898).

The accused was tried by a jury on four charges: (1) forgery of a valuable security under s. 467 of the Indian Penal Code, (2) using as genuine a forged document under s. 471, (3) criminal misappropriation of property under s. 403, and (4) attempting to use as genuine a forged document under ss. 511 and 471 of the Code.

The jury returned a unanimous verdict of not guilty on all the charges.

The Sessions Judge concurred with the verdict of the jury on the 1st, 2nd and 4th heads of the charge, but differing from their verdict on the 3rd charge, referred the case to the High Court under s. 307 of the Code of Criminal Procedure (Act V of 1898).

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

[697] *Ramdutt V. Desai*, for the accused.

JUDGMENT.

PARSONS (Acting), C. J.—The Sessions Judge in this case agreed with the jury in their verdict on the 1st, 2nd and 4th charges, but he differed from them on the 3rd charge, which was criminal misappropriation, an offence punishable under s. 403 of the Indian Penal Code. This latter offence was not triable by jury and, therefore, under sub-s. 3 of s. 269, Criminal Procedure Code, should have been tried by the Court of Sessions with the aid of the jurors as assessors. Nevertheless the Sessions Judge took the verdict of the jury upon it, and differing from it has submitted the case under s. 307 of the Criminal Procedure Code. The procedure of the Sessions Judge was clearly most irregular, but it appears on the authorities that we must accept the trial by jury as a legal one, and hold the case to be one that can be submitted under s. 307. This was the decision of the Calcutta High Court in *In the matter of Bhoolnath Dey* (1) and *Surja Kurmi* v. *Queen-Empress* (2). It was also the decision of this Court in *Imp.* v. *Dev Vithu* (3), where the verdict of the jury of not guilty of an offence triable with the aid of assessors was treated as valid, and the Court heard and disposed of the case under s. 307. Our decision in *Imp.* v. *Lalbu* (4), as to the right of appeal in a case so tried, in no way conflicts with these decisions.

On the merits, the guilt of the accused is clearly proved. He found this Government promissory note, kept it with him for two years without trying to discover the owner, and then attempted to obtain the principal and interest due upon it. No doubt witnesses Nos. 20 and 22 were also

(1) 4 C.L.R. 405.
(2) 25 C. 555.
(3) Cr. Rul. No. 19 of 1892. (Rat. Un. Cr. Cas. 600).
(4) Cr. Rul. No. 15 of 1898. Rat. Un. Cr. Cas. 961.

in the plot, but that fact does not exonerate the accused. We convict the accused of the offence of misappropriation charged punishable under s. 403 of the Indian Penal Code and sentence him to six months' rigorous imprisonment and a fine of Rs. 50, in default of payment to fifty days' additional rigorous imprisonment.

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23 B. 696=1 Bom. L.R. 114.

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23 B. 698=1 Bom. L. R. 185.

[698] APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice and Mr. Justice Ranade.

GANESH VITHAL JADE (*Applicant*), *Appellant v.* KUSABAI (*Opponent*), *Respondent.** [13th March, 1899.]

Guardian and Wards Act (VIII of 1890), ss. 13, 46 and 39—Duty of District Court to hear all evidence—Decision based on evidence taken by a Subordinate Court illegal—Practice—Minor—Guardian.

Section 46 of the Guardian and Wards Act (VIII of 1890) does not control s. 13 of the Act, so as to authorize the District Judge to dispense with the hearing of evidence by himself and transfer the whole investigation of material issues of fact to a Subordinate Court. Nor does it empower the District Judge to use the evidence taken by the Subordinate Court.

An application was made for the appointment of a guardian to the person and property of a minor. The District Court sent the application to a Subordinate Judge for inquiry and report, and issued a notice calling upon any who objected to the appointment of the proposed guardian to appear before the Subordinate Judge, who would hear and dispose of the objections. The whole inquiry was held before, and all the evidence was taken by the Subordinate Judge. Upon the evidence so taken, the District Judge disposed of the application.

Held, that the procedure adopted by the District Judge was illegal, and his decision based upon evidence not taken before him could not be accepted.

[F., 26 B. 716 (719)=4 Bom. L. R. 511; D., 7 A.L.J. 328=6 Ind. Cas. 565.]

APPLICATION under the Guardian and Wards Act (VIII of 1890) for the appointment of a guardian to the person and property of a minor.

The applicant alleged that one Sadashiv Narayan Jade died possessed of considerable moveable and immoveable property; that a few hours before his death he adopted the minor Balkrishna, who performed his funeral ceremonies and inherited the whole of his estate; that the minor lived with his adoptive mother Kusabai for a time; that disputes then arose between Kusabai and the minor's natural father, in consequence of which Kusabai turned the minor out of the house, neglected his education, and wasted his property.

The applicant, therefore, prayed that the Nazir of the District Court should be appointed as guardian of the minor's person [699] and property. This application was presented to the District Judge of Poona on 11th November, 1896.

On 13th November, 1896, the District Judge sent the application to the Joint Subordinate Judge of Poona for inquiry and report as to whether the allegations made in the application were true, and whether it was necessary to appoint a guardian.

At the same time the District Judge issued a notice calling upon any person who objected to the appointment of a guardian to appear on the 14th December 1896, before the Joint Subordinate Judge.

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* Appeal No. 102 of 1898.

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23 B. 698 = 1 Bom. L.R. 185.

In answer to this notice, Kusabai appeared before the Subordinate Judge and objected to the appointment of a guardian on several grounds. She urged (*inter alia*) that the minor was adopted by her after her husband's death under an agreement made with his natural father, which provided that the minor should live with her till he came of age, when, if they disagreed, the whole of her husband's property should be divided half and half between herself and her adopted son.

The Subordinate Judge, without going into the question of the agreement set up by Kusabai, limited the inquiry before him to the question whether it was in the interest of the minor to appoint a guardian of his person or property or both.

On this question the whole of the evidence was recorded by the Subordinate Judge, and a report was submitted by him to the District Judge on the 8th March, 1898, recommending that a guardian should be appointed to the person and property of the minor.

On the 9th June, 1898, the District Judge sent back the case to the Subordinate Judge for further inquiry as to the truth of the conditional adoption alleged by the opponent Kusabai.

The Subordinate Judge took evidence on this question, and sent it to the District Judge, without making any report, or expressing his opinion on the evidence recorded, as the order of the 9th June, 1898, was silent on that point.

On the evidence taken by the Subordinate Judge, the District Judge finally disposed of the application on the 18th November, [700] 1898. He held that the conditional adoption as alleged by the opponent Kusabai was proved, and that there was no ground for removing her from the guardianship. The application was, therefore, rejected.

Against this order the applicant appealed to the High Court.

Ganpat Sadashiv Rao, for applicant.—The procedure in this case was irregular and illegal. The District Judge instead of taking the evidence himself, transferred the whole inquiry to a Subordinate Court and based his decision upon evidence recorded by that Court. Section 13 of Act VIII of 1890 expressly requires the District Judge to hear all the evidence. He cannot delegate this duty to a Subordinate Court.

Under s. 46 (1) he may call for a report from a Subordinate Court on any matter relevant to the inquiry before him: but he cannot rest his decision on evidence taken by the Subordinate Court. Here the judgment is founded entirely on evidence recorded by the Subordinate Judge. Moreover, on the merits the decision cannot stand. The opponent admits that she is unable to manage the minor's property, and she sets up an agreement with the minor's natural father under which she claims a moiety of the property left by the minor's adoptive father. Her interests are thus distinctly adverse to those of the minor. And the Judge ought to have removed her from the position of guardian under s. 39 (*g*) of the Act.

N. G. Chandavarkar, for respondent.—The objection taken here to the lower Court's procedure was never raised in the Court below. The case was pending in the District Court for nearly two years, during which time the appellant never objected to the inquiry being held by the Subordinate Judge. On the contrary he adduced all the evidence he had before the Subordinate Judge without any demur or objection. Nor did

(1) Section 46 of Act VIII of 1890 provides as follows:—"(1) The Court may call upon the Collector, or upon any Court subordinate to the Court, for a report of any matter arising in any proceeding under this Act and treat the report as evidence."

he object when the District Judge finally heard the arguments of both parties on the evidence taken by the Subordinate Judge. It is only now, after the case has been decided against him, that he [701] raises this technical objection. It is the general practice for the District Court to send such cases for inquiry and report to a Subordinate Court. And if he acts on such report, or bases his decision on evidence taken during the course of such inquiry, I submit he does not act illegally. On the merits, the District Judge finds that there is no sufficient reason for removing the minor from the guardianship of his adoptive mother. It is in the interests of the minor that a stranger should not be appointed as his guardian.

JUDGMENT.

PARSONS, J.—The procedure in the lower Court has been distinctly illegal. Section 11 of the Guardian and Wards Act, 1890, requires the Court, that is, the District Court, to fix a day for the hearing of the application, and s. 13 provides that "on the day fixed for the hearing, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application." In the present case the District Judge neither gave notice of a hearing before himself, nor took any evidence himself. On receipt of the application he sent it to the Joint Subordinate Judge for investigation as to whether the allegations made in it were proper, whether it was necessary that a guardian should be appointed, and whether the minor was attending any, and if so, what school, and he issued a notice calling on any who objected to the appointment of the opposed guardian to appear on the 14th December, 1896, before the Joint Subordinate Judge, who would hear and dispose of the objections. The whole enquiry was held before, and all the evidence was taken by, Subordinate Judges. Section 46 of the Act permits the District Court to call "upon any Court subordinate to itself for a report on any matter arising in any proceeding under this Act, and, treat the report as evidence." This clearly does not mean that the whole enquiry should be handed over to a Subordinate Judge, and it does not allow of the use by the District Court of evidence taken by the Subordinate Court. I think that the irregularity is one that vitiates the whole proceedings, and that the conclusion that the District Judge has come to upon evidence not taken before him, cannot be accepted. The parties have the right to require that the District Judge shall take their evidence and pronounce judgment upon it.

[702] We reverse the order and remand the application for a legal hearing.

Costs to abide the result.

RANADE, J.—In this case, the appellant, who is a relative of the minor Balkrishna, made an application under ss. 10—12 of Act VIII of 1890, praying that a guardian be appointed to the person and property of the minor, as the opponent, the minor's adoptive mother, had turned the minor out of the house, and was wasting his property. In the first application made on 11th November, 1896, the applicant prayed that the Nazir of the District Court might be appointed as guardian. In a supplementary application, made on 14th December, 1897, the name of one Govindrao Shete was suggested in place of the Nazir. The original petition was sent on 13th November to the Joint Subordinate Judge of Poona, who was asked to report if the allegations made in the petition were true, and also whether it was necessary to make an appointment as prayed for, and whether the minor attended school. The opponent in her reply denied that

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she had turned out the minor from her house or that she was squandering the property. She further stated that under an agreement made with the minor's father at the time of adoption, she and the minor had equal claim to the property. The Joint Subordinate Judge before whom the inquiry was held, asked the District Judge on 6th July, 1897, whether he should include in his inquiry the disputed question of the adoption and the agreement set up by the opponent, and the District Judge informed him that he should only report on two points: (1) whether it was in the interest of the minor that an appointment of guardian to the person or property or both should be made; and (2) who should be so appointed. Owing to transfers, the evidence in the Subordinate Court was taken before three officers, and finally on 8th March, 1898, a report was submitted recommending that a guardian should be appointed to the person and property of the minor, and that Govindrao and not the Nazir should be so appointed.

The District Judge, after hearing arguments, came to the conclusion that the question of the truth and genuineness respectively of the alleged adoption and agreement set up by the opponent [703] ought to be inquired into before an order could be made for the removal of the opponent from the guardianship which she claimed under the agreement and adoption deed. He, accordingly, on 9th June, 1898, remanded the case for further inquiry. This further inquiry was made by the First Class Subordinate Judge, who sent up, on 24th September, 1898, the evidence taken by him, but expressed no opinion on the same, as the second reference order was silent on that point. Thereupon the District Judge finally disposed of the application on 18th November, 1898, by rejecting it. He held that the first adoption set up by the applicant had not taken place; that the adoption and agreement on which opponent relied were proved; and that there were no grounds for removing the opponent from the guardianship.

The first contention urged by the appellant's pleader before us relates to the procedure followed by the District Judge in conducting the inquiry into this application. It was contended that the District Judge had no power to direct a Subordinate Court to take any part of the evidence without calling for a report from that Court on the evidence so recorded; and, further, the District Judge was in error in acting upon the evidence taken during the course of the second inquiry. On the merits, it was contended that the decision of District Judge in favour of the adoption set up by respondent, and adverse to the earlier adoption, was against the weight of the evidence, and that under any circumstances the respondent was not a proper and fit person to be recognized as guardian of the minor, as she had misappropriated the minor's property, and her interests were in conflict with those of the minor. These are the only two points which require consideration.

In regard to the first point, I feel satisfied that the objection to the procedure followed by the District Judge must be upheld. Section 13 of the Act, VIII of 1890, expressly lays down that the Court shall hear the evidence adduced in support of or in opposition to the application. It is true that s. 46 permits the Court to call upon any Court subordinate to it for a *report* on any matter arising in any proceeding under the Act, and treat such report as evidence. For the purpose of making this report, the Subordinate Court may institute the necessary inquiries. This latter section does not control s. 13 so as to enable the [704] District Judge to dispense with the hearing of evidence by himself, and transfer the whole investigation of material issues of fact to the Subordinate Court. Still

less does it empower the District Judge to admit the evidence recorded by the Subordinate Court when unaccompanied by the report, as was done in this case, in respect of the second inquiry. The points first referred to the Subordinate Court, and on which it submitted its report, were distinct from the point in respect of which the second inquiry was directed, and on the result of which the District Judge finally disposed of the dispute. Not one out of the seven witnesses examined on applicant's behalf or the twenty witnesses examined on opponent's behalf was examined by the District Judge. The conditions laid down in s. 13 were, therefore, not complied with, and in the absence of the report on the remand inquiry, the provisions of s. 46 cannot be said to have been carried out. The decisions in *Buroda Churn Bose* v. *Ajoodhya Ram Khan* (1) *Shadhoo Singh* v. *Ramanoograha Lall* (2), *Iswarchandradas* v. *Jugal Kishor* (3), show that a Court cannot delegate its function of inquiry to an Amin, who in those cases stood in the same position as the Subordinate Court here. The trial of the most important issues of fact cannot be thus delegated. It is true those decisions were passed under Civil Procedure Code, but s. 647 of that Code extends its provisions to all proceedings in any Court of Civil Jurisdiction. They were so made applicable to inquiries under the Dekkhan Agriculturists' Relief Act, to proceedings under Reg. II of 1827, to proceedings under the Land Acquisition and Divorce Acts, and the Registration Act; see *In re Nagappa Hulgappa*(4); *Heysham* v. *Bholanath Mullick*(5); *King* v. *King* (6); *In the matter of the Petition of Hadjee Abdoollah*(7). The inquiry in this case is, therefore, defective in both the ways objected to. The District Judge heard no evidence whatsoever, and he had not the report of the Subordinate Court on the material issue which was raised after the first inquiry, and on which the Judge finally rested his decision. There was thus no legal investigation made by the Judge in this case, and this defect is one which materially affected the merits of the case, **[705]** and is, therefore, not cured by the terms of s. 578, Civil Procedure Code.

On the merits also it may be noted that, on her own showing, the opponent has interests which must conflict with those of the minor. She claims under the disputed agreement that she has an equal interest with him in the property. The existence of such an interest is a sufficient reason to justify the Judge of his own motion to remove a guardian from his post under s. (39) (*g*). This disqualification is not removed by the proviso (*a*), inasmuch as the adverse interest accrued after the death of the opponent's husband. The opponent admitted that she was not in a position to manage the property, and that she was very much in the same condition as the Parda ladies, noticed in *The Collector of Broach* v. *Bai Dariaba* (8), who must rely on karbharis or confidential agents. That same ruling is an authority for holding a lady so situated disqualified, more especially when she claims a right to a large portion of the property which is *prima facie* a part of the minor's estate. The lady held disqualified in the case noticed above was a natural mother of the minor. Even a Collector was held in the same case to be disqualified for guardianship when he had adverse interest to the minor. A person claiming an antagonistic interest to the minor cannot be permitted to dispute the right of the minor to have a separate administrator of the property appointed to

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(1) 23 W.R. 286 (287). (2) 9 W. R. 83, (3) 4 B.L.R. App. 33.
(4) 5 B. H. C.R. 215. (5) 17 W.R. 221 (222).
(6) 6 B. 416. (7) 2 C. 131. (8) P. J. (1892), p. 401.

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take care of the minor's interest—*Dinkarrav* v. *Lakshmibai* (1); *Bai Dolba* v. *Dansing* (2). If the opponent in this case had not set up, as she does on the findings of the lower Court, an adverse right for herself, she might have well urged her objections to the appointment of a Nazir or a stranger, but as it is, it appears to me that the minor has a right to be duly protected by the Court in respect of his property at least—*Parvatibai* v. *Hariboa* (3); *Lakshmibai* v. *Shridhar* (4). The lower Court does not appear to have considered this point. For the reasons aforesaid, even if the findings of fact be accepted, I would reverse the order of the lower Court, and direct a rehearing and a fresh decision on the merits.

Order reversed and case remanded.

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23 B. 706 (F.B.) = 1 Bom. L. R. 142.

[706] FULL BENCH.

Before Mr. Justice Parsons, Acting Chief Justice, Mr. Justice Candy, Mr. Justice Ranade, Mr. Justice Tyabji, Mr. Justice Fulton, Mr. Justice Russell and Mr. Justice Starling.

QUEEN-EMPRESS *v.* MALU AND QUEEN-EMPRESS *v.* NAGU.*

[14th March, 1899.]

Criminal Procedure Code (Act V of 1898), s. 35—Conviction of several offences at one trial—One sentence only to be passed in such cases—Sentence—Indian Penal Code (Act XLV of 1860), s. 71.

Where a person commits house-breaking in order to commit theft, and theft, he may be charged with, and convicted of, each of these offences. In awarding punishment under the provisions of s. 71 of the Indian Penal Code (Act XLV of 1860) the Court should pass one sentence for either of the offences in question and not a separate one for each offence.

If in such a case two sentences are passed, and the aggregate of these does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, that would be an irregularity, and not an illegality, calling for the interference of a Court of Appeal or Revision.

[F., 8 Bom. L. R. 950 = 4 Cr. L. J. 455; 8 Bom. L. R. 855 (856) = 4 Cr. L. J. 450; 11 Cr. L. J. 415 = 6 Ind. Cas. 880 = 3 S.L.R. 224; 1 L.B.R. 279 (280); R., 2 Weir 35 (36).]

REFERENCE to a Full Bench.

The reference was made in two cases which came up before the High Court under s. 438 of the Code of Criminal Procedure (Act V of 1898).

(1) In *Queen-Empress* v. *Malu Arjun and another* the accused were convicted at one trial by the Second Class Magistrate at Mahim of theft in a dwelling-house, and house-breaking by night in order to commit theft, under ss. 380 and 457 of the Indian Penal Code, and sentenced to rigorous imprisonment for fifteen days and for one month separately for each offence.

The District Magistrate of Thana, holding that the separate sentences were illegal, referred the case to the High Court.

(2) In the case of *Queen-Empress* v. *Nagu Babaji* the accused was convicted by the Second Class Magistrate at Satara upon separate charges, at one trial, of theft in a dwelling-house under s. 380 and of house-breaking by night under s. 457 of the Indian Penal Code, and was sentenced to one

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* Criminal References Nos. 26 and 34 of 1899.

(1) P. J. (1886), p. 209.
(2) P. J. (1886), p. 245.
(3) P. J. (1888), p. 351.
(4) 3 B. 1.

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month's rigorous imprisonment for each offence, the sentences to take effect one after the other.

[707] On appeal the District Magistrate passed the following order:—

"The Second Class Magistrate's finding is wrong. He should have treated the two offences as forming one (s. 35, Criminal Procedure Code, and Criminal Ruling No. 36 of 1898), and have inflicted one sentence, and not two. I, therefore, alter his finding and sentence, and find Nagu Babaji guilty of an offence under s. 457, Indian Penal Code, and sentence him to two months' rigorous imprisonment."

The Sessions Judge, being of opinion that the District Magistrate's order was illegal, referred the case to the High Court under s. 438 of the Criminal Procedure Code (Act V of 1898).

Both these references came on for hearing at first before a Division Bench (Parsons, Acting C. J., and Ranade, J., who referred the following questions to a Full Bench:—

(1) Whether a person who has committed house-breaking in order to commit theft and theft, can be charged with, and convicted of, each of these offences?

(2) If so, can a separate sentence be passed on each conviction, provided that the Court does not exceed its ordinary power of inflicting punishment, and that the aggregate sentence passed does not exceed the punishment provided by law for either of the offences?

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.—Before s. 35 of the Criminal Procedure Code was amended by Act V of 1898, there was a conflict of opinion between the different High Courts in India as to whether in a case like the present it was competent to a Court to record a separate conviction and pass a separate sentence for each of the offences charged. The High Court of Calcutta was against two separate convictions and sentences. But this Court took a different view—*Reg.* v. *Anwarkhan* (1); *Reg.* v. *Tukaya* (2). The Allahabad High Court agreed with this Court—*In the matter of Daulatya* (3); *Queen-Empress* v. *Zorsing* (4). The Madras High Court was of the same opinion: see (1869) 4 Mad. H. C. R. Appx. [708] xxxvii. The High Courts of Bombay, Allahabad and Madras agreed in holding that a separate conviction and a separate sentence should be passed for each of the offences charged. The question is whether the new Code of 1898 has made any change in the existing law. An explanation is added to s. 35 of the Code of 1882.

The illustration to the section has created the difficulty. But s. 235 of the Code of 1882 is not amended or altered. Nor is s. 71 of the Penal Code amended. That being the case, s. 35 of the Criminal Procedure Code of 1898 should be read with s. 235 of the same Code, and with s. 71 of the Penal Code. Section 235 of the Criminal Procedure Code provides that a person may be charged at one trial with more than one offence. And illustration B to the section shows that he may not only be separately charged with, but also separately convicted of, each of the offences. Section 258 of the Code provides that when a charge is framed, the accused must be either convicted or acquitted. If he is convicted, a sentence must be passed according to law. It follows, therefore, that, if an accused person is charged with and convicted of several distinct offences, there must be a separate sentence for each offence. Then s. 71 of the Indian Penal Code remains intact. It does not deal with sentences

(1) 9 B.H.C.R. 172. (2) 1 B. 214. (3) 3 A. 305. (4) 10 A. 146.

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23 B. 706 (F.B.) = Bom. L.R. 142.

but with the quantum of punishment. In the Full Bench case of *Queen-Empress* v. *Bana Punja* (1) it is expressly laid down by this Court that where a person is convicted of rioting and of hurt, it is not illegal to pass two sentences, one for rioting and one for hurt, provided the total punishment does not exceed the maximum which the Court might pass for any one of the offences. To the same effect is the ruling in *Queen-Empress* v. *Sakharam* (2).

H. C. Coyaji, amicus curiæ.—I submit that separate convictions and separate sentences can only follow distinct offences. Section 35 of the Code of Criminal Procedure of 1898 allow separate sentences to be passed only if the offences are distinct. But the illustration to the section shows that house-breaking with intent to commit theft and theft are not distinct offences. **[709]** The explanation and illustration to this section must be read together. The object of amending the section was to make the law on this subject clear and consistent. The rulings under the old Code are, no doubt, against my contention. But the ground on which they are based was that theft and house-breaking in order to commit theft were treated as two distinct offences. But the new Code declares that they are not distinct offences. Those rulings, therefore, are no longer any authorities in point. As to the state of the law under the Code of 1872, see *Reg.* v. *Anwarkhan*(3), *Reg* v. *Govinda* (4) and *Reg.* v. *Noujan* (5).

Section 235 (Illustration (*b*)) of the Code of Criminal Procedure is not against my contention. If the Legislature has now expressly excluded the offences in question from the category of "distinct" offences, it is not open to contend that they are distinct offences by analogy of the cases. Moreover, cl. 4 of s. 235 provides that nothing contained in that section affects s. 71 of the Indian Penal Code. The former deals with the procedure at a trial, the latter with punishment only. Because more charges than one can be framed at one trial, it does not necessarily follow that there should be separate sentences also. The section is not imperative but enabling only : see Weir's Criminal Rulings, p. 895 ; see also *Queen-Empress* v. *Ugra Virchand* (6).

Upon the second question, I submit that a separate punishment upon each charge would be illegal. The offences form parts of one and the same transaction : see *Queen-Empress* v. *Muse Bagas* (7).

OPINION.

PER CURIAM.—We are of opinion that the first question should be answered in the affirmative.

We are also of opinion that looking at the illustration and explanation added to s. 35 of the Criminal Procedure Code, 1898, it is the intention of the Legislature that a Court in awarding punishment under the provisions of s. 71, Indian Penal Code, should pass one sentence for either of the offences in question, and not a separate one for each offence ; but if two sentences **[710]** are passed, and the aggregate of these does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, we are of opinion that that would be an irregularity only, and not an illegality requiring interference by a Court of appeal or revision.*

[* The above Full Bench ruling was followed by the Division Bench. The Division Bench decided that the sentence need not be altered and directed that the record and proceedings should be returned.—ED.]

(1) 17 B. 260.
(2) 10 B. 493.
(3) Cr. Rul. 23rd May, 1872.
(4) Cr. Rul. 11th Dec. 1873 (Rat. Un. Cr. Cas. 79.)
(5) 7 M. H.C.R. 375.
(6) Cr. Rul. for 1886, No. 59 (Rat. Un. Cr. Cas. 307).
(7) Cr. Rul. for 1889, No. 63 (Rat. Un. Cr. Cas. 493).

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APPELLATE CIVIL.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

23 B. 710=1 Bom. L.R. 203.

MAHAMAD DASU (*Original Defendant*), *Appellant v.* AMANJI DASU (*Original Plaintiff*), *Respondent.* * [20th March, 1899.]

Bhagdar—Bhagdari estate—Alienation by a bhagdar of his share—Bombay Act V of 1862, s. 3—Collector setting aside sale of share—Subsequent suit to recover share—Limitation.

In the year 1871 the plaintiff, a co-sharer in a bhag, alienated his share to a stranger. In the year 1882 the Collector declared the alienation to be illegal, and in the year 1883 ordered that the plaintiff should be reinstated in the possession of his share. At plaintiff's request his share was given into the possession of the defendant, who was the plaintiff's brother and khatedar of the entire bhag. In the year 1892 the plaintiff brought this suit against the defendant to recover possession of his share. The defendant contended that the suit was time-barred, the plaintiff not having been in possession since the year 1871.

Held, that the suit was not barred, the possession of plaintiff's alienee being the possession of the plaintiff himself, and the defendant not being entitled to tack to the period of his own possession that of the plaintiff's alienee.

SECOND appeal from the decision of R.J.C. Lord, Assistant Judge of Broach with full powers, confirming the decree of Chunilal D. Kavishvar, Second Class Subordinate Judge.

In 1871 plaintiff, a co-sharer in a certain bhag, sold his share to one Valli Adam, who was a stranger to the bhagdar family. Valli Adam continued in possession till the year 1883, when the Collector, who had in the meanwhile declared the sale to be illegal by an order dated the 12th January, 1882, directed that the plaintiff's share be restored to him. The plaintiff thereupon requested that, as he was not living in the village in which the bhag was situate, possession of his share should be given to the defendant, who was his elder brother and the khatedar of the entire bhag. The defendant was accordingly put into possession.

[711] In the year 1892 the plaintiff brought this suit against the defendant to recover his share, contending that the defendant held possession of it as trustee for him.

The defendant denied that he held the property on plaintiff's behalf, and pleaded (*inter alia*) that the suit was barred by limitation, the plaintiff having been out of possession for more than twelve years.

The Subordinate Judge found that the defendant held the property for the plaintiff and that the suit was not time-barred. He, therefore, allowed the claim.

On appeal by the defendant, the Judge (V. V. Paranjpe, First Class Subordinate Judge with appellate powers), without recording findings on all the issues raised, reversed the decree and rejected the claim on the ground that it was time-barred, inasmuch as the plaintiff had not sued within three months from the date of the Collector's order as provided by s. 3 of the Bhagdars Act (Bom. Act V of 1862).

The plaintiff having preferred a second appeal, the High Court reversed the decree and remanded the appeal for a rehearing. See Printed Judgments, 1897, p. 228(1). On the remand the Judge found that the

* Second Appeal, No. 575 of 1898.

(1) The following is the judgment of the Court :—

FARRAN, C.J.—Following the ruling in *Haribhai* v. *Gokal* (P.J., 1897, p. 109) we reverse the decree of the lower Court and remand the appeal for re-hearing upon

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claim was within time, and he confirmed the decree of the Subordinate Judge.

The defendant preferred a second appeal.

H. C. Coyaji, for the appellant (defendant).

Gokuldas K. Parekh, for the respondent (plaintiff).

JUDGMENT.

PARSONS, C. J. (Acting).—The remand order in this case will be found in *Amanji* v. *Mahamad* (1), where the facts are clearly stated. **[712]** The Judge of the lower appellate Court on the rehearing found all the issues in favour of the plaintiff, and the only objection raised here now to his decision is on the ground of limitation.

It is contended that the plaintiff, who had sold his share in 1871 and had, therefore, been out of possession since that time, was barred by prescription from bringing this suit. This contention, however, is based upon a misconception of the relationship that subsists between the parties. They are both sharers in the bhag. The sale by the plaintiff of his share in that bhag and the possession of his alienee were as adverse to the defendant as they were to the plaintiff, and the action of the Collector in 1883, setting aside the sale and reinstating the owners in the possession of the bhag, was beneficial to both, and the effect of it was to restore the parties to their original condition as owners of an unencumbered bhag. It is impossible to assent to the proposition put forward on his behalf that the defendant can prefix to his possession since 1883 the possession of the alienee of the plaintiff between 1871 and 1883, and count the whole period as his possession adverse to the plaintiff; we ought rather to hold that the possession of the alienee was the possession of the plaintiff himself. In alienating the share he transferred his rights over it to his alienee for as long as the alienation lasted, and when the Collector intervened and put an end to the alienation, the effect was to reconvey to the plaintiff those same rights: the plaintiff and his alienee are thus properly to be regarded as successors in title, and the defendant in order to succeed in this suit would be bound to prove adverse possession against both. This he has not done, and the result is that his defence fails. We confirm the decree with costs.

RANADE, J.—The appellant and respondent are brothers, and, along with two other brothers, owned equal shares in a bhag which comprised lands and houses. It is admitted that the land and house in dispute belonged to the respondent before they were alienated by him to strangers in Samvat 1927 (1871). In 1881 the appellant, as khatedar of the entire bhag, applied (Ex. 23) to the revenue authorities for the cancellation of this alienation, and for the restoration of the land and house to the bhag entered in his khata under s. 3 of Bombay Act V **[713]** of 1862. The alienation was accordingly set aside by an order dated 12th January, 1882, and it was directed that the land and house should be restored to the

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the remaining issues. In this particular case the only order the Collector made was this—"I sanction the several portions being rejoined to the bhag." There was nothing in that order which the plaintiff could object to or sue to set aside.

We amend the sixth issue in order to raise the question suggested by Mr. Gokuldas—that the defendant can have no lien on the property for the amount expended in repairing the house, as he has enjoyed the profits of the land—by adding to the last query the words "and has the defendant a lien on the property for the same" after the sentence "what money was so spent."

(1) P. J. (1897), p. 228.

bhag. The appellant wanted the land and house to be made over into his possession. The alienees were, however, willing to restore the land and house to their vendor, the respondent, and not to the appellant. An order was passed accordingly to restore the land and house to the respondent's possession, but he informed the village authorities (Exs. 38, 54) that as he was employed in service in another village, the land and house should be made over into appellant's possession, as he had vahivat of his property, and they were accordingly made over into the possession of appellant on 31st August, 1883.* The respondent later on changed his mind, and as appellant refused to give up possession, the respondent brought his present suit in 1892 to recover possession of the land and house on the ground that the appellant held possession on respondent's behalf. The appellant denied that he held possession of the property on respondent's behalf, and further contended that the respondent plaintiff's claim was time-barred.

The Court of first instance awarded the claim. In appeal it was held that respondent was entitled to be placed in possession, but as appellant did not hold possession on behalf of respondent, and, further, as respondent had not sued to set aside the final order of the Collector within three months under s. 3 of Act V of 1862, the claim was time-barred. In second appeal it was held that s. 3 did not apply to the case, and this Court remanded back the case for decision on the merits. The Assistant Judge has now held that the appellant had obtained possession as trustee for the respondent, and that the latter's claim was not time-barred.

It will be seen from the summary given above that the only two points about which the parties are not agreed are (1) whether appellant or respondent was entitled to the possession of the land; (2) and whether the claim was time-barred.

As regards the first point, s. 3 directs that after the sale is cancelled, the Collector should restore the property to the possession of such person as he deems entitled thereto. The Collector's discretion is thus not absolute and unrestricted. He **[714]** has to determine the question as to the claim for possession, and not of the title to the property —*Haribhai* v. *Gokal* (1). In this case, that discretion was exercised when the District Deputy Collector ordered the Mamlatdar to restore the land to the respondent. The order in appellant's favour was made after respondent had informed the village authorities of his intention to that effect. Appellant did not obtain possession in virtue of a decision of the Collector that he was the person entitled to possession. Quite independently of this circumstance, it is clear that the alienation by respondent having been set aside under the Act, respondent's previous title revived. If, instead of complete alienation, there had been a mortgage or charge, and the Collector had interfered under the same section, and set them aside, it is clear that respondent, and not appellant, would have been benefited thereby. Even though there was no express trust in this case, there can be no doubt that the person entitled to the property was the respondent.

The next question is whether the respondent's claim was time-barred. Respondent alienated the land in 1871, and from that time down to 1892,

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* [Exs. 25, 62.—ED.]

(1) P. J. (1897), p. 109.

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when the present suit was brought, a period of more than twelve years intervenes, during which time respondent was not in possession, and appellant contends that the respondent had no title left to bring the suit. The appellant thus joins his own eight years' possession with the previous twelve years' possession of the alienees of respondent. If the appellant had derived his right from the alienees, his contention would have been valid. But he does not derive his title from the vendees. Their possession, being declared illegal, cannot be pleaded as adverse against the person from whom they derived their title, and who alone was entitled to possession under Act V of 1862. As between the parties to this suit, both of whom held possession of parts of the bhag, the appellant's adverse possession could only commence, at the best, in 1883. The respondent's right to recover possession is, therefore, not time-barred. We confirm the decree of the lower Court and dismiss the appeal with costs.

Decree confirmed.

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23 B. 715 = 1 Bom. L.R. 206.

[715] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

MUKTABAI AND ANOTHER (*Original Defendants*) *Appellants* *v.* ANTAJI AND OTHERS (*Original Plaintiffs*), *Respondents.**
[22nd March, 1899.]

Vatan—Daughter of a vatandar—Not a vatandar of the same vatan during her father's lifetime—Bombay Act III of 1874, *s.* 5—*Bombay Act V of* 1886.

The daughter of a Hindu vatandar is not during the lifetime of her father a vatandar of the same vatan within the meaning of s. 5 of Bombay Act III of 1874, as amended by Bombay Act V of 1886.

SECOND appeal from the decision of L. Crump, District Judge of Satara.

The lands in dispute formed part of a kulkarni service vatan in the Satara District.

On 28th September, 1885, Naro Hanmant, the holder of the vatan, made a gift of the lands to his daughters (defendants Nos. 1 and 2).

In 1893 Naro died. Thereupon the plaintiffs, who were his *bhaubands* and were vatandar kulkarnis of the same vatan, filed a suit to recover possession of the lands, alleging, being service vatan lands, the gift of them to defendants Nos. 1 and 2 could not enure beyond the lifetime of the deceased Naro, and that they (the plaintiffs) alone were entitled to succeed under s. 2 of Bombay Act V of 1886.

The Court of first instance dismissed the suit, holding that the defendants Nos. 1 and 2 had an hereditary interest in the vatan and were consequently vatandars of the same vatan, and that the alienation by gift in their favour was valid under s. 5 of Bombay Act III of 1874.

On appeal the District Judge, following the decision of the High Court in *Chinava* v. *Bhimangauda* (1), held that the defendants Nos. 1 and 2, as daughters of the deceased Naro, were not vatandars of the same

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* Second Appeal, No. 534 of 1898.
(1) 21 B. 787.

vatan within the meaning of s. 5 of Bombay Act III of 1874, and that, therefore, the gift in their [716] favour was not valid. He accordingly decreed the plaintiffs' claim.

Against this decision the defendants appealed to the High Court.

D. A. Khare, for the appellants.

V. G. Bhandarkar (with *V. K. Bhatavedkar*), for respondents.

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JUDGMENT.

CANDY, J.—We agree with the District Judge that this case is governed by the decision in *Chinava* v. *Bhimangauda* (1), and that the daughter of a Hindu vantandar is not during the lifetime of her father a vatandar of the same vatan within the provisions of s. 5 of Bombay Act III of 1874 as amended by Bombay Act V of 1886. We, therefore, confirm the decree with costs.

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23 B. 716=1 Bom. L.R. 213.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

ZENDOOLAL NANDLAL (*Original Defendant No.* 12), *Applicant v.* KISHORILAL MEHTABRAI AND ANOTHER (*Original Plaintiffs*), *Opponents.** [28th March, 1899.]

Civil Procedure Code (Act XIV of 1882). *s.* 108—*Small Cause Court*—Ex parte *decree*—*Satisfaction of the decree*—*Application by defendant to set aside decree.*

The fact that an *ex-parte* decree has been satisfied, does not disentitle a defendant from applying to the Court to set it aside under s. 108 of the Civil Procedure Code (Act XIV of 1882).

APPLICATION under the extraordinary jurisdiction of the High Court [s. 622 of the Civil Procedure Code (Act XIV of 1882).]

On the 18th August, 1897, the opponents obtained an *ex parte* decree against the applicant in the Court of Small Causes, Bombay. The applicant was a resident at Delhi, and the decree was sent there for execution. On the 31st August the applicant's goods were attached, and he (alleging that only then did he come to know of the suit) paid the amount of the decree and costs into the Court at Delhi as *amanat* (deposit), and on the 29th September, [717] 1897, applied to the Small Causes Court, under s. 108 of the Civil Procedure Code (Act XIV of 1882), to set aside the *ex parte* decree and for a re-trial. Meantime the opponents took out of the Court at Delhi the amount paid in by the applicant, and thus the decree was satisfied.

Subsequently the Judge of the Small Causes Court dismissed the application to set aside the decree on the ground that it was made too late. The applicant then applied to the High Court (No. 21 of 1898), and that Court remanded the case to the Judge, directing him to deal with the application on the merits.

On remand the plaintiffs contended that the decree being satisfied, there could not be another trial. The applicant contended that he had paid the amount of the decree into the Court at Delhi under protest, and

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* Application No. 9 of 1899 under the extraordinary jurisdiction.

(1) 21 B. 787.

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that he had got the receipt of the bailiff of the Delhi Court showing that it was so, and that such a payment could not prevent a re-trial.

The Judge thereupon sent the receipt to the Delhi Court for identification, but the letter enclosing the receipt was directed to the District Judge of Delhi instead of to the Deputy Commissioner in whose Court the execution proceedings had taken place. The District Judge replied that the receipt was not passed by any bailiff of his Court. The Judge thereupon rejected the application to set aside the decree on the ground that the decree had been satisfied.

The applicant applied to the High Court under its extraordinary jurisdiction and obtained a rule calling upon the plaintiffs to show cause why the order of the Judge should not be set aside.

Ratanji R. Desai, for the applicant in support of the rule.—The summons was not served upon the applicant. That fact is of itself a sufficient ground for setting aside the decree. We paid the amount of the decree under protest into the Court at Delhi. It was not our doing that the Delhi Court paid out the amount of the decree to the plaintiffs, though the application to set aside the *ex parte* decree and for a retrial was pending in the Bombay Court of Small Causes. But satisfaction of a decree is no ground for refusing to set it aside. Section 108 of the Civil Procedure Code does not impose any such limitation.

[718] *Manekshah J. Taleyarkhan* appeared for the opponents (plaintiffs) to show cause.—The decree being satisfied there is nothing to be set aside or retried. The Judge found that the amount of the decree was not paid under protest. That is a finding of fact, and this Court will not interfere, under its extraordinary jurisdiction, with such a finding of fact. The receipt of the bailiff at Delhi produced by the applicant was disclaimed by the District Judge of Delhi. The rule *nisi* should, therefore, be discharged.

JUDGMENT.

PARSONS, C, J. (Acting).—This case was before this Court on a previous occasion (Application No. 21 of 1898) and it then ordered that the application should be heard on the merits. The Judge of the Small Cause Court has now dismissed it on the ground that the decree sought to be set aside has been satisfied. It appears that the decree was sent for execution to the Court at Delhi where the defendant resided, and that an attachment was there issued and the money was recovered. Whether it was paid under protest or not, was disputed in the Small Cause Court, and the Judge found that it was not proved that the money was paid under protest on the strength of the reply from the District Court at Delhi. It is pointed out to us that the Court which should have replied was the Court of the Deputy Commissioner, and that the District Court was necessarily ignorant of the facts. Be this, however, as it may, we are unable to hold that the fact that an *ex parte* decree has been satisfied, disentitles a defendant from applying to a Court to set it aside under s. 108 of the Civil Procedure Code. No authority has been shown to us for such a proposition, and we cannot assent to it. We direct the Judge of the Small Cause Court to obey the previous order of this Court, and to hear and dispose of the application on its merits. We make all costs, costs in the application.

Rule made absolute.

23 B. 719=1 Bom. L. R. 363.

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[719] APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

GANGABAI (*Original Opponent*), *Appellant v.* KHASHABAI AND ANOTHER (*No.* 1, *Original Petitioner*), *Respondent.** [29th March, 1899.]

Guardian and Wards Act (VIII of 1890), *ss.* 7 (3), 8 (*a*), 13—*Claim to guardianship based on a will does not survive to claimant's representative—Appeal—Death of appellant pending appeal—Abatement.*

One Khashabai applied to be the guardian of the person and property of her minor son. Her application was opposed by Gangabai, the grandmother of the minor who alleged that she had been appointed guardian by the will of the minor's father. The Judge found the will not proved, and he appointed Khashabai to be guardian. Gangabai appealed and pending the appeal she died. Gangabai's brother, one Madhavrao, thereupon applied for leave to prosecute the appeal as Gangabai's representative.

Held, refusing the application, that the appeal must abate by reason of Gangabai's death. Her appointment alleged to have been made under the will was a matter of personal preference and trust. A claim based on personal trust could not survive to her representative.

APPEAL from the decision of J. B. Alcock, District Judge of Nasik.

One Kashabai applied to be appointed the guardian of the person and property of her minor son Hanmant. Her application was opposed by Gangabai, the grandmother of the minor, who alleged that she herself had been appointed the guardian under a will executed by the deceased father of the minor. At the inquiry the original will was not produced, and the Judge appointed Khashabai guardian of the person, associating the Collector with her as guardian of the property of the minor.

Gangabai thereupon filed the present appeal. Pending the hearing Gangabai died. Her brother Madhavrao now applied to have his name entered on the record as her representative and to be allowed to continue the appeal.

Shivram V. Bhandarkar appeared for the applicant.—The applicant being Gangabai's brother is her heir, and he is entitled to succeed to all the rights which Gangabai had.

[720] [PARSONS, C. J.—In the present case Gangabai derived her right of guardianship under the alleged will, and that right being personal came to an end when she died.]

The applicant could have presented an application of his own or could have objected to an application presented by another person under the provisions of the Guardian and Wards Act. So long as Hanmant continues a minor, the applicant is entitled to move in the matter.

Bahadurji (with *Darasha Bazonji* and *Vinayak V. Ranade*) appeared for respondent No. 1, Khashabai.—Without the will, Gangabai had no independent right to the guardianship of the minor. Gangabai being the grandmother of the minor could not be preferred to the respondent, who is his mother. Any right to the guardianship conferred on Gangabai by her son's will came to an end at her death. It was not such a right as survived to her representative. This appeal, therefore, must abate.

JUDGMENT.

PARSONS, C. J. (ACTING).—In this case Khashabai had applied to be appointed the guardian of the person and property of her minor son

* Appeal No. 58 of 1898.

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Hanmant. Her application was opposed by Gangabai, the grandmother of the minor, who claimed the right herself of being appointed the guardian under a will said to have been executed by the father of the minor. The District Judge found the will not proved and appointed Khashabai guardian of the person, associating the Collector with her as guardian of the property of the minor.

Gangabai preferred this appeal against the order and died on the 1st January last. Her brother Madhavrao has now made an application, asking that his name be entered on the record as her representative and that he be allowed to continue the appeal. The question is, whether he has the right to continue the appeal. We answer it in the negative. The objection raised by Gangabai to the appointment of Khashabai was a purely personal one. It was based upon her own appointment by the will of the minor's father, and it ceased on her death. The applicant as her representative could not continue her contention that, as a guardian had been appointed by will, an order appointing another person to be guardian could not be made under the terms of s. 7 (3) [721] of the Act. It cannot, therefore, be said that the right to sue, which in this case must be construed to mean the right to make the objection which Gangabai made, survived.

It was argued that as the applicant Madhavrao might himself have made an application under s. 8 (*a*) to be appointed guardian or have opposed the application of Khashabai under s. 13, he has the right of continuing the application and the opposition of Gangabai, but this is not a sound argument. He could only continue the action of Gangabai if he occupied her place having succeeded as her representative to her rights. This he does not do, for her rights which were based only upon the will determined with her death, and the action of her brother is based not upon the will or upon any rights derived from her, but upon rights which belonged to, and could have been exercised by him in her lifetime. It seems sufficient to say that as the applicant has not succeeded to the office of guardian as the representative of Gangabai, and does not base his opposition to the appointment on any grounds based on representation from Gangabai, he cannot continue this appeal, which must be held to have abated on the death of Gangabai. We now order the appeal to abate.

RANADE, J.—The question at issue, *viz.*, whether this appeal does not abate by reason of the death of the appellant Gangabai, depends for its decision upon the inquiry whether the right to sue in this case survives to Madhavrao as Gangabai's heir after her death (s. 365). Gangabai was opponent in an application made by Khashabai, the respondent, to be appointed guardian and administrator of the minor Hanmantrao. Gangabai chiefly relied upon the will of her deceased son, the minor's father. This will was held not proved, and the District Judge granted the respondent's application so far as the guardianship of the minor's person was concerned, and appointed the Collector and respondent to administer the estate jointly. Gangabai appealed to this Court against this order of the District Judge, and an issue was sent down for inquiry regarding the will. No evidence was given, as Gangabai died in the meanwhile. Her brother now seeks permission to prosecute the appeal as Gangabai's heir. His right to do so must obviously depend upon the right to sue or defend [722] surviving to him as Gangabai's heir. Gangabai claimed the right under her son's will. Independently of the will, she had no superior right as against the respondent Khashabai. Madhavrao claims no right under this will. The appointment of Gangabai alleged to have been made in the will

was a matter of personal preference and trust. Such a claim based on personal trust cannot survive Gangabai. Mr. Shivram Vithal contended that the right survived because the cause of action, according to him, was the minority of Hanmantrao, and that still continued. This is not a correct view to take. The right to sue or defend in this case rests solely on the personal preference contained in the will. The cause of action means in such cases the right to bring the action, or in this case the right to object to the claim. This does not survive to Madhavrao, who claims to be Gangabai's heir. If he claims under any special appointment made in his favour by Gangabai, he must, it is obvious, apply to the District Court and establish his right first. Such an appointment can confer no right on him to have his name substituted in Gangabai's place as appellant in this case. Mr. Bhandarkar admitted that he was unable to cite a single precedent where applications for guardianship or defences in such proceedings have been permitted to be carried on by the heirs of deceased parties. We must, therefore, hold that this appeal abates by reason of Gangabai's death.

The Collector's objection to be joint manager with the respondent will be separately dealt with by the District Judge. It cannot influence the decision of the present appeal in any way.

Appeal ordered to abate.

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23 B. 723=1 Bom. L.R. 215.

[723] APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

TRIMBAK NARAYAN (*Applicant*) *v.* RAMCHANDRA NARSINGRAO AND ANOTHER (*Opponents*).* [4th April. 1899.]

Civil Procedure Code (Act XIV of 1882), s. 310 A, as amended by Act V of 1894—Actual receipt of sale-proceeds by decree-holder necessary to set aside a sale—Sale in execution of a decree.

The words in clause (*b*) of s. 310 A of the Code of Civil Procedure as amended by Act V of 1894—"less any amount which may, since the date of such proclamation of sale, have been *received* by the decree-holder"—contemplate an actual receipt of the amount by the decree-holder. A mere payment of the sale-proceeds into Court does not satisfy the requirement of the section.

A proclamation of sale ordered that for the recovery of Rs. 843-9-9 certain immoveable property belonging to the judgment-debtor should be sold in two lots, A and B. Lot A was sold for Rs. 420, and on the next day lot B was sold for Rs. 584. The judgment-debtor afterwards paid into Court Rs. 452-13-0, and applied to have the sale of lot B set aside, alleging that he had purchased lot A through a third party, and that the sale-proceeds had been paid into Court.

Held, that the mere payment of the sale-proceeds into Court was not a sufficient compliance with the requirements of s. 310A of the Code of Civil Procedure, and as it had not been shown that the sale-proceeds had been received by the decree-holder, the sale could not be set aside.

[Appl., 14 Bur. L.R. 176 (177); R., 28 M.L.J. 262.]

APPLICATION under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

One Ramchandra Narsingrao obtained a decree against Trimbak Narayan for Rs. 843-9-9.

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* Application No. 176 of 1898, under Revisional Jurisdiction.

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In execution of this decree certain lands belonging to the judgment-debtor were sold in two lots. The lands at Munjari were sold as lot No. 1 for Rs. 420 on the 6th September, 1897, and purchased by one Nagesh Shripat Nagpurkar. The lands at Moshi were sold as lot No. 2 for Rs. 584 on the 7th September, 1897, and purchased by Balkrishna Keshrinath.

On the 6th October, 1897, the judgment-debtor applied to the Court to set aside the sale of the lands at Moshi, and paid into Court Rs. 452-10-0. He alleged that the lands at Munjari had [724] been purchased by Nagesh Shripat Nagpurkar as *benamidar* for the judgment-debtor, and that the purchase-money (Rs. 420) had been paid into Court on his behalf.

This application was rejected by the Court on the grounds that the auction sale of one lot only could not be set aside, and that the whole amount mentioned in the sale proclamation had not been paid into Court.

This order was confirmed, on appeal, by the District Court.

The judgment-debtor thereupon applied to the High Court under its Revisional Jurisdiction.

P. P. Khare for applicant.

G. S. Rao for opponent No. 1.

M. B. Chaubal for opponent No. 2.

JUDGMENT.

PARSONS, J.—It is unnecessary for us to decide whether or not an appeal lies from an order refusing to set aside a sale under s. 310 A of the Civil Procedure Code, because on the merits we are of opinion that this application must fail. The proclamation of sale ordered that for the recovery of Rs. 843-9-9 certain immoveable property belonging to the applicant situated at Munjari and Moshi should be sold :— that at Munjari as lot No. 1 on the 6th September, and that at Moshi as lot No. 2 on the 7th September. The Munjari property was sold for Rs. 420 on the 6th September, the Moshi property was sold for Rs. 584 on the 7th September. On the 6th October the applicant paid into Court Rs. 452-13-0 and asked the Court to set aside the sale of his Moshi property. The amount deposited would be sufficient to satisfy the requirements of the section, if the Rs. 420 for which the Munjari property had been sold could be deducted from the decretal debt and if the 5 per cent. could be calculated on the purchase-money of the Moshi property alone. It has been argued that this cannot be done, because, 1st, the Rs. 420 had not been received by the decree-holder, and 2ndly, the application should be to set aside the whole sale and not merely the sale of the Moshi property, in which case 5 per cent. on the whole purchase-money would have to be deposited. The first part of the argument seems to us to be sound. It has been held by the Calcutta High Court that a Court has no power [725] to set aside a sale unless the judgment-debtor has strictly complied with the provisions of this s. 310-A—*Rahim Bux* v. *Nundo Lal Gossami* (1). The words of the section are "less any amount, which may, since the date of such proclamation of sale, have been received by the decree-holder." It cannot be said that the decree-holder has received the sale-proceeds of the Munjari property when in point of fact they have only been paid into Court, and the decree-holder may never receive them at all, because the purchaser

(1) 14 C. 321.

may become entitled to receive the money back under the provisions of s. 315. What the section contemplates is evidently an actual receipt by the decree-holder, and we think that nothing less than that will satisfy its requirements.

In this view of the case, it is not necessary to consider the second part of the argument. We dismiss the application with costs.

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23 B. 723 = 1 Bom. L.R. 215.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, and Sir Richard Couch.

[*On appeal from the High Court at Bombay.*]

RUNCHORDAS VANDRAVANDAS AND OTHERS (*Defendants*) *v.* PARVATIBAI AND OTHERS (*Plaintiffs*).

[22nd February and 11th March, 1899.]

Will—Hindu law—Dharam—*Bequest for "dharam"—Reversioner — Limitation Act (XV of 1877), ss.* 10, 28; *arts.* 120, 141, 144.

A bequest by a Hindu testator of moveable and immoveable property to trustees for *dharam* was held void. The objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control.

Morice v. *The Bishop of Durham* (1) referred to and followed.

The testator died in 1869 leaving two widows to whom he made specific bequests "for enjoying" "the rent and for making *dharam dan*." He bequeathed the residue of his property, moveable and immoveable, to trustees for *dharam*. One of the widows died in 1871, and the other in 1888. On the death of the survivor this suit was brought in 1888 to have the bequest set aside and for administration of the estate.

[726] *Held*, on the question of limitation, that the suit was not barred. The limitation, if applicable to the moveables, would have been under art. 120, and to the immoveables under art. 141 of Act XV of 1877. Art. 144, which makes the period of limitation commence from the date when the possession of the defendant is adverse to the plaintiff, does not apply where the suit is otherwise specially provided for, and, therefore, had no application here. At the same time, s. 28 of the Act, as to the extinction of a right by the effect of limitation running against the widows, if it had done so, would not have been applicable to the plaintiff, whose right was not derived from or through the widows, but was derived through their husband on the death of the surviving widow.

[F., 23 A. 448 (451); 30 M. 340 (341) = 17 M.L.J. 379 = 2 M.L.T. 198; 2 Bom. L.R. 106 (108); 14 Ind. Cas. 247 = 78 P.R. 1912 = 106 P.L.R. 1912 = 63 P.W.R. 1912; 25 Ind. Cas. 692 = 16 M.L.T. 435 = 27 M.L.J. 569; 18 Ind. Cas. 959; **Rel.**, 31 B. 583 (590) = 9 Bom.L.R. 560; 6 C.L.J. 490 (498); 75 P.R. 1907 = 168 P.L.R. 1908 = 139 P.W.R. 1907; **Appl.**, 26 B. 632 = 3 Bom.L.R. 902 (904); 9 C.L.J. 236 (238) = 6 M.L.T. 362; 3 N.L.R. 35; 11 O.C. 48 (53); **R.**, 37 B. 447 = 14 Bom. L.R. 987 = 17 Ind. Cas. 689; 31 C. 895 = 8 C.W.N. 653 (655); 37 C. 128 = 3 Ind. Cas. 642 = 10 C.L.J. 355 (367) = 14 C.W.N. 18; 40 C. 232 = 21 Ind. Cas. 194; 25 M. 507 (510); 26 M. 193 = 12 M.L.J. 197 (199); 4 Bom.L.R. 893 (902); 6 Bom. L.R. 78 (81); 18 Ind. Cas. 948; 4 N.L.R. 49 (54); 4 P.R. 1903; **Cons.**, 34 M. 74 = 6 Ind. Cas. 579 = 20 M.L.J. 964 = 8 M.L.T. 97; **Expl.**, 25 A. 435 (439); **D.**, 28 M. 197 (201); 61 P.W.R. 1908; **Expl. & D.**, 30 A. 111 = 5 A.L.J. 23 (27) = 28 A.W.N. 34.]

CONSOLIDATED appeals from a decree (19th February, 1897) of the appellate High Court of Bombay varying a decree (27th July, 1896) of the High Court in the original jurisdiction. See I. L. R., 21 Bom. 646.

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(1) (1804) 9 Vesey, 399; (1805) 10 Vesey, 522.

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The appellants in the principal appeal represented the late Vandravandas Purshotamdas, who was an original defendant in this suit brought on the 21st December, 1888. He was the sole surviving executor of the late Kallianji Sewji, who died childless on 6th January, 1869, leaving two widows, Cooverbai, who died in 1871, and Nenavahu, who died in 1888. He made his will on the day before he died.

The respondents, Parvatibai, executrix, and Harivalabhdas Haridas and Purshotam Mulji, executors, represented in this suit the late plaintiff Cursandas Govindji, who was nephew (brother's son) and heir of the testator. He sued to have bequests to *dharam*, made in the will, declared void. The Advocate General, on behalf of a charity said to have been set up in pursuance of the will, submitted himself to the order of the Court.

The will proved by the executors on the 2nd March, 1869, gave two properties, moveables and immoveables, to each of the testator's widows, for them to receive the income thereof for their lives.

The income of these four properties was directed by the testator to be spent by the executors, after the death of the widows, for *dharam*, which the will explained to be "doing all good works of a permanent nature, and acting in such a manner as to give me a good name."

[727] The questions raised in this appeal were (1) whether the bequest to *dharam* was valid or void; (2) whether the suit was barred or affected by the law of limitation under Act XV of 1877.

The pleadings, issues and facts appear in their Lordships' judgment. See also the report of the case in I. L. R. 21 Bom. 646.

PARSONS, J., in the original jurisdiction of the High Court, declared the bequest to *dharam* void, and that no part of the suit was barred by limitation. He declared that the plaintiff was entitled to the immoveable estate, and to any moveable property of the testator undisposed of at Nenavahu's death. He directed an account of the immoveable property of the testator from the 19th November, 1888, to the date of the decree and an account of the moveables left by the widows at their deaths, distinguishing the *stridhan* of Nenavahu from the other property. The material passages in his judgment were the following:—

"On the authorities cited, and on the plain construction of the terms of the will, I have no hesitation in holding that the provisions constituting the *dharam*, and directing the executors to expend the income of the estate or *dharam*, are void. That being so there would be an intestacy as to the whole of the estate so attempted to be dealt with; and the effect of this would be that the widows of Kallianji would take not the limited estate devised to them by the will, but what is in law defined to be a widow's estate in his property."

With regard to limitation, the Judge held that art. 141 of the Act XV of 1877 applied. He held that the plaintiff's title and right to possession, would not come into being until the death of the last surviving widow, and then, and not till then, could he legally sue for the property; and that during the lives of the widows there could be no such thing as possession adverse to the heir.

There was an appeal from this judgment, the defendants contending that the bequest to *dharam* was valid, that the plaintiff's claim was barred by limitation, that Nenavahu's will disposed of her moveable estate, and that the plaintiff was not entitled to the moveable estate, which never came into the widow's possession.

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The plaintiff cross-appealed, contending that he was entitled generally to all the immoveable property left by the testator, to the proceeds of what had been sold, to all the accumulations, and [728] to an account of what moveable property had come to the hands of the executors.

The High Court varied the decree of the lower Court. They declared the bequest to *dharam* void, and that the plaintiff was entitled to receive from the defendants the immoveable properties which were in the defendant's possession at the death of Nenavahu, and the proceeds of the property which had been sold by him with accounts for the purpose.

The Judges (Farran, C. J., and Tyabji, J.) held 'that the possession of the executors, in so far as they were not by the terms of the will made trustees for the widows and reversionary heirs of the testator, was adverse to the widows and heirs. The executors entered into possession under the will, and acted not as trustees for the widows and heirs, but as independent owners deriving their title under the will. Such possession was adverse to the heirs, whether they consented, or did not consent, to that possession. They held under express trusts intended to defeat the title of the heirs: on failure of those trusts, no trusts arose in favour of the heirs contrary to the terms of the will. As regards the claim to Cooverbai's estate, which was all moveable, the plaintiff's claim was long since time-barred.

'As regards Nenavahu, the testator gave her full power of disposition over the income of the properties given to her for her life. She accordingly had the power to make the will which she made. The decree below must be varied by omitting the portion which directed an account of the moveables left by her.

'With regard to the bulk of the property left by the testator. First, as to the moveables left by him, and the profits of the immoveables, which the executors spent during the lifetime of Nenavahu, and with her acquiescence, the plaintiff had no claim. As Nenavahu could herself have dealt with this class of property, so she could authorize the executors of her husband to deal with it. Secondly, with regard to the *corpus* of the immoveable estate, and to such portion of the moveable, and of the profits as were unexpended at the death of Nenavahu, the plaintiff's claim to the former was not barred by limitation: to the latter his claim equally was not barred; but they were of opinion that [729] Nenavahu's claim to the latter being barred at her death, the plaintiff had no fresh starting point from that period.' With regard to the invalidity of the gift in *dharam*, the High Court held that it was concluded by authority "until that law shall have been differently expounded by a superior tribunal." They observe that "it is doubtless the case that this interpretation of the law defeats in innumerable instances the cherished wishes of Hindu testators. Few Hindu wills that we have met with are without a devise of this nature, though some testators define with precision the objects of their *dharam*, and it may well be that the Courts would have acted with more regard to native feelings and ideas if instead of considering the broad signification that the word '*dharam*' indisputably bears, which appears to be as wide as the words philanthropy, or piety, or charity, in its untechnical sense, they had considered the objects which the Hindu shastras and Hindu testators would consider to be embraced within the term, and construed it in reference to the Hindu sacred law relating to *dharam*. These objects might, we think, be exhaustively enumerated under a few heads which would, even now, with advancing ideas, not be wider than the objects which are deemed to be 'charitable,' by the Courts in England,

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and would not embrace such objects as are suggested in the argument in *Macduff* v. *Macduff* (1). In a native Court untrammelled by English precedents or decisions, we can hardly doubt but that a devise in *dharam* would be upheld and applied." "We agree with the Division Court that the devise to *dharam* is too general and too indefinite for the Court to enforce, and is, therefore, void."

On the 8th March, 1897, the appellants petitioned to appeal on the grounds: (1) that the bequests to *dharam* were good and valid; (2) that the plaintiff was not entitled to possession of any immoveable estate of the testator other than those of which Nenavahu died possessed, his claim being barred by limitation. The plaintiff petitioned in cross-appeal that he was entitled generally to all the immoveable estate of the testator, and that his claim should not have been limited to such of it as was in the possession of the defendant at the death of Nenavahu. The Court ought to have held that "by reason of the devise to *dharam* being incapable [730] of enforcement, the executors become express trustees of the whole estate not validly disposed of by the will for the heirs of the trustees." The plaintiff further claimed all the moveable estate not validly disposed of by the widows during their lifetime.

J. D. Mayne and *H. Cowell*, for the appellants, the representatives of the surviving executor and trustee, argued that the bequest to *dharam* was valid. By the use of that word were intended such objects as Hindus deemed to be incumbent upon, or for the benefit of, the testator in a future state, and not such objects as only would correspond to charitable objects in the sense understood by the English Courts. It was rather the clause in the regulation enacting that Indian Courts should be guided by the justice, equity and good conscience that should govern the construction of the word *dharam* as used in this will. This rule was generally taken as derivable from the law of the English Equity Courts. But the latter were no guide on this subject, keeping in view, as they did, the principles of securing objects of public charity, and maintaining the analogy of the statute of Elizabeth. Reference was made to the Civil Procedure Code, 1882, s. 539. The Court in the present case could settle a scheme, there being nothing in the bequest contrary to the Hindu law, as that law, relating to wills, was enforced in the British Courts—*Soorjeemoney Dossee* v. *Denobundoo Mullick* (2). It had been held below that the question, whether a gift to *dharam* was valid, was not an open one. It was, however, not concluded by authority before this Committee. The decisions which the appellant sought to have over-ruled were, principally, *The Advocate General* v. *Damothar* (3), *Gangabai* v. *Thavur Mulla* (4) and *Pranjivandas Tulsidas* v. *Devkuvarbai*(5). Reference was made to *Lakshmishankar* v. *Vaijnath* (6), where a gift for the performance of ceremonies and to feast Brahmins was held valid—*Cursandas Govindji* v. *Vundravandas* (7); *Devshankor Naranbhai* v. *Motiram Jageshar* (8); *Dwarkanath Bysack* v. *Burroda Persaud* (9); *Bai Motivahu* v. *Bai Mamubai* (10).

[731] In regard to limitation:—An adverse possession for more than twelve years would have extinguished the widows' right. After that they could not have sued on their title. Under s. 28 of Act XV of 1877 their title would have been gone. They represented the estate. The plaintiff in

(1) (1896) 2 Ch. 451.
(2) 9 M.I.A. 123 (135).
(3) (1852) Perry Oriental Ca. 526.
(4) 1 B.H.C.R. 71.
(5) 1 B.H.C.R. 76 in note.
(6) 6 B. 24.
(7) 14 B. 482.
(8) 18 B. 136.
(9) 4 C. 443.
(10) 21 B. 709 = 24 I.A. 93.

this suit was not at the date of the last widow's death "entitled to possession" within the meaning of the Act in art. 141, which did not give a fresh cause of action but only a new starting point for limitation. No doubt the reversioner's claim was through the deceased husband, and not through the widows. But still, if the widows' title had been extinguished, there would have been no estate existing to which he could succeed at the date of the last widow's death. Reference was made to *Nobin Chunder Chuckerbutty* v. *Issur Chunder*(1); *Amirtolall Bose* v. *Rajonee Kant Mitter* (2); *Srinath Kur* v. *Prosunno Kumar Ghose* (3); *Hanuman Prasad Singh* v. *Bhagauti Prasad* (4) *Hurrinath* v. *Mothoor Mohun Goswami* (5); *Lachhan Kunwar* v. *Anant Singh* (6).

J. Jardine, Q. C., and *J. H. A. Branson*, for the respondents, cross-appellants, contended that in holding the bequest invalid the High Court had been right. *Dharam* was not defined in any of the cases that had been cited. It was a vague term, probably including both benevolence and religion. H. H. Wilson, in his "Glossary of Indian Terms," p. 137, translated the word as meaning "law, virtue, legal or moral duty." No Court could give effect to the intention of a testator using this term in its widest sense. The objects need not be of a public nature even, but might be one of the private religious acts regarded among Hindus. Gifts to *dharam* had been declared invalid fifty years ago. In Bombay there was an early case in Perry's Oriental Cases already cited, but, in Calcutta, *Sibchunder Mullick* v. *Treepoorah Soondary Dosee*(7) was before it. As there was no Hindu law for the construction of a will on this subject, the analogy of English law was taken as a guide. The gift was by that law void for vagueness.—*Macduff* v. *Macduff*(8).

[732] With regard to limitation, assuming the trustees' possession to be adverse to the widow, and even that her rights were barred, still the reversioner's claim in this suit was not barred. By the operation of art. 141 of Act XV of 1877, adverse possession during the life of the widow did not prevent this suit. As to this were cited *Ram Kali* v. *Kedar Nath*(9); *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami*(5); *Massumat Lachhan Kunwar* v. *Anant Singh*(6); *Hanuman Prasad* v. *Bhagauti Prasad* (4). But the possession of the trustees was not, either in law or in fact, adverse to the widows, even as to the moveables. The widows took the moveables, as they were at the testator's death, with full power of disposition, subject to whatever remained undisposed of by them reverting to the husband's estate, and passing to his heirs at the surviving widow's death. So far as the trustees had possession, it was in trust all the time for those beneficially interested therein, and that trust was for a specific purpose, to use the words of the Indian Legislature, the words "express trust" being the words used by the English Courts and enactments.

Reference was made to *Patrick* v. *Simpson*(10), *Salter* v. *Cavanagh*(11), among English cases, and among Indian, to *Lallubhai Bapubhai* v. *Mankuvarbai*(12). Those decisions were on this principle, that if the donee under a will is made a trustee, and he does not take any beneficial interest, the trusts are express trusts.

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(1) 9 W.R. 505 = B.L.R. Sup. Vol. 1008.
(2) 2 I. A. 113 (121).
(3) 9 C. 934.
(4) 19 A. 357 (371).
(5) 20 I. A. 183; 21 C. 8.
(6) 22 I.A. 25 = 22 C. 445.
(7) (1842) Fulton, Rep. 98 (109).
(8) (1896) 2 Ch. 451 463, (470).
(9) 14 A. 156.
(10) (1889) 24 Q.B.D. 128.
(11) (1838) 1 Dr. and Wal. 668.
(12) 2 B. 388 (414).

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[LORD MACNAGHTEN here referred to *Lyell* v. *Kennedy*(1).]

Thus the cross-appellants were entitled to hold the present decree as respondents, and also were entitled to all the immoveable estate of the testator, without the claim being restricted to such of the testator's property as was in the possession of the appellants at the death of Nenavahu, the surviving widow. And it should be held that in consequence of the bequest to *dharam* failing as invalid, the executors under the will had become trustees of all the testator's estate not validly disposed of by the **[733]** will. They were trustees for the heirs of the testator. The respondents were also to inherit all the moveables undisposed of, at the death of the surviving widow, by the widows in their lifetime.

J. D. Mayne, in reply, argued that the appellants were not deprived of the right to rely on limitation under s. 20 of Act XV of 1877, if there should be understood to be only a resulting trust in favour of the respondents instead of a trust for a specific purpose, or express trust. He referred to *Dickenson* v. *Teasdale* (2), *Cunningham* v. *Foot* (3) and *Lyell* v. *Kennedy*(1). In the Indian Law of Limitation the rules applied to every suit or proceeding which was not specially excepted. He referred to *Balwant Rao* v. *Puran Mal* (4), *Kherodemoney Dossee* v. *Doorgamoney Dossee* (5), *Cowasji Nowroji Pochkhanawala* v. *Rustomji Dossabhoy Setna* (6), as showing against what persons the trustees would hold adversely. Even if the law as explained by the High Court, in regard to cases that fell under Act IX of 1871, had been altered by the later enactment XV of 1877, it would still be necessary for the reversioner to make out a title to an existing estate. However, not only would the widow's title have been barred under art. 144 by the adverse possession of the trustees, but under s. 28 her right would have been absolutely extinguished, with the result that there would have been no estate for the reversioner to get; although the period within which he could sue commenced, for such a suit as the present, under art. 141, from the date of the death of the widow.

JUDGMENT.

Afterwards on March 11th, 1899, their Lordships' judgment was delivered by

SIR RICHARD COUCH.—Kallianji Sewji, a Hindu who died on the 6th of January, 1869, made his will on the previous day in the following terms.

After specifying his immoveable and moveable property and giving to his wife Nenavahu a piece of land and a house and to his other wife Cooverbai a garden and a house the will says :—

[734] "According to these particulars out of the above-mentioned estates belonging to me the above-mentioned estates four in number have been given to my wives for enjoying the rent (thereof) and for making *dharam dan* (charitable or religious gifts, &c.) (of the same), and whatever other estates belonging to me remain and whatever profit appertaining to my share may remain after deducting the debts, &c., in my books belong wholly to me personally. I have during my lifetime appointed three persons trustees over the same."

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(1) (1889) 14 Ap. Ca. 437.
(2) (1862) 1 DeGex. J. and S. 52.
(3) (1878) 3 Ap. Ca. 974.
(4) 10 I. A. 90=6 A. 1.
(5) 4 C. 455.
(6) 20 B. 511.

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(Here follow the names of the trustees).

"According to these particulars I have appointed trustees. The said trustees are to act in such manner as they think proper for preserving my name so that my money might always be used for some good *dharam* (religious or charitable purpose) after my death (and) by which good might be done to me. No one shall have any right (or) claim whatsoever thereto."

(Then there is a direction to make certain monthly payments out of the *dharam* fund to his brother, step-mother and step-brother).

"Further it is as follows—As to the estates which have been given by me to my wives they are to enjoy the rents of the said estates during their natural lives, and on the death of my wives tha said estates are to revert to my *dharam* (religious or charitable fund), and whatever income may be derivable from the said estates is to be expended for my *dharam* (religious or charitable purposes)."

On the 2nd of March, 1869, probate of the will was granted to the persons named in it as trustees. Cooverbai died in 1871 and Nenavabu in 1888. On the 21st of December, 1888, after her death Cursondas Govindji, who was the heir-at-law of Kallianji Sewji, brought a suit in the High Court at Bombay against Vandravandas Purshotumdas, the sole surviving executor and trustee, who having died is now represented by the appellants Runchordas and others his executors and executrix and also against the Advocate-General of Bombay. Cursandas Govindji having also died during this appeal is now represented by the respondents Parvatibai and others, his executrix and executors.

The plaintiff in his plaint submitted that the bequests in the will for *dharam* were void and inoperative, and the property which was the subject of them was undisposed of by the will, and prayed that the estate might be administered under the direction of the Court, and it might be declared that the bequests for *dharam* were void. This was disputed by the first defendant, the Advocate-General submitting himself to the order of the Court. Issues were settled, one being whether the suit is barred by limitation and another whether the bequests to *dharam* are void. **[735]** The other issues need not be noticed. The learned Judge of the High Court who tried the suit held "that the provisions constituting the *dharam* and directing the executors to expend the income of the estate for *dharam* were void, and that the suit was not barred by limitation." Vandravandas Purshotamdas appealed, and the appeal Court held that the devise to *dharam* "is too general and too indefinite for the Court to enforce, and is, therefore, void." It also held that the suit was not barred by limitation for the immoveable properties.

It is not necessary for their Lordships to refer particularly to the cases in the Indian Courts where it has been held that a devise or bequest for *dharam* is void for vagueness and uncertainty. They begin at an early period both in Bombay and Calcutta, and according to the judgment of the appeal Court are numerous. The reasons for the decisions of the English Courts upon devises or bequests of a similar nature are stated by Lord Eldon in his judgment in the leading case of *Morice* v. *Bishop of Durham* (1). He says (10 Ves., 539). "As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust, therefore, which, in case of

(1) (1804) Ves. 399; 10 Ves. 522.

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maladministration, could be reformed and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct a due administration." Lindley, L.J., refers to this judgment (*In re Macduff* (1)) and says: "That is the principle of that case and has been enunciated or repeated from time to time." In the latter case the words of the bequest were "purposes charitable or philanthropic." In Wilson's Dictionary "*dharam*" is defined to be law, virtue, legal or moral duty, and the language of Lord Eldon applies as strongly if not more so to *dharam* as to the words used in the English cases. The objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control.

[736] It is, therefore, necessary to decide the question of limitation. The Act which is applicable to this case is Act XV of 1877. The plan of this Act following the plan of the repealed Act IX of 1871 is to specify, in the second schedule to it, the period of limitation for every description of suit. The division of them is so complete that the schedule contains 180 articles or divisions in three columns headed, 'Description of suit,' 'Period of limitation,' 'Time from which period begins to run.' Article 141 is that which applies to the present suit. It is "like suit (for possession of immoveable property) by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female. When the female dies." The period given is twelve years. Article 144, which makes the time begin to run from when the possession of the defendant becomes adverse to the plaintiff, is not applicable where the suit is otherwise specially provided for. The article which applies to the moveable property is 120 in which the time (six years) begins to run when the right to sue accrues. The suit, therefore, for both kinds of property is not barred by the Act.

The learned counsel for the appellants relied on s. 28, which provides that at the determination of the period limited for instituting a suit for the possession of property the right to the property shall be extinguished. The obvious answer to this argument is that in this case the period limited is not determined. It is not necessary to consider what might be the case if the widows or the survivor of them were suing, as the plaintiff does not derive his right from or through them, and the extinguishment of their right would not extinguish his.

It has been held by the appeal Court as to the moveable property (if any) in the hands of the defendant at the death of Nenavahu and the rents and profits of the immoveable properties in the defendant's hands at the same period that her claim was barred at her death and that there is no provision of the Limitation Act which gives the plaintiff a fresh starting point from that period. Accordingly the appeal Court has varied the decree of the first Court. Their Lordships do not agree to this view. The right of the plaintiff to this property (if any) accrued at the death of Nenavahu. The decree of the first Court, dated **[737]** 27th July, 1896, should not have been varied as it has been. It is for an account of the moveable property left by Cooverbai and Nenavahu at the time of their death distinguishing between such of it as was their *stridhan* and "as such" formed part of the estate of the testator. "As such" appears to be

(1) (1896) 2 Ch. 463.

an error for "such as." With this alteration their Lordships think the decree will be right.

Their Lordships will, therefore, humbly advise Her Majesty to dismiss the principal appeal (No. 44 of 1898), and in the cross-appeal (No. 45) to set aside the order of the appeal Court and affirm the order of the first Court with the alteration mentioned. The appellants in the principal appeal will pay the costs of both appeals.

Principal appeal dismissed: cross-appeal allowed.

Solicitors for the appellants and respondents on the cross-appeal:—Messrs. *Payne and Lattey.*

Solicitors for the respondents and cross-appellants:—Messrs. *Nicholl, Manisty and Co.*

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Before Mr. Justice Candy; and, on appeal, before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Tyabji.

KASAM HAJI MITHA (*Plaintiff*) *v.* THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED (*Defendants*).* [23rd June, 1899.]

nsurance—Covering note—Slip—Policy—Concealment of material fact.

On the 15th March, 1897, the plaintiff, who was a shipper of salt, applied for and obtained from the defendants' company in Bombay a preliminary "covering note" for Rs. 51,000 for salt to be shipped by him from Bombay to Calcutta. The covering note stated that a stamped policy in completion thereof would be issued on receipt of particulars. The plaintiff's practice was to bring salt from his salt-works at Uran in native prows and to put it on board steamers in Bombay harbour. On the 14th April, 1897, the plaintiff put 594 bags of salt on board a prow for shipment in the British India steamer "Nairung." The transhipment commenced on the 27th April. Forty-nine bags had been transhipped when a storm arose and the prow shipped water and sank with the remaining 545 bags on board, which were thus wholly lost. Their value was [738] Rs. 4,360. On the 29th April, 1897, the plaintiff applied to the defendants' company for a policy and paid the premium, and on the 30th April a policy of insurance was issued to him. It was "an insurance (lost or not lost) at and from Bombay to Calcutta upon any kind of goods and merchandise and freight of or on the ship or vessel called the 'Nairung,' including all risk of craft and boat to or from the ship or vessel." Upon this policy the plaintiff sued to recover the value of the lost salt, *viz.*, Rs. 4,360. The defendants pleaded that the covering note of 15th March, 1897, did not constitute a completed agreement for the insurance of the salt; and as to the policy they pleaded that it was void, inasmuch as the loss had already occurred at the time of issue and that the plaintiff had concealed the fact from them. The plaintiff alleged that the information of the loss was given on the 27th April when the policy was applied for, and he further contended that in any event the defendants were liable, inasmuch as the covering note of 15th March, 1897, was a complete and final contract binding upon the defendants, whatever events might subsequently have happened.

Held, affirming Candy, J., that the plaintiff was not entitled to recover.

SUIT on a policy of marine insurance.

Plaintiff sued the defendants to recover a sum of Rs. 4,360 under a policy of insurance dated the 30th April, 1897.

The plaintiff dealt in salt, which he brought in prows from Uran and put on board steamers in Bombay harbour. He had for several years insured the goods thus shipped with the defendants' company.

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* Suit No. 531 of 1897. Appeal No. 993 of 1898.

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The practice was, in the first instance, for him to obtain "covering notes" from the defendants, and subsequently to apply for and obtain a policy of insurance.

On the 15th March, 1897, the defendants' company issued the following covering note to the plaintiff :—

"THE BRITISH AND FOREIGN MARINE
"INSURANCE COMPANY, LIMITED.
"Preliminary Covering Note, 3 P.M.
"*Bombay*, 15*th March* 1897.

"TO KASIM H. MITHA, Esq.

"DEAR SIR,—We have noted your application in the above company as under, and a stamped policy in completion thereof will be issued on receipt of particulars.

"Amount Rs. 51,000 on salt. Any B. I. (*i. e.*, British India steamer) and for Asiatic steamer or steamers from Bombay and salt ports to Calcutta at $\frac{3}{8}$ per cent.

[739] "This note will be null and void on departure of the vessel from port of sailing.

"*N. B.*—From 25th May to 31st August, both inclusive, risk of boats alongside the vessel between sunset and sunrise is not covered by this acceptance.

"Yours faithfully,
"(Signed) MACKINNON, MACKENZIE, & CO.,
"Agents."

At the end of that month some salt was shipped by the plaintiff on a B. I. (British India) steamer (the "Nurani"), but no particulars were given to the defendants of that shipment and no policy was issued in respect of it. But on the 14th April the plaintiff put on board the prow "Putli" at Uran 594 bags of salt for shipment on the B. I. steamer "Nairung." There was some delay in bringing the prow alongside the "Nairung," but this was done on the 27th April. On the 27th April, 1897, the transhipment of the bags from the prow to the "Nairung" was commenced. Forty-nine bags had been put on board the steamer, when a storm arose and the prow shipped water and sank with the remaining 545 bags on board, which were thus wholly lost. The value of the salt was alleged to be Rs. 4 per maund, and there were two maunds in each bag. The sum sued for, *viz.*, Rs. 4,360, was the value of the lost salt.

On the 29th April, 1897, the plaintiff applied to the defendants' company for a policy and paid the premium. He stated at the hearing that it was his practice when applying for a policy to give the particulars and that he did so after the salt had been shipped. On the 30th April a policy of insurance, to the amount of Rs. 60,000, on 15,000 maunds loose salt was stamped and issued to the plaintiff. It was "an insurance (lost or not lost) at and from Bombay to Calcutta upon any kind of goods and merchandise and freight of and in the ship or vessel called the 'Nairung,' including all risks of craft and boats to and from the ship or vessel."

The plaintiff in this suit sought to recover under this policy the value of the lost salt, *viz.*, Rs. 4,360.

In their written statement the defendants contended that the covering note of the 15th March, 1897, did not constitute a [740] completed agreement for the insurance of 594 bags which the plaintiff had intended

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to ship on board the "Nairung." They admitted the subsequent issue of the policy on the 30th April, 1897, but alleged that it was issued before they received any notice of the loss. The fourth paragraph of the written statement was as follows :—

"The defendants say that at the time the plaintiff paid the said premium, and before the said policy was issued, the plaintiff knew or ought to have known of the loss in the plaint alleged, but that he neglected to communicate the same to the defendants, and that in consequence thereof, and by reason of the said loss having already taken place, the plaintiff has no right to recover from the defendants in respect thereof."

The defendants further contended that if and so far as they were liable under the covering note, such liability had already been extinguished by previous shipments of the plaintiff, and that the plaintiff could not recover the sum now claimed.

The following issues were raised at the hearing :—

1. Whether there was any completed agreement between the plaintiff and defendants for the insurance of the 594 bags of salt in the plaint referred to for the loss of such bags.

2. Whether the defendants are liable, by reason of the policy in the plaint referred to, to indemnify the plaintiff against the loss of the said bags.

3. Whether the said policy is not void by reason of the concealment of the loss of the said bags at the time the said policy was effected.

4. Whether the defendants by reason of the covering note in the plaint mentioned are liable to indemnify the plaintiff for the loss of the said bags.

5. Whether the liability of any of the defendants under the said covering note had not been exhausted by reason of the previous shipments by the plaintiff before the loss of the said bags.

Lang (Advocate General) and *Macpherson*, for plaintiff.—They cited *Cory* v. *Patton*(1) ; *Lushman* v. *Northern Maritime Insurance Company*(2).

Scott and *Lowndes*, for defendants.—The policy of insurance was subsequent to the loss. The fact of the loss was concealed from the defendants when the policy was applied for, and, therefore, **[741]** the policy is void. The covering note merely gives the right to demand a policy, but does not validate the policy ; if otherwise it would be void. If the covering note had any further force, then we say it was exhausted at the date of the policy, because salt to the full value had been previously shipped on board the "Nurani" for which no policy was taken.

CANDY, J.—This is an action on a policy of marine insurance made by the defendants with the plaintiff and dated 30th April, 1897.

Plaintiff is a large shipper of salt, his works being at Uran, whence he brings the salt in prows and puts it on board steamers in Bombay harbour. On 15th March, 1897, defendants as agents for the British Foreign Marine Insurance Company addressed a preliminary covering note to plaintiff, which is in a printed form, and runs as follows :—"We have noted your application for insurance in the above company as under, and a stamped policy in completion hereof will be issued on receipt of particulars. Amount Rs. 51,000 on salt F. P. A. per any B. I. and for Asiatic steamer or steamers from Bombay and salt ports to Calcutta. This note will be null and void on the departure of the vessel from port of

(1) (1872) L.R. 7 Q.B. 304 = (1874) L.R. 9 Q.B. 577.
(2) (1873) L.R. 8 C.P. 216 = (1875) L. R. 10 C.P. 179.

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sailing." The words above were filled in with ink. The form is apparently one meant to apply to a particular vessel named therein. But it is admitted that in some prior transactions between the parties the form has been filled in as shown above, no vessel being named.

Towards the end of March, 1897, plaintiff did ship 14,791 maunds salt on the B. I S. S. "Nurani;" but it is admitted that no particulars were given to defendants of that shipment, no premium paid, and no policy issued by defendants for the same. On 14th April, 1897, plaintiff had put on the prow "Putli," at Uran, 594 bags of salt (each bag containing 2 maunds) for shipment on the B. I. S. S. "Nairung." Delay (for which plaintiff is apparently in no way to be blamed) occurred in bringing the prow alongside the "Nairung," but this was eventually done; and on 27th April, 1897, the salt was being shipped on board the "Nairung." After 49 bags had been put on board, a gale sprang up, the prow was sunk, and the remaining 545 bags were lost. **[742]** Plaintiff's son Suleman and the clerk Murlidhar say that they, on that very day, went to the defendants' office and informed the head clerk Atmaram of the loss. Defendants deny that any information of the loss was given on the 27th April. On the 29th April the premium on the policy in suit was paid, and the policy was stamped and dated on 30th April.

The policy was in the ordinary form to the amount of Rs. 60,000 (lost or not lost) at or from Bombay to Calcutta upon 15,000 maunds loose salt in the S. S. "Nairung," including all risk of craft and boats to and from the ship or vessel. On 30th April plaintiff wrote to defendants notifying the loss and enclosing the protest, bill, and policy. Correspondence ensued, defendants taking the position that the loss had occurred before the policy was taken out, so they were not liable under the policy, and that the covering note had been exhausted by the shipment on the "Nurani" in March, 1897. On that latter point the finding must be against the defendants. Plaintiff says that he did not insure the shipment on the "Nurani," because he had received instructions from his Calcutta firm not to insure that shipment as shown by the letter D. The genuineness of that letter is attacked by the defendants; and there are obvious considerations in regard to it which cannot be overlooked. But it is unnecessary to deal further with the point, for whatever may have been the motive for plaintiff not insuring his salt shipped on the S.S. "Nurani," the fact remains that, whether with sinister intent or not, he did not make any declaration of particulars or take out any policy for the "Nurani" shipment.

No mercantile practice has been alleged by which plaintiff would be compelled for the first shipment after the date of the covering note to take out a policy. Therefore, as long as the covering note of 15th March, 1897, was not expressly cancelled, it remained in force. No authority pointing to the contrary conclusion has been quoted. As to the words "lost or not lost" in the policy, they do not affect the question whether the policy can be avoided as regards the loss of the 545 bags on the 27th April, 1897. (See Arnould, 6th Ed., p. 235, and Phillips, 5th Ed., s. 925.)

[743] Of course if it be a fact that plaintiff's son Suleman and his clerk Murlidhar (as they state) went straight from the S.S. "Nairung" to defendants' office on 27th April, and gave information of the loss to the head clerk Atmaram, then there is an end of the case. If defendants chose to effect a policy with full knowledge that loss had actually happened, they must be bound by it. (Arnould, 6th Ed., p. 235.) But I am not

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satisfied that in the present case the underwriters had such full knowledge. Suleman deposed that he told Atmaram that the prow had sunk, "and as my father was ill, should we write to the defendant company? Atmaram replied we need not write, as we were not in the habit of doing so." Suleman was not cross-examined on this, but Mr. Scott for defendants asked the Court to note that he did not admit the alleged interview with Atmaram. Murlidhar deposed that he and Suleman gave information of the loss, and "Atmaram told us to give a protest in writing to that effect. . . . . I am sure that Atmaram said to us to give something in writing." Atmaram in his deposition stated that he could not remember any such interview. He admitted that previously (as stated by Mr. Currie in his affidavit), losses had been reported verbally to him and by him to his master. (Mr. Currie stated that in four instances the losses were reported to the defendants verbally by the plaintiff, who produced the tindal's notarial protest.) But from the fact that this loss was not reported by him to his master, Atmaram stated that no such verbal information had been given to him. In this conflict it is expedient to look at the conduct of the parties. There is an obvious inconsistency in the stories told by Suleman and Murlidhar. Plaintiff's counsel contended that they were speaking of different writings: the one of a written information of the loss; the other of the notarial protest. But if it was the practice to give verbal information of the loss when the protest was handed in, what was the object of Suleman's query to Atmaram, and how are we to reconcile Atmaram's answer that no writing was necessary with the answer that some writing was necessary? Atmaram gave his evidence fairly enough; he did not try to prove too much. He could not swear no information was given on 27th, but he gave his reason for holding that it could **[744]** not have been given. He is supported by the conduct of the parties as shown by the correspondence. Plaintiff having obtained the policy (and not till then) wrote: "We have to bring to your knowledge the fact that a part of salt which was covered under your policy, &c." The learned Advocate General for plaintiff argued that plaintiff was not writing a lawyer's letter, and that the expression must not be too closely criticised. But it would not require a lawyer's acumen to state the obvious and vital fact that information had been given previously. Even when defendants replied that they disclaimed liability, because the policy was dated the 30th, while the goods were said to have been lost on 27th, plaintiff did not state by way of rejoinder that information had been given on 27th. He simply relied on the fact that defendants by the covering note had undertaken to issue a policy. Even in the plaint there is no hint of such information on the 27th. The only allusion is to the notice of the claim on the 30th April. For all these reasons I cannot hold that plaintiff has established the allegation that information of the loss was given on 27th April. It is not pretended that information was given on the 29th, when the premium was paid and the receipt taken.

Plaintiff's counsel in support of his contention that, even under these circumstances, plaintiff can recover, relies on the principle laid down in *Cory* v. *Patton* (1) that where underwriters have (as by initialling the slip) made a complete and final contract binding upon them in honour and good faith, whatever events may subsequently happen, the assured need not communicate to the underwriters facts material to the risk insured

(1) (1872) L.R. 7 Q.B. 304.

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against, which came to his knowledge between the time of initialling the slip and that of signing the policy, and the non-disclosure of such facts will not vitiate the policy of insurance afterwards executed. So here it is contended the covering note was available—(see Stamp Act, sch. II, art. 16)—to compel the delivery of a policy according to the contents of the covering note,—that is, on salt for the amount of Rs. 51,000 per any steamer or steamers of the B.I. Company or of the Asiatic Company. No exception **[745]** has been taken by defendants to the validity of the policy which was taken out on 30th April on the ground that it is for Rs. 60,000, not Rs. 51,000. Plaintiff's explanation of the increase in the amount may or may not be true. That is beside the question. But it is contended that the fact remains that as long as the vessel of the B.I. or Asiatic Company desired by plaintiff to be entered in the policy had not left the port, plaintiff could compel defendants to issue a policy for salt per that vessel. And if the principle laid down in *Cory* v. *Patton* is rightly applied to the present case, then the fact that part of the goods covered by the policy had actually been lost, which fact was not disclosed by plaintiff to defendants before or when the policy was called for, would not free the defendants from their liability.

For defendants their learned counsel argues that the above principle will not apply, because in *Cory* v. *Patton* the slip which was initialled by the underwriters specified the ship, so that there was a complete contract in all particulars. Here, on the contrary, the covering note was general—any steamer of certain companies. Mr. Scott pointed to the remarks in *Ionides* v. *Pacific Insurance Co.*(1) (the reasoning in which case was the foundation of the judgment in *Cory* v. *Patton*), where Blackburn, J., delivering the judgment of the Court, and speaking of the declaration which has to be made on a policy "on goods by ship or ships to be declared," says: "Nor is it necessary that the declaration should do more than identify the adventure and so prevent the possible dishonesty of a party insured, who might intend to apply the policy to particular goods, so that they should be at the risk of the assurers, and he should come on them if there was a loss; and then when those goods had arrived safely, to pretend that he intended to apply the policy to another set of goods still subject to risks —*Harman* v. *Kingston* (2), *Robinson* v *Touray* (3). Here the defendants not unnaturally say, to allow the plaintiff to recover on this policy is to allow him to commit a possible fraud, for it is quite possible that plaintiff having obtained the covering note of 15th March, **[746]** 1897, intended to take out the policy for the salt shipped on the "Nurani," but finding that that salt was all safely shipped, the chief risk being in the Bombay harbour, he took out no policy and pretended that he intended to apply the policy to other goods. When he found that some of his salt, while being shipped on the "Nairung," was lost, he naturally took out a policy with the name of that steam-ship entered.

On a careful consideration of the principle involved, I have come to the conclusion that Mr. Scott's argument must prevail. For what does the preliminary covering note purport to recite? An agreement to issue a stamped policy on receipt of particulars. Those particulars do not necessarily include the name of the vessel. It is obvious from the slips in Ex. B that the same form is used even though the vessel is named in the preliminary covering note. The particulars relate to the subject-matter of the policy, which was afterwards declared to

(1) (1871) L.R 6 Q.B. 674 (682). (2) 3 Camp. 150. (3) 3 Camp. 158.

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be "15,000 maunds loose salt." It would have been quite open to plaintiff on payment of the premium to call upon defendants to issue the policy to the amount of Rs. 51,000 on 15,000 maunds loose salt in "any B. I. or Asiatic steamer or steamers." That would have been equivalent to a policy "on board ship or ships," the limitation merely being as to the steamers of the two companies named. So far only can it be said that there was a complete contract between the parties on 15th March, 1897. If, then, in equity the defendants must be considered as having issued such a policy on 15th March, 1897, could plaintiff recover for the loss on 27th April? The answer is "no," because he did not declare the ship as soon as he was aware of it, and, if possible, before the loss. He could have declared the ship any day after 14th April when he put the goods on the prow to be shipped on the S. S. "Nairung." To allow him to wait till a loss actually occurred, prior to the vessel leaving the port, before he actually named the ship, would be to offer a temptation to fraud. As the policy was intended to include all risk of craft and boats to and from the ship or vessel, plaintiff was bound to name the vessel when he had put the goods on the boat to be shipped on the vessel. As a fact the preliminary covering note only speaks of a policy "from Bombay and Salt Ports to Calcutta," and strictly speaking [747] the completed contract between the parties did not cover a policy which included risk of craft and boats to and from the vessel. But this point was not taken by the learned counsel, and the mercantile practice apparently being to issue a policy in the form of Ex. F on the covering note in the form of Ex. C, the original contract may be said to have impliedly included the risk of craft and boats to and from the vessel. But it would be obviously unfair to put plaintiff in a better position than if a policy had been issued on 15th March, 1897, on salt "per any B. I. or Asiatic Co.'s steamer or steamers." Such a policy would have been perfectly good: but the plaintiff would have been bound, if possible, to declare the vessel before loss. (Arnould, 6th Ed., pp. 337, 338).

No doubt if the preliminary covering note had named the vessel—the S. S. "Nairung,"—then the contract would have been complete to that extent also, and as the plaintiff would have been entitled at any time to a policy on salt shipped by the "Nairung" he would have been entitled to recover on the present policy, even though he knew of the loss before the policy was issued. That was exactly the case in *Cory* v. *Patton* (1). The learned Advocate-General seeks to put plaintiff in the same position as if the S.S. "Nairung" had been named in the covering note. But that would be obviously unfair. If the principle to be derived from the authorities is that the time between the slip (covering note) and the policy is not to be counted, and the latter relates back to the former (per Bramwell, B., in *Lishman* v. *Northern Maritime Insurance Co.* (2)) then here the policy is for salt shipped on any B. I. or Asiatic Co. steamer or steamers. If plaintiff wanted to insert the name of the vessel in the policy, he should have done so, if possible, before loss; and this was possible. In *Ionides* v. *Pacific Insurance Co.* (3) quoted above, the original slip was on hides "by ship or ships," and the insurer afterwards at the request of the broker initialled a slip on hides by the "Socrates," making no inquiry as to the particular ship proposed, this second slip being expressly made in order to be substituted for the slip "by ship or ships"

(1) (1872) L.R. 7 Q.B. 304.
(2) (1875) L.R. 10 C.P. 179 (181).
(3) (1871) L.R. 6 Q.B. 674.

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already mentioned. [748] The policy was accordingly executed. It was held that the jury were justified in finding that, regardless of what might be the name of the ship, the insurer meant to insure the goods at a premium already fixed in the first slip, by the vessel on which these goods were really shipped, which was the "Socrates," the mistake being an innocent one and of no consequence. But another policy answering to an original slip on goods by the "Socrates" was held void by reason of the misrepresentation. It is necessary to bear these facts in mind when considering the remarks above quoted from the judgment of Mr. Justice Blackburn.

If the object of the declaration is to ear-mark and identify the particular adventure to which the assured elects to apply the policy, and so prevent the possible dishonesty of a party insured, then in the present case the plaintiff should have made the declaration as soon as possible and before loss. The same principle was applied in *Harman* v. *Kingston* (1) which was an action on an "open" policy "on sugar and cotton as might be thereafter declared and valued." It was found as a fact that there had been no declaration before loss; and Lord Ellenborough ruled that "where there is an insurance on goods as may be thereafter declared and valued, this gives the assured a power by duly declaring and valuing before the loss to make it a valued policy; but that if the assured do not so declare and value, it is then an open policy, and the interest is matter of evidence at the trial." The present is an action on a valued, not on an open policy. The contract was for a policy on goods on any steamer or steamers of two specified steam-ship companies. If plaintiff wished the risk to attach to the salt on a declared steamer of one of those companies, he should have made the declaration before loss. Similarly in *Robinson* v. *Touray* (2), the action was on an open policy on goods to be thereafter valued and declared by ship or ships; the declaration was duly made, but a blunder was made in the names of the ships first declared. This was found to have been without fraud and without prejudice to the under-writers. The assured, therefore, recovered.

[749] It cannot, in my opinion, be said that there was a mercantile practice between the parties to the present suit, contrary to the principle above indicated. No doubt defendants have in four instances paid for loss occurring between the dates of the slips and of the policies, and in two of these (in 1896) the defendants were not bound to make the payments, if the above principle is correct. It is, however, possible that defendants have now realized their mistake, and there is no reason why they should not be permitted to take their stand on the correct principles of the law of marine insurance. This right is not taken away because plaintiff may have been in the habit, since December, 1893, (when he commenced to insure with defendants) of not taking out his policies till his salt had been shipped on the steamers. The findings on the issues, except as to the covering note being exhausted, will be in favour of the defendants, and the suit must be dismissed with costs.

The plaintiff appealed.

The appeal came on for hearing before Jenkins, C. J., and Tyabji, J.

Macpherson and *Raikes*, for appellant.

Scott (Acting Advocate-General) and *Lowndes*, for respondents.

The authorities referred to were those mentioned in the judgment.

(1) (1811) 3 Camp. 150.

(2) (1811) 3 Camp. 158.

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JUDGMENT.

JENKINS, C. J.—This is an appeal from a decree made by Mr. Justice Candy in a suit brought against the defendants on a policy of insurance issued by them to the plaintiffs on the 30th April, 1897. The facts are fully stated in the judgment of the lower Court and I will mention only those which are material for the purpose of our decision in this appeal.

The plaintiffs are salt merchants and for some years have had marine insurance transactions with the defendants. On the 15th March, 1897, a covering note or 'slip' was issued by the defendants to the plaintiffs in the following form :—

[750] "THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED.

"Preliminary Covering Note, 3 P.M.

"*Bombay*, 15*th March*, 1897.

"To KASAM H. MITHA, Esq.

"DEAR SIR.—We have noted your application in the above company as under, and a stamped policy in completion hereof will be issued on receipt of particulars.

"Amount Rs. 51,000 on salt. Any B. I. and for Asiatic steamer or steamers from Bombay and salt ports to Calcutta at $\frac{3}{8}$ per cent.

"This note will be null and void on departure of the vessel from port of sailing.

"*N.B.*—From 25th May to 31st August, both inclusive, risk of boats alongside the vessel between sunset and sunrise is not covered by this acceptance."

Now it will be observed that in this covering note there is no indication given of any particular venture for which the policy is to be granted, or of any specific goods which are to be insured. At the end of March it appears that the plaintiffs did put on board a ship which came within the class of ships mentioned in the note a quantity of salt, but apparently as to that particular shipment no steps were taken by the plaintiffs to bring the covering note into legal operation : at least there is no evidence before us that there were. But on the 14th April, 1897, the plaintiffs put on board the prow "Putli" at Uran 594 bags of salt for shipment on board the British India steamer "Nairung." On the 27th April, after forty-nine of these bags had been safely transhipped, a storm came on and the prow sank with the 545 remaining bags on board, and they were wholly lost.

In the usual course a protest setting forth the circumstances of the disaster was made before a Notary Public on the 28th April, and on that day the notarial certificate was obtained.

On the 29th April, 1897, the plaintiffs paid the premium on the policy, and on the next day (the 30th) the policy was stamped and issued. On that day the plaintiffs gave the defendants notice of their claim. It is on these facts that the suit is brought.

In answer to the claim the defendants say that the plaintiffs are not entitled to recover under the policy, because to the plaintiffs' knowledge the goods had already been lost at the date at [751] which the policy was issued, and that they had concealed this material fact from the defendants. By way of reply to this defence the plaintiffs say (1) that

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notice of loss was given, and that (2) it is immaterial whether such notice was given or not.

As to the first point, it is a question of fact. The Judge of the lower Court has found that the plaintiffs failed to prove that notice was given. There is a direct conflict of evidence upon the point, and where that is the case, I, sitting in a Court of appeal, would be slow to differ from the Judge who has had the advantage of seeing the witnesses and of observing their demeanor. (His Lordship referred to the evidence and to the probabilities, and continued :—) On the question of fact, then, we concur with Mr. Justice Candy in holding that the plaintiffs have not proved that notice of the loss was given before the policy was effected.

It remains to consider the question of law, *viz.*, whether the fact that the covering note or slip had been issued made it immaterial whether or not the loss was disclosed before the issue of the policy. The plaintiff contends that the slip constituted a complete contract between him and the defendants, which remained unaffected by any circumstances which subsequently occurred. He relies on two cases—*Ionides* v. *Pacific Insurance Co.* (1) and *Cory* v. *Patton* (2). I do not think these cases apply here. They decide that although a 'slip' cannot be sued on for financial reasons, nevertheless it has this effect that it constitutes the bargain which binds the parties in honour though not in law, and when a policy is subsequently issued in conformity with the slip, then, in an action on the policy, circumstances occurring in the interval between the date of the slip and the policy cannot be pleaded as a defence. The test put in one of these cases is that you must treat a slip as apparently it is treated in America and as it was formerly treated in England before financial legislation dealt with it—as a document on which a suit for specific performance might be brought. Had such a suit been brought on the slip in this case and had a policy been issued in conformity with it, that policy **[752]** would have been an open policy of insurance. But if the policy issued in this case had been an open policy, it is conceded that this suit must fail by reason of the non-disclosure of the loss of the goods at the time of issue. It is impossible to hold that the effect of the slip was to give the plaintiff an option to wait until he had incurred a loss before declaring his goods and taking out his policy. That would be to give him without his paying any premium a perpetual insurance which would always hold good for him until he suffered a loss against which he desired to protect himself.

I think, therefore, that the second point raised for the appellant fails and that the decree of the lower Court should be affirmed with costs.

TYABJI, J.—I agree. I had some doubt on the question of fact, but I do not feel justified in differing on the point from the Judge of the lower Court. On the question of law I concur in what has been said by the Chief Justice.

Decree affirmed.

Attorneys for appellant (plaintiff).—Messrs. *Roughton and Byrne.*

Attoneys for respondents (defendants).—Messrs. *Craigie, Lynch and Owen.*

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(1) (1871) L.R. 6 Q.B. 674 ; S. C. on appeal ; (1872) L. R. 7 Q B. 517.
(2) (1872) L.R. 7 Q.B. 304.

23 B. 752=1 Bom.L.R. 366.

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Before Mr. Justice Candy and Mr. Justice Crowe.

SAYAD ZAIN (*Original Defendant*), *Appellant* v. KALABHAI LALLUBHAI (*Original Plaintiff*), *Respondent*.* [5th April, 1899.]

Appeal—Practice—Appeal from a decree in the nature of an award—Case referred to the decision of a Court, both parties agreeing to abide by such decision.

Where both parties to a suit referred the matters in dispute between them to the Court, and agreed to abide by its decision, and the Court passed a decree awarding a certain sum to the plaintiff.

Held, that no appeal lay from the decree, the decision of the Court being in the nature of an arbitrator's award.

[F., 38 C. 421=9 Ind. Cas. 296.]

SECOND appeal from the decision of Rao Bahadur K. B. Marathe, First Class Subordinate Judge of Surat.

[753] The plaintiff, a pleader, sued to recover Rs. 6,504-3-5, being the amount of fees due to him by the defendant for professional services.

On the 5th September, 1898, before the suit came on for hearing, both parties presented an application to the Subordinate Judge to the following effect:—

"We have decided that the Court should make a settlement of the dispute between us according to Chap. XXXVIII of the Civil Procedure Code; and we will abide by whatever decision the Court may give.

"We have specially decided that the Court shall have full authority to obtain information from the parties in whatever way the Court may think proper, but the parties are not to produce any evidence except documentary records."

On the 6th September, 1898, the Subordinate Judge passed an order, directing the parties to state their objections, if any, on or before 12th September, 1898, why the provisions of Chap. XXXVIII of the Code of Civil Procedure (Act XIV of 1882) should not be strictly followed.

On the 24th September, 1898, the Subordinate Judge, after hearing the parties, passed the following order:—

"The parties refer me to *Raoji Trimbak Nagarkar* v. *Govind Vinayak Nagarkar* (1) and out of deference to their wishes I need not go through the formal procedure of rejecting the suit and registering their application as a fresh suit. The defendant should produce, if he has any, the accounts and papers in connection with the matter in dispute within eight days."

On the 25th October, 1898, the Subordinate Judge gave his decision, awarding to the plaintiff Rs. 5,816-11-6 and interest at 6 per cent. amounting to Rs. 3,983-4-7, in all Rs. 9,800.

He passed a decree for this amount.

Against this decision defendant appealed to the High Court.

Scott (with *Manekshah Jehangirshah* and *K.R. Daphtari*), for respondent.—No appeal lies in this case. The parties referred all matters in dispute between them to the decision of the Subordinate Judge. They agreed to abide by his decision. His decision stands on the same footing

* Appeal No. 9 of 1899.

(1) P.J. (1897), p. 413.

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as an award. No appeal, therefore, lies from his decision—*Raoji Trimbak* v. *Govind Vinayak* (1) ; *Burgess* v. *Morton* (2).

[754] *R. R. Desai*, for appellant.—The parties expressly referred the case under Chap. XXXVIII of the Code of Civil Procedure (Act XIV of 1882). An appeal lies from a decree passed under that chapter— *Jamnadas* v. *Gordhandas* (3). The lower Court was wrong in dispensing with the procedure laid down in that chapter. If that procedure had been followed, there could not have been any question as to the defendant's right of appeal. Even taking the lower Court's decision to be in the nature of an arbitrator's award, an appeal lies from a decree based upon an illegal award--*Nandram Daluram* v. *Nemchand* (4) ; *Husananna* v. *Linganna* (5) ; *Saturjit* v. *Dulhin* (6).

JUDGMENT.

CANDY, J.—In this case Mr. Scott for respondent-plaintiff has taken the preliminary objection that no appeal lies ; and we think that this objection must prevail. Plaintiff is a pleader who was engaged professionally by defendant in some heavy litigation. At the close of the litigation disputes arose between the present defendant and this pleader, the plaintiff, as to what was really due to the plaintiff according to the terms of remuneration which had been previously agreed upon. Attempts were made to settle the disputes by arbitration, but eventually the plaintiff filed a regular suit (No. 119 of 1896) in the First Class Subordinate Judge's Court, Surat. Before the case had come to a regular hearing, both parties as well as their pleaders signed an application to the Subordinate Judge, dated 5th September, 1898, which ran as follows:—

" We have decided that the Court should make a settlement of the dispute between us according to Chap. XXXVIII of the Civil Procedure Code, and we will abide by whatever decision the Court may give.

" We have specially decided that the Court should have full authority to obtain information from the parties in whatever way the Court may think proper, but the parties are not to produce any evidence except documentary records."

This application was endorsed on 6th September, 1898, by the Subordinate Judge to the effect that among other things Chap. XXXVIII of the Civil Procedure Code required a case stated. He ended his endorsement thus :—

[755] " The parties and pleaders are informed as to what procedure is indispensable, and they are called on to state their objections, if any, till Monday the 12th September, 1898."

Then on 24th September, 1898, the Subordinate Judge made the following further endorsement :—

" The parties refer me to *Raoji Trimbak Nagarkar* v. *Govind Vinayak Nagarkar* (1) and out of deference to their wishes I need not go through the formal procedure of rejecting the suit and registering their application as a fresh suit. The defendant should produce, if he has any, the accounts and papers in connection with the matter in dispute within eight days. The plaintiff to behave accordingly."

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(1) P.J. (1897), p. 413. (2) (1896) Ap. Ca. 136. (3) P.J. (1896), p. 424.
(4) 17 B. 357. (5) 18 M. 423. (6) 24 C. 469.

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Subsequently defendant put in a supplementary written statement, and on 25th October, 1898, the Subordinate Judge gave his decision in the form of findings on the issues which had been previously framed, and ordered defendant to pay plaintiff a certain sum.

Against this decision the present appeal was filed by defendant. We think that on the authority of the case quoted by the Subordinate Judge in his endorsement of 24th September, 1898, no appeal lies.

The very mention of that case shows that the parties must have intended that the decision of the Subordinate Judge as arbitrator should be final. In that case, as in this, the parties solemnly agreed by themselves and by their pleaders to abide by the decision of the Court to be made in a particular way. They cannot, therefore, appeal from it. The case of *Jamnadas* v. *Gordhandas* (1) was different. In that case the parties simply agreed that the Court's decision should be arrived at upon certain specified materials and no more; they did not agree to accept that decision as final. Here the parties agreed that they would abide (*manya karave*) by the decision of the Subordinate Judge. The fact that the express provisions of Chap. XXXVIII of the Civil Procedure Code were knowingly disregarded, shows that the proceedings were *extra cursum curiæ*, and thus the judgment of the Subordinate Judge was in the nature of an arbitrator's award, against which an appeal cannot be entertained if the competency of the appellate Court is objected to by the party holding the judgment. (See *Burgess* v. *Morton* (2).)

[756] The fact that the Subordinate Judge gave his award in the form of a decree will not make it a decree from which a regular appeal can lie. Nor is it necessary for us to express an opinion as to the steps which plaintiff may be advised to take in order to reap the benefits of the judgment which he holds.

We hold that no appeal lies, and dismiss with costs the appeal filed by defendant.

Appeal dismissed.

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23 B. 756=1 Bom. L.R. 370.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice and Mr. Justice Ranade.

ISAK (*Original Defendant No.* 2), *Appellant v.* KHATIJA (*Original Plaintiff*), *Respondent.** [6th April, 1899.]

Jurisdiction—Civil Procedure Code (Act XIV of 1882), *s.* 16, *proviso, and s.* 57—*Relief to be obtained by personal obedience of defendants—Property situate outside the jurisdiction of the Court in which the suit is filed—Practice—Procedure.*

The proviso to s. 16 of the Civil Procedure Code (Act XIV of 1882) requires not only that the relief sought should be entirely obtainable through the personal obedience of the defendant, but also that the defendant should reside within the jurisdiction of the Court in which the suit is filed.

Held, therefore, that a suit for the determination of an interest in immoveable property, filed in a Court within the jurisdiction of which the property was not situate, did not lie in that Court, as all the defendants did not reside within the jurisdiction of that Court, even though the relief sought could have been obtained through their personal obedience.

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* Appeal No. 2 of 1899 from order.

(1) P. J. (1896), p. 424.

(2) (1896) A. C. 136.

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Held, also, that in such a case the Judge ought not to dismiss the suit, but return the plaint to be presented to the proper Court under s. 57 of the Civil Procedure Code.

[F., 1 N L.R. 121 (124).]

APPEAL from an order passed by M. P. Khareghat, District Judge of Ratnagiri, remanding a suit for retrial by Rao Bahadur V. V. Vagle, First Class Subordinate Judge.

The plaintiff sued in the Court of the First Class Subordinate Judge of Ratnagiri for a declaration that she was the owner of a thirtieth-share of the khoti of the village of Uple, which [757] was situate within the local jurisdiction of the Subordinate Judge of Rajapur, and to have her name entered in the B Statement, a village record, as such sharer, and to recover the profits of the share, and for a declaration that she was entitled to pass kabulayats to Government, &c., &c. In her plaint she stated that the suit was filed in the Court at Ratnagiri, because all the defendants resided within its jurisdiction and all the reliefs sought could be obtained by their personal obedience to the orders of the Court.

The defendants were twenty-six in all; some of them admitted the plaintiff's claim and others contested her claim on grounds immaterial for the purpose of this report.

The Subordinate Judge dismissed the suit, holding that he had no jurisdiction to entertain it. The follo wing is an extract from his judgment:—

"It is admitted that the village in respect of which the suit is brought is situated within the local jurisdiction of the Rajapur Court. It is plain from the prayers as set out (in the plaint) that this is a suit for the determination of a right to or interest in, immoveable property. Such a suit under s. 16 of the Civil Procedure Code must be instituted in the Court within the local limits of whose jurisdiction the property is situate. This suit ought to have been, therefore, instituted in the Rajapur Court. It is, however, contended by the plaintiff's vakil that the suit was maintainable in this Court, because all the parties reside within the local jurisdiction of this Court and because the relief sought can be entirely obtained through the defendants' personal obedience. *Vide* proviso to the aforesaid section. But, in the first place, all the defendants do not reside within the local limits of this Court's jurisdiction. In the next place, all the reliefs prayed for in this case are not such as can be entirely obtained through the personal obedience of the defendants. It is evident that the determination of the plaintiff's share in the village is the principal relief on which others depend, and this is a relief which cannot be entirely obtained through the defendants' personal obedience. The plaintiff's vakil contended that the entry of the plaintiff's name as a sharer in B register was the principal relief and that the main object of this suit was to compel the defendants to give their consent to that entry. But, in the first place, the prayer is not so worded, and, in the second place, no entry of the plaintiff's name in B register can be effected, nor the defendants be compelled to give their consent to that entry, unless and until the plaintiff succeeds in establishing her right or share which is denied by the principal contending defendants. In any view, the determination of the plaintiff's right to share in the village is the principal relief sought in this case, and this relief cannot surely be obtained through the [758] personal obedience of the defendants. I am, therefore, of opinion that neither the proviso nor the decision at I. L. R. 19 Bom. 43 (*Bhikaji* v. *Pandu*) relied upon by the plaintiff is

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applicable to this case. It is true that in this case the defendants do not take any objection to this Court's jurisdiction—may, they actually waive their objection. But mere consent of parties cannot clothe this Court with jurisdiction which it does not possess."

On appeal by the plaintiff the Judge reversed the decree and remanded the case for trial on the merits. In his judgment he said :—

"No doubt the village of Uple although in the Ratnagiri taluka for revenue purposes is within the jurisdiction of the Subordinate Judge of Rajapur. But I think in this case the relief sought can be entirely obtained by the personal obedience of the defendants, and, therefore, the suit falls within the proviso to s. 16. Some of the defendants objected to the entry of the plaintiff's name in the revenue registers as a co-sharer, and that is why plaintiff has had to file this suit. She asks for a declaration that she is entitled to get her name so entered. She further asks the Court to fix the order in which the co-sharers are to manage the village and an injunction against defendants not to obstruct her when she manages in her turn. None of these reliefs require anything to be done by the Court at the village."

Defendant No. 2 preferred a second appeal.

Manekshah J. Taleyarkhan appeared for the appellant (defendant No. 2).—The District Judge is wrong in holding that the Court at Ratnagiri has jurisdiction. The property in suit is situate within the jurisdiction of the Court at Rajapur and the suit should have been brought there—Civil Procedure Code (Act XIV of 1882), s. 16. The plaint states that all the defendants reside within jurisdiction of the Subordinate Judge of Ratnagiri. But the first Court has found that allegation to be incorrect and that all the defendants do not reside within its jurisdiction. The record shows that one of the defendants lives at Thana, some others at Jaitapur and a third at some other place. All these circumstances show that the Subordinate Judge of Ratnagiri had no jurisdiction to entertain the suit—*Keshav* v. *Vinayak* (1).

There was no appearance for the respondent (plaintiff).

JUDGMENT.

PARSONS, C. J. (Acting).—This suit was one for the determination of an interest in immoveable property, namely, the $\frac{1}{30}$th [759] share in the village of Uple which was situated within the local limits of the Rajapur Court. It was, however, filed in the Ratnagiri Court, and the District Judge considered that the latter Court had jurisdiction, because the relief sought could be entirely obtained by the personal obedience of the defendants, and that, therefore, the suit came within the proviso to s. 16 of the Civil Procedure Code (Act XIV of 1882). He seems, however, to have quite overlooked the fact that this proviso also requires that the defendant, through whose personal obedience the relief sought could be obtained, should reside within the jurisdiction of the Court in which the suit was filed. In the present case the Subordinate Judge of Ratnagiri says that all the defendants do not reside within the local limits of the jurisdiction of his Court ; the proviso, therefore, will not apply even if we assume that the District Judge was right in his opinion that the relief sought could be obtained through their personal obedience. We must reverse the order of the District Judge.

(1) 23 B. 22.

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The Subordinate Judge ought not to have dismissed the suit, but returned the plaint to be presented to the proper Court under s. 57 of the Code. For this reason we reverse his order of dismissal also, and direct him to return the plaint with the proper endorsement. The plaintiff must bear the costs of the defendants throughout.

Orders reversed.

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23 B. 759 = 1 Bom. L. R. 220.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

PARSHOTAM MANJI (*Original Plaintiff*), *Appellant v.* GANESH VINAYAK AND OTHERS (*Original Defendants*), *Respondents.** [6th April, 1899.]

Execution—Sale in execution subject to mortgage—Suit to set aside sale and for re-sale of property free from mortgage—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), s. 287.

The plaintiff, having sold property in execution of a decree subject to a certain mortgage lien which had been duly investigated and allowed, brought this suit to have the sale set aside and praying for a re-sale of the property free from the mortgage lien.

[760] *Held*, that he was not entitled to the relief sought. His proper remedy was to have brought a suit for a declaration that the alleged mortgage was null and void, and to have stayed the sale till the determination of that suit.

SECOND a peal from M. B. Tyabji, District Judge of Thana.

The plaintiff as assignee of a decree attached certain property in execution and applied to have it sold. The first defendant thereupon intervened and claimed to have a mortgage lien upon it. On inquiry his claim was allowed and was ordered to be entered in the proclamation of sale. The property was sold subject to this encumbrance and was bought by the second defendant.

The plaintiff brought this suit praying that the sale should be set aside and that the property should be re-sold free from the first defendant's mortgage. The lower Courts dismissed the suit. The plaintiff appealed to the High Court.

Manekshah J. Taleyarkhan, for the appellant (plaintiff).

Narayan V. Gokhale, for the respondents (defendants).

JUDGMENT.

PARSONS, C. J. (Acting).—We think that the lower Courts have correctly held that this suit will not lie. The facts are these. The plaintiff as the assignee of the decree-holder attached certain property and asked for its sale. The defendant No. 1 came forward in response to notices issued in accordance with the rules framed under s. 287 of the Civil Procedure Code, and claimed a mortgage lien over the property. His claim was enquired into and was found proved, and was ordered to be entered in the proclamation of sale, and, though the plaintiff took the matter up to this Court, he failed to get the order set aside. The encumbrance accordingly remained notified in the proclamation of sale, and the property was sold and purchased by the defendant No. 2.

The plaintiff has brought this suit to have the sale set aside and a re-sale ordered of the property freed from the alleged encumbrance. We

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* Second Appeal No. 632 of 1898.

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think that he is not entitled to this relief. We know of no authority which allows of a decree-holder selling property twice over on his own application where there has been no irregularity in publishing or conducting it, and no default committed on the part of the purchaser. His proper remedy in the first instance was to have brought a suit for a declaration that the alleged mortgage was null and void, and to have stayed [761] the sale till the determination of that suit. Instead of that he caused the sale to be held under the proclamation which contained the encumbrance, and that sale has been confirmed by the Court. No fraud is alleged on the part of the defendant No. 2, on the contrary his action has been held by the lower Courts to have been throughout *bona fide*. He cannot, therefore, now be deprived of what he has bought. Possibly, if the mortgage is non-existent, the plaintiff might have a remedy against the defendant No. 1 in the form of an action for slander of title, but that is quite different to what he asks for in the present suit. We confirm the decree with costs.

Decree confirmed.

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23 B. 761=1 Bom. L.R. 414.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

BALVANTRAO *(Original Plaintiff), Applicant v.* F. L. SPROTT *(Original Defendant), Opponent.** [10th April, 1899.]

Mamlatdar's Court—Jurisdiction of Mamlatdar over officers of Government sued in their official capacity—Act XIV of 1869, *s.* 32—*Act X of* 1876, *s.* 15—*Bombay Irrigation Act (Bom. VII of* 1879), *s.* 48—*Leakage water—Rights of riparian proprietors—Water-course.*

A Mamlatdar has jurisdiction, under Bombay Act III of 1876, to hear and determine a suit brought against officers of Government for acts purporting to have been done by them in their official capacity.

The Irrigation Department has no power, under Bombay Act VII of 1879, to dam a stream or a water-course on the ground that it derives its supply of water by leakage from an irrigation canal. Section 48 of the Act only gives the Department the special right of charging a water-rate on land which derives benefit from the leakage.

Water which has leaked from a canal into the land of another person does not belong to the Irrigation Department, so as to give the latter the right to follow it up and claim it as their own.

If the leakage flow was such that it itself had become, in the eye of the law, a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses.

A Mamlatdar has no power to inquire into matters not covered by the issues laid down by the Act itself.

[**Appl.**, 25 B. 395 (398)=2 Bom. L.R. 1136; **Qualified**, 31 B. 86=8 Bom. L.R. 904 (915)=2 M.L.T. 13.]

[762] APPLICATION under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

Suit for an injunction.

Plaintiff was the owner of certain land (Survey No. 13) at the village of Loni, through which a stream of water flowed.

In 1893 the Irrigation Department sought to levy leakage rates on the plaintiff's land (Survey No. 13), alleging that the water of the stream

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* Application No. 237 of 1898.

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was derived by leakage and percolation from a certain canal called the Mula Mutha Canal. Plaintiff resisted this levy, contending that the water of the stream was natural spring water and not canal leakage water.

While this matter was under the consideration of Government, a neighbouring owner of land (Survey No. 17) at the suggestion of the irrigation officers erected a dam across the stream so as to prevent the stream flowing down to plaintiff's land (Survey No. 13).

Thereupon plaintiff sued the owner of Survey No. 17 in the Mamlatdar's Court and obtained an order directing the dam to be removed and plaintiff's use of the stream to be restored.

Under this order the dam was removed by the village officers on 4th June, 1897.

On the 8th June, 1897, the irrigation officers re-erected the dam in Survey No. 17 which had been removed in execution of the Mamlatdar's order, and again prevented the water of the stream from flowing on to plaintiff's field.

Thereupon plaintiff filed the present suit in the Mamlatdar's Court, praying for an injunction against the Executive Engineer for Irrigation at Poona and three of his subordinates.

The defendants pleaded (*inter alia*) that under s. 32 of Act XIV of 1869 as amended by s. 15 of Act X of 1876, the Mamlatdar's Court had no jurisdiction to try a suit brought against officers of Government for acts done by them in their official capacity, and that the plaintiff had no right to sue.

The Mamlatdar held that he had jurisdiction to take cognizance of the suit against officers of Government. He further held, however, that as the water of the nala was canal leakage water, the Irrigation Department had a right to erect the dam and to give the sole **[763]** use of the water to the occupant of Survey No. 17. He, therefore, dismissed the plaintiff's suit.

Against this decision plaintiff applied to the High Court under its revisional jurisdiction.

Branson (with him *Ganpat Sadashiv Rao*), for applicant.—The Mamlatdar was wrong in discussing the title to the water of the nala. His finding that the water of the nala is canal leakage water is beside the question. Even assuming that it is leakage water, that does not empower the Irrigation Department to stop the flow of the water to plaintiff's land. Under s. 48 of Bombay Act VII of 1879 the irrigation authorities can only levy leakage rates, if the requirements of the section are fulfilled ; but they cannot dam up the stream, and obstruct the plaintiff's user of the water. The Mamlatdar has no authority to inquire into the legality of the obstruction caused—*Ganesh* v. *Ramchandra* (1). The only issues he has to try are those specified in s. 15 of the Mamlatdars' Courts Act (Bom. Act III of 1876). He was bound to find whether or not the obstruction we complained of was caused by defendant within six months before suit. But he has not done so. His decision is, therefore, illegal. The pleadings of the parties show that the issues laid down in the Act must be decided in plaintiff's favour.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for opponent.—The Mamlatdar's Court has no jurisdiction over officers of Government for acts done, or purporting to have been done, by them in their official capacity. Section 32 of Act XIV of 1869, as amended by s. 15

(1) P. J. (1891), p. 96.

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of Act X of 1876, shows that the Court of a District Judge is the only Court which can have and determine a suit against officers of Government. If a Subordinate Judge or a Court of Small Causes has no jurisdiction over them, *a fortiori* a Mamlatdar's Court cannot have any. On the merits, the Mamlatdar has found that the water of the nala is canal leakage water. The defendant No. 1, who is a canal officer, also says in his evidence that the water is leakage water. His opinion on this point is final and conclusive under s. 48 of Bombay Act VII of 1879— *Balvant G. Oze* v. *Secretary of State for India* (1). The water being canal leakage water, the irrigation **[764]** officers have the power under the Act to regulate the supply of such water in such manner as they think fit. See ss. 8, 16, 22 of the Act. For this purpose it is open to them to erect a dam across a water-course. And if they erect one, they do no wrong for which an action will lie.

JUDGMENT.

PARSONS, J.—The first point raised in this application is, whether a Mamlatdar's Court has jurisdiction under the Act of 1876 to hear and determine a suit brought against officers of Government for acts purporting to have been done by them in their official capacity.

The facts are these :—There is a nala or water-course which rises in the hill to the south of Loni. It runs through several fields, among them Survey No. 17 and Survey No. 13 (which latter field is next to Survey No. 17 and belongs to the plaintiff) and ultimately discharges into the Mutha Mula river. The irrigation canal is carried over it by a bridge at a spot which is over a mile distant from Survey No. 13. The owner of Survey No. 17 in 1897 built a dam across the nala thus preventing the flow of any water into the plaintiff's field ; for this the plaintiff sued him in the Mamlatdar's Court and obtained an injunction, under which the dam was destroyed. A few days afterwards the dam was rebuilt by, and by order of, the defendants, who are the Executive Engineer for Irrigation at Poona and three of his subordinates, and the plaintiff has brought the present suit in the same Court to obtain against them the same relief.

The Mamlatdar held that he had jurisdiction, and we think that in this he is right. His Court is a Civil Court ; the only enactment cited to us as restrictive of the powers of Civil Courts in their jurisdiction over persons is s. 32 of the Bombay Civil Courts' Act, 1869, but it mentions Subordinate Judges and Courts of Small Causes only, and the Court of a Mamlatdar is neither of these.

The next point relates to the legality of the order of the Mamlatdar dismissing the suit, and as to this there can be no doubt that the Mamlatdar has been hopelessly wrong. He framed the proper issues, but instead of deciding as to the possession or enjoyment of the use claimed, he entered upon a long **[765]** discussion into the title to the water in the nala and came to the conclusion that it was not natural water but canal leakage water and, as such, he says, the Irrigation Department had a perfect right to utilize it in the most advantageous manner, and to dam it up when and where they pleased, and to give the sole use of it to the occupant of Survey No. 17. The fact, that he thus tried a question of title and declined jurisdiction because he found that the water belonged to the Irrigation Department and not to the plaintiff, without any enquiry into the question of possession or enjoyment,

(1) 22 B. 377.

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would oblige us to reverse his order and remand the suit for retrial; but we think it necessary here to add a few words as to the nature of the title thus set up for the defendants by the Mamlatdar, for that it was set up by the Mamlatdar and not by the defendants is clear from the pleadings. Water which has leaked from a canal into the land of other persons would not belong to the Irrigation Department, so that the latter would have the right to follow it up and claim it as their own. Ordinarily it would belong to the owner of the soil, and the Act only gives the department the special right of charging a water-rate on the land which derives benefit from the leakage (see s. 48 of the Bombay Irrigation Act, 1879). If the leakage flow was such that it itself had become in the eye of the law a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses. In the present case, the leakage flow, if any, was into an admittedly pre-existing water-course, and, therefore, the law applicable to the case is that which would be applicable to that water-course.

The Mamlatdar, however, has nothing whatever to do with the law of the case; all he has to do is to determine three simple issues of fact. Admittedly there is a water-course and there is a flow of water down that water-course, the use of which the plaintiff claims. What, therefore, the Mamlatdar has to determine is, (1) whether the plaintiff is actually in possession or enjoyment of the property or use claimed, (2) whether the defendants are disturbing or obstructing or have attempted to disturb or obstruct him in such possession or enjoyment, (3) whether such disturbance or obstruction or such attempted disturbance or obstruction **[766]** first commenced within six months before the suit was filed; and to pass a decree according to his findings thereon.

We reverse his present order and remand the case for a decision on the merits. All costs to be costs in the cause.

RANADE, J.—In this case the applicant, who was plaintiff in the Mamlatdar's Court, had obtained a decree against one Javeri for the removal of a dam which had been constructed by the latter in his own (Survey No. 17) so as to obstruct the flow of a water-course into plaintiff's land (Survey No. 13). This decree was obtained on 3rd June, 1897, and was executed by the removal of the dam. Within a day or two after, the present defendants, who are respectively (Irrigation) Executive Engineer and his subordinates, set up the dam, and obstructed the flow of water into plaintiff's Survey No. 13, and thereupon plaintiff applied under the Mamlatdars' Act for an injunction to restrain the defendants from obstructing the flow of water into his land. The question of jurisdiction was raised before the Mamlatdar, but he overruled the objection. On the merits, the Mamlatdar held that the stream received its water-supply from the leakage of canal water, and not from any independent source, and that as the Irrigation Department had a right to control their leakage supply, it cannot be said that plaintiff had ever possession or enjoyment of this water, and there was thus no disturbance of that possession. The claim for injunction was, therefore, rejected by the Mamlatdar.

The applicant seeks the revision of this decree on the ground that the Mamlatdar had no authority under the Act to inquire into any other question save that of possession and obstruction, and that his inquiry into the source of the supply was *ultra vires*. The Government Pleader, who appeared to support the decree, raised a preliminary question about the

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jurisdiction of the Mamlatdar's Court to entertain the suit, and he also urged that the decree was right on the merits.

It will be convenient to consider the question of jurisdiction in the first instance. It is admitted that the Mamlatdars' Act is silent on the point, and contains no limitation as regards the parties to possessory suits over which these Courts have jurisdiction. [767] Section 10 of the Act directs the Mamlatdar to return the plaint if the subject of the plaint is not within his jurisdiction. It is, however, contended that as under s. 32 of Act XIV of 1869 as amended by s. 15 of Act X of 1876, the Subordinate Judges cannot receive or register a suit in which the Government or any officer of Government is a party in his official capacity; the same restriction should obtain in the case of Mamlatdars' Courts, where, as in the present suit, officers of Government are defendants. It may be argued, on the other hand, that questions of jurisdiction cannot be properly decided on grounds of presumption or analogy. Though under s. 32 of Act XIV of 1869, the Subordinate Judges' Courts had no jurisdiction over Sirdars who could only be sued in the Agents' Courts, these latter were subject to the jurisdiction of Small Cause Courts in the Mofussil until the Act of 1887 was passed into law. Similarly, Courts of Small Causes were not subject to the same limitations as those which bound the Subordinate Judges' Courts till s. 15 of the Revenue Jurisdiction Act was amended. It was only this section which included Small Cause Courts with Subordinate Judges' Courts as being subject to this restriction of their powers in suits to which Government or an officer of Government acting in his official capacity is a party. The Mamlatdar had, therefore, jurisdiction to entertain this suit. It is further clear also that the provisions of s. 424 of the Civil Procedure Code have no application in respect of the acts of public officers which could not possibly be said to have been done by them in their official capacity. On the whole I feel satisfied that the Mamlatdars' Court had jurisdiction to entertain this suit, though irrigation officers were defendants.

We have next to consider the decision on the merits. I feel satisfied that the Mamlatdar has gone out of his way in considering the question of the source of water-supply, and basing his conclusion on the view he took of that source of supply. The Act itself lays down the issues that must be considered in such suits, and all matters not covered by these issues are extraneous, and ought not to influence the decision either way. It is admitted that plaintiff had obtained a decree against Javeri, and that decree was executed. The irrigation officers, who are parties [768] to this suit, in a day or two after re-set up the dam; and this action was sought to be justified on the ground that they had power to do so under s. 48 of the Irrigation Act. That section, however, empowers canal officers only to charge a water-rate on lands which in their opinion receive a supply from percolation or leakage or surface flow. It did not empower the defendants to act in open defiance of the authority of the Mamlatdar's Court, and set at naught the decree of that Court.

The only issues the Mamlatdar had to consider were, whether the plaintiff was in possession, whether defendants obstructed or disturbed that possession, and, lastly, whether this disturbance was within six months before suit—*Basapa* v. *Lakshmapa* (1). The pleadings of the parties made it clear that these points must be disposed of in plaintiff's favour. The plea of justification set up on the ground of the source of

(1) 1 B. 624.

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the water-supply being leakage from the canal was not a point which could be pleaded in the Mamlatdar's Court—*Ganesh* v. *Ramchandra* (1)—and the Mamlatdar was in error in entering upon this inquiry, and basing his decision on the result of the conflicting evidence offered on that point. The opinion of the Collector Mr. Ommanney was apparently in favour of the view that the stream had an independent source of supply. Justification and title other than that of possession within six months could only be pleaded in a properly instituted suit in a Civil Court. This is not a case where the discretion about the non-interference of this Court can be exercised with advantage as was the case in *Rakhma* v. *Tulaji* (2) and *Nathekha* v. *Abdul Alli* (3). I would, therefore, set aside the Mamlatdar's order, and send back the case to him for a proper and legal order.

Order reversed and case sent back.

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23 B. 769 = 1 Bom L.R. 436.

[769] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Crowe.

RAGHUNATHRAO (*Original Plaintiff*), *Appellant v.* VASUDEV AND OTHERS (*Original Defendants*), *Respondents.** [13th April, 1899.]

Khot—Khoti khasgi lands—Khasgi lands allotted to a khoti sharer—Sale of khoti—Occupancy rights in khoti khasgi lands.

One Naro was the owner of a 14 pies takshim (share) in a khoti village. To this takshim were allotted twenty khasgi thikans. In 1876 Naro mortgaged his khoti takshim to the plaintiff.

In 1880 the takshim was sold in execution of a decree against Naro and purchased by Ambardekar. Ambardekar sold the takshim to the plaintiff in 1881.

In 1893 plaintiff obtained a decree against Naro establishing his right to recover thal (or customary rent) in respect of the twenty khasgi thikans.

Naro having died, plaintiff brought this suit against Naro's sons in 1895 to eject them from the khasgi thikans.

Held, that the plaintiff was entitled to recover. The sale of the khoti takshim passed with it the khasgi lands allotted to the takshim. Both as mortgagee and purchaser of the takshim plaintiff acquired a title to the khasgi thikans in dispute.

Held, also, that the effect of the decree which plaintiff had obtained against Naro in 1893 in the rent suit was that, in the absence of any agreement, Naro was a mere tenant-at-will of the khasgi thikans, liable to be evicted after due notice.

Held, also, that a khoti sharer has not, with reference to a khoti khasgi thikan allotted to his share, an "occupancy right" against the body of khoti sharers, so that when he parts with his share in the khoti, his khoti khasgi lands are changed into khoti nisbat lands.

SECOND appeal from the decision of M. P. Khareghat, District Judge of Ratnagiri.

Suit in ejectment. One Naro (the father of defendants Nos. 1, 2 and 3) and his brother Balaji were owners of a 14 pies takshim (or share) in the khoti village of Nive Budruk to which certain khoti khasgi lands were attached. No formal partition of the khoti had been made, but the sharers for mutual convenience had allotted to each share a part of the

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* Second Appeal No. 412 of 1898.

(1) P. J. (1891), p. 96. (2) 19 B. 675. (3) 16 B. 449.

khasgi lands, and twenty thikans of these lands had fallen to the share held by Naro and Balaji.

[770] In 1876 Naro for himself and his brother mortgaged the whole of his khoti takshim to the plaintiff.

In 1879 Naro sold four out of twenty thikans of the khasgi land to one Vishvanath.

In 1880 the share (or takshim) of the khoti village belonging to Naro and Balaji was sold in execution of a decree obtained against them by one Krishnaji Lakshman, and purchased by Ambardekar, and in 1881 Ambardekar sold it to the plaintiff.

In 1889 plaintiff filed suits both against Naro (owner of sixteen thikans) and against Vishvanath (owner of four) to recover thal (rent) of the twenty khasgi thikans. The Subordinate Judge held that by reason of the Court sale of the khoti takshim Naro had lost his *status* as a khot and had been reduced to the position of an ordinary tenant-at-will in a khoti village, liable to pay thal to the plaintiff as khot according to the custom of the country.

This decision was eventually upheld in appeal by the High Court in 1893 (*Rav Raje Sir Dinkarrav* v. *Narayan*)(1).

Subsequently to this decision, Vishvanath re-sold the four thikans of khasgi land to Naro.

Naro having died, plaintiff filed the present suit in 1895 to eject Naro's sons (defendants Nos. 1, 2 and 3) and their tenants, (defendants Nos. 4 and 5) from the twenty khasgi thikans, after giving them notice to quit.

Defendants pleaded (*inter alia*) that the plaintiff had not acquired any title to these khasgi thikans either under his mortgage or by his purchase at the Court sale; that the khasgi thikans were not comprised or included in the khoti takshim, and that the defendants were occupancy tenants of the thikans, and as such were not liable to be evicted so long as they paid the fixed rent.

The Subordinate Judge held that the khasgi thikans in dispute were part and parcel of the khoti takshim, and that consequently when the khoti takshim was sold, they passed with it; that the plaintiff had become owner of the thikans by right of purchase; that the defendants were not occupancy tenants, and were liable **[771]** to be ejected after notice to quit. He, therefore, awarded the plaintiff's claim.

The decision was reversed, on appeal, by the District Judge, and the suit was dismissed with costs.

The following extract from the District Judge's judgment gives his reasons :—

" (2) On the second point I hold that the plaintiff has only acquired the right of the khot, *i.e.*, the right to levy rent on the khasgi lands of defendants Nos. 1 to 3, and not the right of occupancy which has remained with them. The khoti takshim was mortgaged to the plaintiff in 1876 under Ex. 46; that khoti takshim was sold through the Court in execution of the mortgage decree of one Krishnaji Lakshman on 4th June, 1880, and purchased by one Ambardekar (see sale certificate, Ex. 52), and conveyed by him to plaintiff on 27th April, 1881, under the sale-deed, Ex. 51. In none of these documents is there a word about the khasgi lands; they only deal with the khoti takshim. The Subordinate Judge considers that the khasgi lands are an inseparable appanage of the khoti, and so when the khoti is sold,

(1) P.J. (1893), p. 550.

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the khasgi passes with it. I entirely differ from him on this point. The khasgi lands are not inseparable from the khoti; they are very frequently dealt with separately. The khasgi lands do not generally pass when the khoti alone is transferred. During my three years' experience of this district I have seen a large number of documents dealing with khoti takshims as well as khasgi lands, and, as a rule, I have seen that whenever the khoti alone is mentioned, and the khasgi lands are not expressly mentioned, they do not pass. No doubt, instances can be quoted to the contrary, but they are rare. I would, therefore, lay the burden of proof upon the party who asserts that in any particular case khasgi lands passed without explicit mention with the khoti. To show that such has been the experience of other officers also, I may quote the report of Captain Wingate (on p. 245 of the 'Ratnagiri Gazetteer'). According to him, 'in mortgage-deeds executed by the khot, the mortgage referred to the rents and profits of the village, never to the ownership of a definite plot of land, and when a khot mortgaged special pieces of land, it was as his private property, not as a part of the hereditary khotship.' This is but natural, considering that the occupancy right of khasgi lands has little in common with the rights of a khot as such, which are generally those of management and levy of rent, that khasgi lands may have been acquired quite apart from the khoti either by hereditary possession before the acquisition of the khoti or by transfer from occupancy tenants after the acquisition of the khoti."

Against this decision plaintiff preferred a second appeal to the High Court.

M. R. Bodas, for appellant.—The plaintiff is entitled to the khasgi thikans both under his mortgage and by rights of purchase. **[772]** The mortgage-deed not only refers to the khot's right to levy rent on the khasgi lands, but also to all lands possessed by the khot at the time. The khasgi lands are part and parcel of the khoti, and as such are included both expressly and by implication in the property mortgaged to plaintiff. The sale of the khoti takshim carried with it the khasgi lands, and the purchaser at the Court sale acquired a complete title to the khasgi lands —*Govindrav* v. *Ravji* (1). After the sale, Naro ceased to be a khot, and sank to the position of an ordinary tenant-at-will of the khasgi lands. The lower Court erred in holding that Naro had occupancy rights in the khasgi lands. A khot is not, and cannot be, an occupancy tenant of such lands. The previous litigation shows that Naro was not an occupancy tenant, but a mere tenant-at-will of the lands. The matter is *res judicata*. The defendants being tenants-at-will are liable to be ejected after notice to quit.

M. V. Bhat, for respondents (defendants).—The lower Court has found that Naro had no intention to part with the khasgi lands, and that this was the intention of both parties to the mortgage transaction. This is a finding of fact and cannot be disturbed in second appeal. This case falls within the principle laid down in *Mahadev* v. *Kashinath* (2). What was mortgaged was simply the khot's right to levy rent on the khasgi lands which are the absolute and private property of the khot. It was never contemplated that the mortgage should include the khot's right over these lands. Suppose the khoti is abolished or attached under s. 27 of the Khoti Act, the khot's right of occupancy in his khasgi lands will not be affected at all. In respect of the khasgi lands, the khot is himself the khatedar kul and pays rent to himself as khot. As to the nature of khoti

(1) P.J. (1888), p. 59.

(2) P.J. (1888), p. 358.

khasgi lands, see *In re Antaji Keshav Tambe* (1) and *Secretary of State for India* v. *Sitaram* (2). The right to hold the khasgi lands on payment of the customary rent is vested in defendants.

JUDGMENT.

CANDY, J.—The principal question in this case is whether the plaintiff, who is the purchaser of the 14 pies takshim of the defendants Nos. 1 to 3 in the khoti of the village of Nive Budruk, is entitled after due notice to eject those defendants from certain [773] fields which have been found to be "khasgi thikans" allotted to the said takshim. There is no question as to the identity of the twenty thikans as found by the Subordinate Judge after careful enquiry. Both the lower Courts find that, though there has been no formal partition by metes and bounds of the khoti, yet the different sharers have for mutual convenience allotted to each share certain khoti nisbat and also khoti khasgi fields, and that the twenty thikans in question were the khasgi thikans so allotted to the 14 pies takshim of Naro and Balaji, who are now represented by defendants Nos. 1 to 3. Defendants Nos. 7 and 8 are brothers of Naro and Balaji. Defendant No. 6 is an assignee of defendant No. 7, and defendants Nos. 4 and 5 are tenants of defendants Nos 1 to 3. It was also found that the custom of the village is for the khoti sharers *inter se* not to pay thal for the khasgi thikans in their respective shares. This is a custom which is very prevalent in khoti villages.

Now, postponing for the moment a question which arises regarding four of the twenty thikans in question said to have been sold to one Vishvanath, and speaking of the twenty thikans as the khasgi fields belonging to the 14 pies takshim of which plaintiff was mortgagee and then purchaser, the first question which arises is, did plaintiff by his position as mortgagee and purchaser of the 14 pies takshim acquire any interest in these twenty khasgi thikans? It is quite possible for a khot when executing a mortgage of his share in a "khoti" to reserve a portion and not mortgage the whole. Thus he may reserve his khasgi thikans, and only mortgage his share in the rents received from the tenants of the khoti nisbat lands. Thus in *Mahadev* v. *Kashinath* (3) we have the illustration of a khoti takshim and a khoti khasgi thikan allotted to that takshim, separately dealt with. On the other hand, the same Judges (Sir C. Sargent, C. J., and Nanabhai Haridas, J.) held in *Govindrav* v. *Ravji* (4) that it was wrong to suppose that the purchase of a takshim would not include the khasgi lands allotted to that takshim, even though they were not expressly recited, and that the mention of the takshim as including the lands in the village would necessarily comprise the khoti khasgi lands. Thus the contrary opinion [774] expressed by the District Judge in the present case is shown to be opposed to authority.

Further, the District Judge was under the impression that the views which he expressed were supported by the opinion of Captain Wingate, as shown in an extract from a report of that officer quoted on p. 245 of the Bombay Gazetteer, Vol. X. The passage in question is stated in the Gazetteer to be taken from Bombay Government Selections CXXXIV, p. 53; and if the District Judge had had the opportunity of referring to these Selections instead of quoting from the Gazetteer, he would have found that the authority he relied on did not really afford support to the

(1) 18 B. 670.
(2) 23 B. 518.
(3) P. J. (1888), p. 358.
(4) P.J. (1888), p. 59.

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view which he was expressing. Captain Wingate was seeking to establish his proposition that a khot was a mere collector of Government dues, and had no interest in the lands cultivated by the rayats. He went on to say :—

"It will be found, I believe, that the rice and garden lands of khoti villages have generally been divided into separate occupancies, which are held by the parties in possession quite independently of the khoti vatan. The holders of these occupancies either pay revenue to the khot, or, as is sometimes the case when they themselves hold a share of the khoti vatan, they pay nothing, the exemption in this case forming part of the profits of their share. But the rents in all cases and not the land from the khoti vatan. And in all the mortgage-deeds executed by the khots it will be found that the mortgage refers to a share of the vatan, or the right to the rents and profits of the village generally, but never to the possession or ownership of a definite and describable portion of the village lands. Particular pieces of lands are occasionally mortgaged by a khot, but such land is invariably, if I mistake, not, mortgaged as the private property of the individual, and not as a portion of the khoti vatan. The mortgagee, with a view to secure his own interests, has the mortgage-deed worded in as comprehensive and also specific terms as possible, and if the khoti vatan comprehended the ownership of land, (inclusive of a right of occupation) I have no doubt whatever that this would be particularly described."

Captain Wingate then went on to describe a mortgage-deed, which like plaintiff's mortgage-deed in the present case was as comprehensive as possible ; but (said Captain Wingate) :

"The nature of the vatan rights over all these items is not distinctly specified. They are to be inferred from the subsequent part of the deed, in which the mortgagor, who by the deed sinks into the position of an ordinary khoti rayat, engages to pay for the rice land he cultivates himself as may be settled by agreement between himself and the mortgagee, and for the varkas as a chautheli, *i.e.*, at the rate of one-fourth of the crop."

[775] So here the mortgagor khot Naro for himself and his brother Balaji by the mortgage-deed (46) covenanted that for their home-farm (*amhi ghari sheti karun tyachi thal*) they would pay a crop share—one-fourth—by appraisement : they became ordinary khoti rayats.

But this arrangement was soon afterwards modified. Besides the khoti khasgi fields allotted to a khoti sharer, he may cultivate some of the khoti nisbat lands. These latter fields would not by being in his occupancy be necessarily changed from khoti nisbat to khoti khasgi, for that would change the due proportion of khoti khasgi fields allotted to each share. So to prevent any misunderstanding the mortgagor khots, Naro and Balaji, passed the agreement (48), in which they recited the covenant of the mortgage-deed that they would pay crop share, one-fourth, for their home-farm lands (*khasgat amhi sheti karun*), and it was then agreed that instead of that they should pay a lump sum of Rs. 21 annually for their khasgi fields, which were set forth in detail : if beyond these they themselves cultivated any other lands, then for such they were to pay thal. For the twenty khoti khasgi thikans set forth they were to pay the annual makta of Rs. 21 until the mortgage should be redeemed. And from the actual cultivators of this khoti khasgi thikans, *i.e.*, Gana, Hari and Dhondo, a separate writing was taken binding these men to pay the mortgagee Rs. 20-4-0 per annum, the balance of 12 annas being recoverable from the mortgagors.

Thus we see that the khoti sharers were not themselves actually cultivating these 20 khasgi thikans. But it was none the less true that they constituted their " home-farm," which they might cultivate by hired labourers or by letting to yearly tenants. It is difficult to see how a khoti sharer's proprietary interest in such lands could ever be independent of his share in the khoti vatan. Such an idea would involve a contradiction in terms. A khoti khasgi field must have some connection with a khoti vatan. Of course in a mixed village, containing both dhara and khoti lands, a khoti sharer may hold certain dhara lands, and these would be quite independent of his share in the khoti vatan. If he mortgaged these, the language used by Captian Wingate would be strictly accurate. Possibly the District Judge in this case was [776] misled by a confusion of thought shown by the Subordinate Judge in the Court of first instance. The Subordinate Judge said: "In a purely khoti village all land is khoti, and there are three varieties of it according to the difference of interests of the khot in the lands. The three classes are khasgi, kularji and khotnisbat." Now a reference to Molesworth and Candy's Dictionary shows that in a purely khoti village there cannot be such a thing as kulargi lands. A kulargi village is one held by dharekaris in opposition to a khoti village. In a purely khoti village there can be no dharekaris. The land is all khoti, the division being khasgi, lands held by the khots themselves (their " home-farm " as it has often been called), and the khoti nisbat lands, *viz.*, lands held by cultivators most of whom have occupancy and some also transferable rights.

The District Judge remarked that " the occupancy right of khasgi lands has little in common with the rights of a khot as such, which are generally those of management and levy of rent, and that khasgi lands may have been acquired quite apart from the khoti, either by hereditary possession before the acquisition of the khoti, or by transfer from occupancy tenants after the acquisition of the khoti." And in support of this view we were referred to certain remarks made by Mr. Justice Parsons at the close of his judgment in the *Secretary of State* v. *Narayan* (1). Now it must be self-evident that if a khoti khasgi " field may have been acquired quite apart from the khoti, then it cannot be a *khoti* khasgi field. If it was acquired before the acquisition of the khoti, then it would apparently be dhara. If it was acquired by transfer from the occupancy tenant thereof after the acquisition of the khoti, then it would still remain khoti nisbat (as it must have been when held by the occupancy tenant), and it would require the assent of the whole body of the khoti sharers to change it from khoti nisbat to khoti khasgi. Mr. Justice Parsons' remarks obviously apply solely to the case of one khot owning the whole interest in a khoti vatan ; and we have his authority for saying that this is so. Of course, if such a khot brings waste lands of his village into cultivation he can treat them as khoti khasgi: if they lapse to him from any occupancy tenant he can equally treat [777] them as khoti khasgi. If the khotship were abolished, and the village treated by Government as an ordinary rayatwari village, the khot would hold such lands as an ordinary survey occupant. In this case the District Judge has in several places in his judgment referred to a khot's interest in his khoti khasgi fields partaking of a dual nature, *viz.*, his own occupancy right, and his right to take rent from his tenant-at-will, whom he may put into actual occupation of the land. But there is a fallacy

(1) P. J. (1899), p. 12.

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at the foundation of this proposition. For what is an "occupancy right"? It is a right established by a tenant against his superior holder, to hold his land in perpetuity conditionally on the payment of the rent from time to time lawfully due by him to the superior holder. How can a khot establish such a right against himself? If he has such an occupancy right it must be against himself and his co-sharers in the khoti vatan. If he sells his khoti—that is the sum total of his interest in the khoti vatan—then *ex hypothesi* the purchaser acquires this occupancy right. And if, as the District Judge holds, on the occasion of such a sale this occupancy right does not pass to the purchaser, then the vendor, who is no longer a khot, is an occupancy tenant of the fields which were once khoti khasgi, but have now become khoti nisbat. This shows that there cannot be an "occupancy right" in khoti khasgi lands.

The Survey Department, even when it attempted to apply a Deccan rayatwari system to the villages of the Konkan, did not overtly assert a right to make the actual cultivator of a khoti khasgi field a survey occupant of that field. It did so with regard to all khot nisbat fields, whether the cultivator was of old standing or recent. But the "khoti khasgi thikans" were apparently left in the uncontrolled ownership of the khot, to whose takshim they were allotted, or of the whole body of khots, if there had been no such partition or allotment. It is true that s. 5 of Bombay Act I of 1880 speaks of a holder of "khoti land" (which would include khasgi) acquiring under certain conditions occupancy rights. But that comes under the heading "inferior holders" in contradistinction to the heading "khots" above s. 4, and, therefore, it would only empower the Settlement Officer at the most to give an occupancy right to the actual cultivator of a [778] khoti khasgi thikan against the khoti sharer, to whose share this thikan had been allotted. This, even if within the letter of the Statute, would be distinctly opposed to the intention of the makers of the Statute, and the point if ever it arises will require careful consideration.

Here the question is, whether a khoti sharer, has, with reference to a khoti khasgi thikan allotted to his share, an "occupancy right' against the body of khoti sharers, so that if he parts with his share in the khoti, the khoti khasgi lands, which had been allotted to his share, at once pass from having been khoti khasgi to khoti nisbat. The obvious answer to such a question is that if the nature of the lands is thus changed, then the purchaser by his purchase does not acquire the full interests of his vendor. The vendor had the right of doing what he liked with those lands: he could cultivate them himself one year: he could let them to a tenant the next. He paid nothing to his co-sharers in respect of those lands, except the survey assessment. But the vendee's position would be quite different: and as regards the co-sharers in the vatan the proportion of khoti nisbat and khoti khasgi fields would be entirely changed. The District Judge infers that the "occupancy right," which a khot in his opinion has in his khasgi fields, could not have in the present case passed to the plaintiff as purchaser of the khoti takshim, otherwise the plaintiff, who was first mortgagee and afterwards in 1881 purchaser from the Court purchaser in 1880 of the 14 pies takshim, would at the time of the purchase have taken actual possession of the khasgi thikans, and subsequently instead of enhancing the rent he would have given notice of ejectment. But this inference is not good. Plaintiff and his agent are not actual cultivators. There is no reason why plaintiff to this day should not be perfectly willing to let defendants Nos. 1—3 remain in possession, if they will peaceably pay the rent lawfully due by them to

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their khot. But that is just what they will not do, as will presently be shown : hence this suit in ejectment.

Plaintiff having become the full owner of the 14 pies takshim, and not merely the mortgagee, sued defendants Nos. 1—3. He was at first unsuccessful, but after he had given notice that the agreement for makta (48) was at an end, he succeeded in Suit No. 255 [779] of 1889 in recovering *thal* from Naro and Balaji and in Suit No. 257 of 1889 from Vishwanath. The Subordinate Judge held that the mortgage and the agreement for makta were at an end ; that Naro and Balaji had lost their status as khots and must be regarded as ordinary tenants in a khoti estate, and in the absence of a contract must pay rent (*thal*) according to the usage of the locality. At the end of his judgment the Subordinate Judge remarked that "the makta fixed by the Settlement Officer was fixed on the 17th November, 1888, and the present suit in so far as it seeks a modification of it is within time." On appeal to the District Court the Subordinate Judge, A. P., reversed the Subordinate Judge's decision, holding that the agreement to pay makta till the mortgage was redeemed, meant that makta should always be paid, the words 'till redemption' being simply put in as an expression of hope. It is unnecessary to further notice the judgment of the First Class Subordinate Judge, A. P. His decision was reversed by the High Court and that of the Subordinate Judge, restored—*Rav Raje Sir Dinkarrav* v. *Narayan*(1) Sargent, C. J., and Candy, J., held that by the notice putting an end to the makta agreement the tenancy-at-will, under which the defendants must be deemed to have been holding after the expiration of the agreement, was thus put an end to, and they thereupon became liable to pay thal like all other cultivators of khoti lands. This decision must mean that, in the absence of any agreement, Naro and Balaji were tenants-at-will of the khoti khasgi lands, which as part of their takshim had passed to plaintiff. As such tenants-at-will they would in the absence of specific agreement pay thal like occupancy tenants (s. 8 of Bombay Act I of 1883). But they would be none the less tenants-at-will. And, as shown before, it is difficult to see how inferior holders of khoti khasgi lands can be regarded as anything but tenants-at-will of those lands. For all these reasons we are of opinion that the Subordinate Judge was right in holding that plaintiff being now khot of the 14 pies takshim can after due notice eject defendants Nos. 1—3 from the khoti khasgi thikans.

Then comes the question, how is this right affected by the fact that while plaintiff was merely the mortgagee of the 14 pies [780] takshim, and before the Court sale to Ambardekar, who sold to plaintiff, four of the khasgi thikans were purchased by one Vishwanath, who sold them back to Naro and Balaji in 1893 [the District Judge says *rented*, but that is apparently a clerical error]. The Subordinate Judge held that Vishwanath was merely a benamidar for Naro and Balaji; but the District Judge took the contrary view, and this is a finding of fact with which we cannot interfere. The equity of redemption of this portion of the mortgaged property having been purchased by Vishwanath in 1879, plaintiff and Ambardekar, when they purchased in 1880 and 1881, became owners of the whole takshim, except these four thikans, and the mortgage on them is still outstanding. Thus Naro and Balaji having purchased from Vishwanath stand in relation to their mortgagee in the same position as they stood before the sale to Vishwanath. Regarded in that light they might be entitled to plead that they never could be ejected as long as

(1) P.J. (1893), p. 550.

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they paid the fair proportion of the makta, Rs. 21, due on the four fields. But when plaintiff brought the Suit No. 255 of 1889 against Naro and Balaji, in which it was eventually held that the agreement for makta was at an end and that Naro and Balaji were tenants-at-will, he at the same time brought a similar suit against Vishwanath (No. 257 of 1889), and this suit was eventually decided in the same way as the suit against Naro and Balaji. In a subsequent suit for thal of the years 1888-89 to 1890-91 (Suit No. 257 of 1892) plaintiff obtained a consent decree to the same effect as before. Further, in Suit No. 506 of 1895 plaintiff claimed thal, for all the twenty thikans for the years 1891-92 to 1893-94, and the District Judge has held in that case that for these four fields defendants Nos. 1—3 must pay thal, so the makta agreement is no longer in force as regards those four fields. Plaintiff has appealed against the District Judge's decision as regards the sixteen thikans, but defendants have filed no cross objections as regards the four fields. Therefore as regards them defendants Nos. 1—3 must be regarded as mere tenants-at-will, and plaintiff, who is khot, whether as mortgagee or purchaser, can eject them after due notice. Whether defendants Nos. 1—3 can now sue to redeem the four thikans and so regain their position as khots of the four fields, is a question as to which we need not express an opinion.

[781] Mention was made above of the decision of the Settlement Officer in 1888 that Naro and Balaji and Vishwanath were "occupancy tenants" of the khoti khasgi thikans, and as such liable to pay makta only. But the decision of the High Court in 1893, alluded to above, clearly reversed the decision of the Settlement Officer as to status, and the reversal of the decision as to rent followed as a matter of course (*cf.* the ruling of the Full Bench in *Antaji* v. *Antaji* (1).).

The only remaining question is as to the rights of the other defendants in these thikans. The District Judge concurred with the Subordinate Judge in holding that these rights do not affect the plaintiff's claim; and we see no reason for differing from that view.

For the above reasons we must reverse the decision of the District Judge and restore that of the Subordinate Judge. Defendants Nos. 1 to 3 will bear plaintiff's costs throughout as well as their own. The other defendants will bear their own costs throughout.

Decree reversed.

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23 B. 781 = 1 Bom. L.R. 461.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

SIDHESVAR (*Original Plaintiff*), *Appellant* v. BABAJI AND OTHERS (*Original Defendants*), *Respondents.** [12th June, 1899.]

Mortgage—Suit for sale of mortgaged property—Regulation V of 1827, *s.* 15, *cl.* 3—*Special agreement—Limitation.*

Plaintiff brought this suit in 1895 on a mortgage-bond, dated 1870, to recover the balance due on the mortgage by sale of the mortgaged property, or, in the alternative, for possession of the property until payment of the balance. The mortgage contained a stipulation that, on default of payment of interest by the mortgagor, the mortgagee should take possession and hold possession in lieu of

* Appeal No. 92 of 1898.

(1) 21 B. 480.

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interest, and that such possession should continue until the mortgagor paid the principal and interest that remained unpaid when the mortgagee took possession.

The Judge dismissed the suit, holding that the claim for possession was time-barred, and the claim for the sale of the property could not be enforced, as the [782] mortgage-bond contained a special agreement which took the case out of clause (3) of s. 15 of Regulation V of 1827.

On appeal, *held*, reversing the decree, that s. 15 of Regulation V of 1827 was not applicable, as the mortgagee never was in possession, and that the claim to enforce the mortgage security by sale was not barred.

[R., 5 Bom. L.R. 119 (122).]

APPEAL from the decision of E. M. Pratt, District Judge of Sholapur.

The plaintiff Sidhesvar, a minor, represented by his next friend, the Collector of Sholapur, brought this suit in 1895, to recover Rs. 1,080, the balance due on a mortgage-bond executed on the 17th June, 1870, by the deceased defendant Babaji bin Piraji to his (plaintiff's) deceased uncle Krishnapa for Rs. 540 by sale of the mortgaged property, praying, in the alternative, for possession of the property until payment of the balance due. The following is the translation of the mortgage-bond sued on :—

"Mortgage-bond (passed) to Krishnappa bin Mahadappa Hagre, Lingayat Vani, * * by Babaji valad Piraji Patil * * occupation agriculturist, in Fasli year 1280, the mortgage-deed written as follows : —

"The former debt due to you from us is Rs. 540, (on this) we shall pay interest at one rupee per cent. per mensem ; and the following ancestral property of ours is (given) is mortgage :"

(Particulars of the property).

"The aforesaid ancestral property has been in our possession from before and had been mortgaged by a registered mortgage-bond dated the 17th October, 1866. An account is now made of all former dealings, and this mortgage has been effected as security for the said rupees ; but the management (*vahivat*) of the lands shall be with ourselves ; we shall derive income therefrom and pay your interest every year in the month of Chaitra, and if in any year you do not receive your interest from us, at that same time we shall put you in possession of the mortgaged property ; thereafter you should pay the Government assessment and enjoy the profits in lieu of interest. Thereafter we shall resume possession, (only) after the crops of the year have been removed, when we shall pay the principal debt and the arrears of interest due before your being put in possession. Till then we shall have no claim to these lands. We shall take receipts for payments of the *vasul*. This mortgage bond has been executed of our own free will and accord. Dated Jeshta Vadya 4th, 1792, 17th June 1870."

Bapu, the son of the mortgagor Babaji, replied that he had no knowledge of the mortgage ; that only a moiety of the mortgaged property belonged to him ; and he prayed that an account of the [783] mortgage transaction should be taken under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

Defendant No. 2, Aba, the brother of the mortgagor Babaji, contended that the lands had been divided many years ago between himself and his brother, that a half share had been allotted to him at the partition ; that he was not bound by the mortgage, and that the claim, so far as his share was concerned, was barred by limitation.

The Judge of the lower Court found that the mortgage executed by Babaji was proved, but that it only affected his half share, and that the

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debt due was now Rs. 540. He held, however, that the plaintiff's claim for possession was barred by limitation, and that having regard to the terms of the mortgage-bond, it was clearly the intention of the parties that the property should not be sold; that the provision that the mortgagee should continue in possession until the debt should be discharged was a special agreement; and that as the bond contained no promise to pay, and fixed no time for payment, the plaintiff was not entitled to either of the remedies he sought (see cl. 3 (1) of s. 15 of Reg. V of 1827).

The following is an extract from his judgment:—

"* * * * It is proved that at the time of execution (of the mortgage) Babaji, defendant No. 1, and his brother defendant No. 2, were joint. * * *. They, however, effected partition after the great famine and have been separate in estate for eighteen or twenty years. There is no evidence that Babaji executed the deed as manager and for a family purpose so as to bind his brother. The mortgage, therefore, does not bind the moiety of the estate which is in the possession of defendant No. 2, or those who hold under him. It is admitted that the amount specified in the deed is made up half of principal and half of interest. The mortgage contains a promise to pay interest, and provides that, in default of payment of interest, the mortgagee shall take possession of the mortgaged property. As the mortgagee has neglected to enforce this remedy, he is not entitled to interest subsequent to the mortgage. The balance due, therefore, is the original debt of Rs. 540.

"[784] The real question for decision in this case is whether the plaintiff is entitled to either of the reliefs he claims. The claim for possession of the mortgaged property is admittedly time-barred.

"The other relief sought is recovery of the balance by sale of the mortgaged property.

"The deed recites that the property is mortgaged for the debt; the mortgagor promises to pay interest at fixed annual dates; it is further provided that, on his making default of payment, the mortgagee shall take possession and hold possession in lieu of interest, and the last provision is that such possession shall continue until the mortgagor pays the principal and the interest that remained unpaid when the mortgagee took possession.

"It was clearly, therefore, not the intention of either party that the property should be brought to sale. The provision for the possession of the mortgagee to continue until the debt is discharged is a special agreement which takes the case out of cl. (3) of s. 15 of Reg. V of 1827. The deed contains no promise to pay and fixes no time for payment. The plaintiff is not entitled to either of the reliefs he claims."

The plaintiff appealed.

Vasudev J. Kirtikar (Government Pleader), for the appellant (plaintiff).—The Judge has misconstrued the mortgage-deed in holding that it was not the intention of the parties that the mortgaged property should be brought to sale. Section 15 of Reg. V of 1827 is not applicable, because we were not in possession of the mortgaged property. Clause (3) of that section cannot operate to our prejudice, because there is no special condition in the deed that the property shall not be sold for the realization of

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(1) Section 15 of Bombay Regulation V of 1827, cl. 3:—

"Third.—In the absence of any special agreement, or recognized law or usage to the contrary, either party may at any time, by the institution of a civil suit, cause the property to be applied to the liquidation of the debt, the surplus, if any, being restored to the owner.

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our debt. A mortgagee has the right to recover his mortgage money by sale of the mortgaged property—*Motiram* v. *Vitai* (1); *Venkatesh* v. *Narayan* (2); *Mahadaji* v. *Joti* (3); *Datto* v. *Vithu* (4); *Yashvant* v. *Vithal* (5).

We do not press our claim against the property in the hands of defendant No. 2.

There was no appearance for the respondents (defendants).

JUDGMENT.

JENKINS, C. J.—This is a suit brought by the plaintiff to enforce a mortgage security, and the first question to be considered is whether the claim is time-barred. The District Judge of Sholapur [785] Bijapur has decided this in the affirmative on the ground that the plaintiff's only remedy was a suit for possession.

On the part of the appellant it is contended that this decision is wrong, and that the plaintiff is entitled to enforce his security by sale. In our opinion this contention is right.

Having regard to the date of the mortgage, the Transfer of Property Act (IV of 1882) does not apply, but the District Judge appears to have thought the case was governed by s. 15 of Reg. V of 1827, and on that assumption he has held that there was a special agreement, which takes the case out of cl. 3 of that section. We do not agree with this view. Even if the section applied, we think, there was no such agreement. But beyond that it seems to us that the section has no application seeing that the mortgagee never was in possession. We, therefore, hold in accordance with the prior decisions of this Court, to which our attention has been drawn, that the plaintiff is entitled to enforce his security by sale, and consequently that his claim is not barred.

The Government Pleader who appears for the plaintiff has conceded that he cannot support the claim for a sale of the entirety and, therefore, the decree will not affect the moiety, which is in the possession of the defendant No. 2 or those who hold under him.

The District Judge has held that the balance due is Rs. 540, and as its correctness has not been impugned before us, we do not disturb his finding on that point.

The Court allows the appeal, reverses the decree of the lower Court and passes a decree for the plaintiff for Rs. 540 and costs in this and the lower Court to be realized by a sale of the moiety of the mortgaged property in the possession of respondent No. 1, or those who hold under him, in case such amount and costs are not paid within six months from the date of the decree of this Court.

Decree reversed.

(1) 13 B. 90.
(2) 15 B. 183.
(3) 17 B. 425.
(4) 20 B. 408.
(5) 21 B. 267.

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APPELLATE CIVIL.

23 B. 786=1 Bom. L.R 459.

23 B. 786=1 Bom. L.R. 459.

[786] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

KALLIANDAS (*Original Plaintiff*), *Appellant v.* TULSIDAS (*Original Defendant*), *Respondent.** [12th June, 1899.]

Injunction—Light and air—Easement—Damages—Practice where amount of injury does not justify injunction.

The plaintiff sued for an injunction restraining the defendant from erecting a building which interfered with the light and air coming to the plaintiff's house. The lower appeal Court found that, though the light and air of the plaintiff's house was sensibly diminished by the defendant's building, there was not such substantial damage done as would justify an injunction, and it dismissed the suit with costs, being of opinion that the plaintiff's remedy, if any, was a suit for damages.

Held, that the lower Court was right in not granting an injunction, but instead of dismissing the suit, and referring the plaintiff to another suit for damages, it ought itself to have directed an inquiry as to the damages sustained by the plaintiff by reason of the diminution of the supply of light and air to his house.

[F., 2 S.L.R 65 (67); R., 36 M. 11=11 Ind. Cas. 642=21 M.L J. 742=10 M.L.T. 121 (122)=(1911) 2 M.W.N. 89 ; 13 Bom. L.R. 905=12 Ind. Cas. 381.]

SECOND appeal from the decision of E. H. Moscardi, District Judge of Surat.

Suit for an injunction. Plaintiff sued for an injunction directing the defendant to pull down a building which he was erecting on a piece of open land adjacent to plaintiff's house, and restraining him from proceeding with the building, alleging that the building materially diminished the supply of light and air which the plaintiff had uninterruptedly enjoyed for more than twenty years through the windows of his house, which overlooked the open land.

The Subordinate Judge granted the injunction.

On appeal the District Judge rejected the plaintiff's claim, holding that no sufficient case for an injunction had been made out. His reasons were as follows:—

"The point for decision is whether the diminution of light and air caused by the defendant's building is sufficiently serious to justify an injunction for the removal of the building.

"I find this in the negative. The law on the subject is to be found in *Ghanasham* v. *Moroba*(1), in which it is laid down that in order to justify an injunction [787] for the removal of a building on the ground of its interfering with the access of light and air to another building, it is not enough to show that the light and air of the latter building have been sensibly diminished, but it must be shown that the damage is large, material, and substantial, and that the latter building has been rendered unfit for the purpose for which it might reasonably be expected to be used. I have personally inspected the buildings in suit, and have come to the conclusion that applying this principle there is no ground for an injunction. The building complained of is a sort of wooden staging or set of two balconies one above the other, entirely open on the west side, on which it is quite close to plaintiff's house, in fact virtually contiguous to it, and on the east or opposite side. The light coming to the windows

* Special Appeal No. 684 of 1898.

(1) 18 B. 474.

on the ground and first floors is somewhat diminished by the two balconies overhanging them, but not to such an extent as to be even disagreeable. Two small openings in the wall of the ground floor, chiefly intended for ventilation, are closed up so far as the light from them is concerned. But they still admit the air freely. A window in the upper or second storey is crossed by the upper balcony of the defendant's wooden staging, and there is a sensible diminution of light there; but the room cannot be said to be completely darkened or rendered unfit for the uses to which it is ordinarily put. From the lower balcony the defendant and his family can approach close to the plaintiff's first floor window, and look right through his house, and this is no doubt intensely disagreeable to the plaintiff. This, however, is not the ground on which the injunction is sought. I am, therefore, of opinion that a case for an injunction is not made out; because though the light and air of the plaintiff's building has been sensibly diminished, there is not such a large, material and substantial damage as would justify the granting of an injunction, nor has the plaintiff's building been rendered unfit for any purpose for which it might reasonably be expected to be used. The plaintiff's remedy, if any, is by a suit for damages.

"I reverse the decree of the lower Court, and reject the plaintiff's claim with costs on plaintiff throughout."

Against this decision plaintiff preferred a second appeal to the High Court.

Nagindas Tulsidas, for appellant.

N. V. Gokhale, for respondent.

JUDGMENT.

PARSONS, J.—The District Judge has given good and sufficient reasons for not granting an injunction in the present case, but he was wrong in dismissing the suit with costs and referring the plaintiff to another suit to recover pecuniary damages for what was found by him to be a sensible diminution of the supply of light and air to the plaintiff's house. It is within the jurisdiction of a Court to give relief by way of damages when it refuses **[788]** an injunction, and it is the practice of the Courts in England to direct an enquiry as to damages though not prayed by the bill—*Lady Stanley of Alderly* v. *Earl of Shrewsbury* (1). In the present case the plaint asked for an injunction or for such other relief as the Court might think fit to grant. The case thus resembles the case of *Catton* v. *Wyld* (2), in which a decree to ascertain what damages the plaintiff had sustained was ordered.

We ask the Judge of the lower appellate Court to take evidence and record a finding on this issue, *viz.*:—

What money damages is the plaintiff entitled to recover from the defendant for the injury complained of and found proved? and certify the same to this Court within two months.

(1) (1875) 19 Eq. 616.

(2) (1863) 32 Beav. 266.

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CRIMINAL REFERENCE.

23 B. 788=1 Bom. L.R. 345.

23 B. 788=1 Bom. L.R. 345.

CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* DABHAI KABHAI.* [22nd June, 1899.]

Salt Act (Bom. Act II of 1890), s. 47 (a) (1)—Possession of salt water with the intention of manufacturing salt.

The mere possession of salt water with the intention of manufacturing salt therefrom is not an offence under the Bombay Salt Act (Bom. Act II of 1890).

REFERENCE by J. K. N. Kabraji, District Magistrate of Kaira, under s. 438 of the Code of Criminal Procedure (Act V of 1898).

The accused was convicted by the Third Class Magistrate of Borsad under s. 47 (*a*) of Bombay Act II of 1890 and sentenced to a fine of Rs. 5, for having in his possession salt water for the purpose of manufacturing salt.

[789] The evidence against the accused showed that salt water was found in his house and that he admitted his intention to manufacture salt therefrom. But no salt was actually manufactured.

The District Magistrate was of opinion that the offence of manufacturing salt without a permit was not complete, and that the mere intention was not punishable under the Act.

The District Magistrate, therefore, referred the case to the High Court.

The reference came on for disposal before Parsons and Ranade, JJ.

There was no appearance for the Crown or for the accused.

JUDGMENT.

PARSONS, J.—The District Magistrate is right. The possession of salt water even with the intention of manufacturing salt therefrom is not made an offence under the Bombay Salt Act, 1890. We, therefore, reverse the conviction and order the fine to be refunded.

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23 B. 789=1 Bom. L.R. 420.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

LAKSHMIBAI AND ANOTHER (*Original Defendants*), *Appellants v.* SARASVATIBAI AND ANOTHER (*Original Plaintiffs*), *Respondents.*‡
[26th June, 1899.]

Hindu law—Adoption by senior widow—Widow's capacity to adopt—Implied prohibition.

In the absence of express prohibition the husband's consent to an adoption by his widow is always to be implied.

The question of implied prohibition is one of legal inference from the facts found, and it is open to the Court to inquire into its correctness in second appeal.

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* Criminal Reference No. 66 of 1899. ‡ Second Appeal No. 689 of 1898.

(1) Section 47 (*a*) of Bombay Act II of 1890 provides as follows :—"Whoever, in contravention of this Act, or of any rule or order made under this Act, or of any license or permit obtained under this Act, manufactures, removes, or transports salt, shall, for every such offence, be punished with fine which may extend to Rs. 500 or imprisonment for a term which may extend to 6 months or both."

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Semble.—In the Bombay Presidency the widow's right to adopt is inherent and not merely delegated.

Semble.—In the absence of express prohibition by the husband, the widow's power to give or take in adoption is co-extensive with that of the husband.

[R., 25 B. 537 (541).]

SECOND appeal from the decision of Rao Bahadur Vaman M. Bodas, First Class Subordinate Judge of Sholapur with appellate [790] powers, confirming the decree of Rao Saheb M. Davlatrai, Subordinate Judge of Pandharpur.

Suit to set aside an adoption.

In April, 1894, one Yeknath Ramchandra died without leaving a son, but leaving two widows, *viz.*, Lakshmibai (defendant No. 1) and Sarasvatibai (plaintiff), and one daughter Mathurabai, the child of Sarasvatibai.

In September, 1894, the two widows partitioned Yeknath's estate, each taking a moiety.

In January, 1895, Lakshmibai adopted one Ganesh (defendant No. 2) whereupon Sarasvatibai and her daughter Mathurabai brought this suit to set aside the adoption, and for a declaration that Lakshmibai had only a life interest in the moiety of the property taken by her on partition, and that Ganesh (her alleged adopted son) had no interest in the property at all.

The plaintiffs contended that the adoption was invalid on the following grounds :—

(1) That Lakshmibai (defendant No. 1) had not only no authority from her husband to adopt, but had been forbidden to adopt.

(2) That she had refused to live with her husband, and as a fact had lived separate from him for twenty years.

(3) That the authority to adopt had been given to Sarasvatibai (the plaintiff) by Yeknath, the deceased husband.

(4) That at the time of the adoption, Lakshmibai was untonsured.

(5) That Ganesh, the adopted son, was older than Lakshmibai, who adopted him.

(6) That Lakshmibai had received half of the deceased husband's property on the express condition that she would not adopt.

The Subordinate Judge found that when partition of Yeknath's property was made between the two widows, it was not agreed that Lakshmibai No. 1 should not adopt; that the adoption was not invalid on the ground of Lakshmibai being untonsured; that Sarasvatibai (plaintiff No. 1) was not expressly authorized by [791] Yeknath to adopt; that Lakshmibai was not expressly forbidden to adopt; that Ganesh was not older than Lakshmibai. He held, however, that the fact that Lakshmibai had been for a long time separate from her husband, and had been on unfriendly terms with him, prevented her from making a valid adoption. He, therefore, declared the adoption invalid.

On appeal by the defendants the Judge confirmed the decree, holding that a widow's power to adopt was not inherent, but delegated by her husband, and that under the circumstances of the present case no inference of such delegation could be made.

The defendants preferred a second appeal.

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Setlur with *Balkrishna N. Bhajekar*, for the appellants (defendants).—We contend that a widow's power to adopt is not a delegated power, at least in the Bombay Presidency. It is a privilege which she enjoys in right of her wifehood—of her being a *patni*. No doubt this power, like all other powers of hers, is subject to her paramount duty, namely, the duty of implicitly obeying the commands and wishes of her husband. It is this duty that prevents her from exercising this power without the permission of her husband during his lifetime—*Narayan* v. *Nana Manohar* (1). But the Vyavahar Mayukha (Mandlik's Hindu Law, p. 57) distinctly lays down that even though alive, if he becomes infirm on account of age or otherwise and incapable of exercising his authority, she can herself adopt without waiting for his permission. After his death, unless he has expressed his wish, either in words or by conduct, that she shall not adopt, she has always the right to adopt. It has been held that a minor's widow can adopt—*Patel Vandravan* v. *Patel Manilal* (2). Then, again, when there are several widows, the eldest alone can adopt, and, as pointed out in *Padajirav* v. *Ramrav* (3), the preference is based on the fact that the eldest widow alone is *patni* and as such is preferentially entitled to the privileges of that status.

[JENKINS, C.J.—When a wife or widow adopts, to whom does she adopt—to herself or to her husband ?]

[792] We submit that the question in that form cannot arise, as the Hindu law regards the husband and wife as one individual. The identity of the wife with her husband is a leading principle, not only of the Mitakshara, but of the whole Hindu law—*Gojabai* v. *Shrimant Shahajirao* (4). So when the husband adopts, he adopts for her, and when the wife or widow adopts, she adopts for him and for herself also. The circumstance that the husband has the authority at any time to deprive the wife permanently of the power to adopt, does not necessarily imply that the power is his and not hers. It is only an instance of the obedience which the wife owes to the husband according to Hindu law. This is shown clearly by the law as now settled relating to the power of a co-parcener's widow to adopt—*Vithoba* v. *Bapu* (5).

[JENKINS, C.J.—What about the disqualified heir's widow; can she adopt ?]

We submit she can. Such an adopted son, no doubt, would not get the share which the father would have got if he had not been labouring under a disqualification, but this disability of such adopted son is due to the Court's engrafting the principles of the law of property on the law of adoption which under Hindu law is a quasi religious institution. The Full Bench decision in *Ramchandra* v. *Mulji Nanabhai* (6) on the question of the motive of a widow in making an adoption removes all doubts on this point, and we submit that so far as the Bombay Presidency is concerned, the power of the widow to adopt is her own and not a delegated power.

Even if the view we contend for be not upheld, still from the facts of the present case it is impossible to infer any implied prohibition. The Judge has relied on *Dnyanoba* v. *Radhabai* (7). But the facts of that case were totally different.

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(1) 7 B.H.C.R.A.C.J. 153.
(2) 15 B. 565.
(3) 13 B. 160 (166).
(4) 17 B. 114 (122).
(5) 15 B. 110.
(6) 22 B. 558.
(7) P. J. (1894), p. 22.

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[JENKINS, C.J.—Is not the question of implied prohibition one of fact and the Judge's finding on it binding on us in second appeal ?]

Implied prohibition is a mixed question of law and fact, and it is to be inferred from facts found, and this Court has the power to see whether the inference drawn is legal or otherwise. The plaintiffs **[793]** have admitted, by giving us after the husband's death a half share in the property, that our status as *patni* was still existing, and that being so, we had a right to exercise the power of adoption incidental to that status.

Narayan G. Chandavarkar, for the respondents (plaintiffs) :—We do not deny that in the Bombay Presidency the widow has always the power to adopt in the absence of the husband's prohibition, express or implied. In the present case the Judge has, after careful consideration of all the circumstances, found that there was an implied prohibition. Whether in a particular case there was implied prohibition or not, must be decided with reference to the circumstances of the case, and it is a question of fact. In the present case the detailed description given by the Judge of the scene that occurred at Ahmednagar at the time the defendant separated from her husband, can leave no doubt that she had given up all connection with her husband. Under these circumstances the inference drawn by the Judge, who is himself a Brahmin, of implied prohibition is quite justifiable and it cannot now be disturbed. It would be unnatural to infer that the husband would have directed his widow, who separated from him in her very childhood, not long after the marriage, and who never cared to go back to him during the twenty-five years of his subsequent life, to adopt a son for himself while there was another widow of his who always lived with him and had borne him a daughter. These circumstances, we submit, clearly show that there was an implied prohibition by the husband.

Setlur in reply.—To imply prohibition it is not enough to show that there was no affection between the husband and the wife. It must be shown that the husband applied his mind to the question, and indicated his desire that the wife should not adopt—*Ramji* v. *Ghamau* (1).

JUDGMENT.

JENKINS, C. J.—The plaintiffs have brought this suit to obtain a declaration that the adoption of Ganesh Yeknath Kowlagi (defendant No. 2) by Lakshmibai (defendant No.1) is unauthorized and invalid. The adoption in question was made by defendant No. 1 as the elder co-widow of Yeknath Ramchandra Kowlagi ; and it is impugned by the plaintiffs, who are the junior co-widow **[794]** and her daughter, on the ground that defendant No. 1 was, by the implied prohibition of the deceased husband, disqualified from adopting. It is, so far as this present appeal goes, conceded that Lakshmibai, as the senior co-widow, could adopt in the absence of prohibition, and the only question to be determined is whether a prohibition is to be implied; for admittedly none is expressed. Both the lower Courts have found this in the affirmative, but it is contended before us on the part of the appellants, the elder co-widow and the boy whom she has purported to adopt, that this finding is based on inferences not justified by the facts, and that consequently it is open to us, even on second appeal, to enquire into its correctness. The respondents, on the other

(1) 6 B. 498 (504).

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hand, maintain that this finding cannot be questioned in this Court, and in any case it is correct.

It appears to me that the determination of the question whether an incapacity on the part of the elder co-widow results from the facts found by the lower Court, under the circumstances of this case, involves matter of legal inference, and is in consequence properly open to us even on second appeal. It has been argued before us on the part of the appellant that a widow's power to adopt does not rest on any delegation from her deceased husband, but is her own inherent right, and it is obvious that the distinction may have more than an academic value. The commentaries, which prevail in this Presidency, seem to me strongly to favour the view thus contended for, but some at any rate of the more recent decisions in this Court contain expressions that point in the other direction. In the view I take of the present case, it is not necessary to decide the point, but the inclination of my opinion (though I reserve to myself the right to reconsider the matter hereafter, if necessary) is that in this Presidency the widow's right is inherent and not merely delegated.

Though at first sight it might appear that the husband's right to forbid, indicated that his authority, either express or implied, was necessary, still it may well be answered to this that his right to forbid and the widow's consequent inability to adopt are referable rather to the paramount duty incumbent on a Hindu wife to obey her husband's command, than to a delegation of [795] power from him. But even if it be that the widow's right is not inherent, still it must be conceded that at any rate the husband's consent is, in the absence of prohibition, always to be implied. In this case, as I have already said, there is no express prohibition, nor can I see in the circumstances anything to justify the conclusion that one should be implied. Let it be granted that the parties did not live together ; still that alone cannot be sufficient, and I am wholly unable to see that the husband by any disposition of his property or in any other way has so acted that a prohibition proceeding from him can be implied. At the time of separation the elder widow was not deprived of the token of marriage, and her status and right to succeed to a share in her husband's property have been recognized by the compromise to which our attention has been called ; nor has there been such unwifely conduct on her part as, according to the authority on which the respondents rely, would disqualify her from her right to adopt. I, therefore, hold that adoption made by her is valid. I think the decision under appeal is wrong : it must, therefore, be reversed and the suit dismissed with costs here and in the lower Courts.

CANDY, J.—The question in this second appeal is whether, on the facts found by the lower Courts, the legal inference arises that there was an implied prohibition by the husband preventing his senior widow Lakshmibai from adopting a son.

This question is, in my opinion, one of law and not of fact. To borrow the language of the Privy Council in the recent case of *Lala Beni Ram et al.* v. *Kundan Lall et al.* (decided 11th March last) (1) with reference to the cognate question of acquiescence, implied prohibition is not a question of fact, but of legal inference from the facts found. It is unnecessary to recite at length those facts, which are fully set out by the learned Judge of the lower appellate Court, who fully believed the story told by the independent witness Mr. K. Patwardhan. That shows that

(1) 26 I.A. 58 (65).

in 1878 or 1879, when the wife was still almost a child, on the one side the wife and her father, and on the other side the husband and his mother, came to an agreement that for the future the wife [796] should live with her father, and not with her husband, who should in no way be liable for her maintenance. It is unnecessary to discuss the question as to who was mainly responsible for this estrangement, but it is admitted that there never has been any charge made against the lady's moral character. In this respect, the case is entirely different from *Dnyanoba* v. *Radhabai* (1), quoted by the lower Courts. In that case, the husband repudiated his wife on account of her bad conduct, and she formed a *pat* marriage with other men. Under those circumstances this Court held that it was impossible to hold that there was any implied authority in the woman to adopt, and that express authority would, therefore, be necessary.

Here the learned Judge of the lower appellate Court has held that as a general rule in this Presidency where there is no express prohibition by the husband—and there was admittedly none in the present case—then there is implied authority, but that this general rule may be subject to exception under circumstances which show that there was implied prohibition. He held that in the present case there were such circumstances which showed not only that there was an implied prohibition, but also that an express authority was necessary. In my opinion such an inference was wholly unjustified by the facts. The story told by Mr. Patwardhan shows that while Lakshmibai absolutely refused to join her husband and mother-in-law in their pilgrimage to Paithan, asserting her great unhappiness with them, her father also refusing to let her go and asserting that she had been cruelly treated by her mother-in-law and pointing to a branding mark on her person, on the other hand the mother-in-law, not denying the branding, was willing that the girl should stay with her father, if he would be responsible in future for her maintenance, and if the girl would give up her ornaments. The mother-in-law even demanded the girl's *mangalsutra*, but this was not given up: only two ornaments were taken by the girl from her person and given to the mother-in-law, who then went away with her son, the latter having been a silent party in these proceedings. From that day Lakshmibai never saw her husband again. After some years—shortly after her husband's death—she went to his house [797] and claimed from the junior widow the half share in his property. Her position as his senior widow was eventually recognized, and she was given the property. Nothing was then said about any adoption; the idea did not apparently occur to the parties. Subsequently she adopted the second defendant.

On these facts, which are undisputed, it seems to me impossible to draw the inference that express authority was necessary, or that the husband impliedly prohibited adoption.

I have treated this case on the principle followed by the lower appellate Court, *viz.*, that it was for the party contesting the adoption to show that under the circumstances express authority from the husband was necessary, or that there was an implied prohibition on his part. It was contended by the learned pleader for appellants before us that the power of a widow to adopt is a right incidental to her position as widow, and does not depend upon any authority expressly or impliedly delegated to her by her husband, and that, therefore, in the absence of any express prohibition by the husband, the right remains unimpaired. In the view which I take of the case it is unnecessary to discuss the authorities

(1) P.J. (1894), p. 22.

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quoted by the learned counsel. But I may allude to a recent case, not quoted by counsel, which is of the highest authority, and which may be used as supporting his contention. It is the case of *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (1) decided by the Privy Council on the 11th March last. In that case the point was taken that the gift or reception of an only son in adoption, if not invalid in law, is so improper that in the absence of express authority given by a husband, his widow has no power to effect it. Their Lordships said: "The only authority for the argument of the appellants is the opinion of the late Sir Michael Westropp delivered in the case of *Lakshmappa* v. *Ramava*, which was decided in the High Court of Bombay in the year 1875 and a report of which was after a long delay * inserted in the 12th Bom. H. C. Rep., p. 364. That learned Judge **[798]** held that, assuming that a man's only son may be given in adoption by himself, yet, if he has not expressly given to his widow an authority to make such a gift, it cannot be implied by law. Now the power of a widow to *give or take* in adoption differs in different schools of Hindu law. Their Lordships are not retrying this Bombay decision. In Madras it is established that, unless there is some express prohibition by the husband, the wife's power, at least with concurrence of sapindas in cases when that is required, is co-extensive with that of the husband. That is certainly the simplest rule, and it seems to their Lordships most consistent with principle. The distinction taken by Westropp, C. J., appears to have been quite novel, and also at variance with a decision by his predecessor Sir Michael (? Matthew) Sausse. There may be some peculiarity in the school of law which prevails in Bombay to support it, though it has not been brought to their Lordships' notice." In the present case no consent of sapindas was required: Yeknath was a separated Hindu. If, then, the principle to be followed in such a case in Bombay is that, in the absence of express prohibition by the husband, the widow's power to give or take in adoption is co-extensive with that of the husband, it is possible that some expressions in previous decisions of this Court regarding this important question will require modification.

I know of no peculiarity in the school of law which prevails in Bombay cutting down the widow's power to give or take in adoption. On the contrary, as Mr. Mayne says, (Hindu Law and Usage, § 118), in Western India the widow's power of adoption is even greater than in Southern India. As their Lordships in the Privy Council said in *Sri Raghunadha* v. *Sri Brozo Kishore* (2), the law of Madras is something intermediate between the stricter law of Bengal and the wider law of Bombay.

In *Vithoba* v. *Bapu* (3) I had occasion to trace the development in the Bombay Presidency of the law regarding the right of a **[799]** widow,

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* There is some mistake here. The decision in *Lakshmappa* v. *Ramava* was given and was reported in 1875. The previous decisions in *Mhalsabai* v. *Vithoba* (7 Bom. H. C. Rep., Appx., p. xxvi) given by Sausse, C.J., and Hebbert and Forbes, JJ., and which was overruled by the decision in *Lakshmappa* v. *Ramava*, was given in 1862 and was reported in the volume of 1870. So, too, the decision in *Bayabai* v. *Bala* (7 Bom. H. C. Rep., Appx., p. i.) in which Westropp, J., differing from Tucker and Warden, JJ., doubted whether, according to the Maratha School, a widow can adopt without the express authority of her husband given prior to his decease, was given in 1866 and was reported in the volume of 1870.

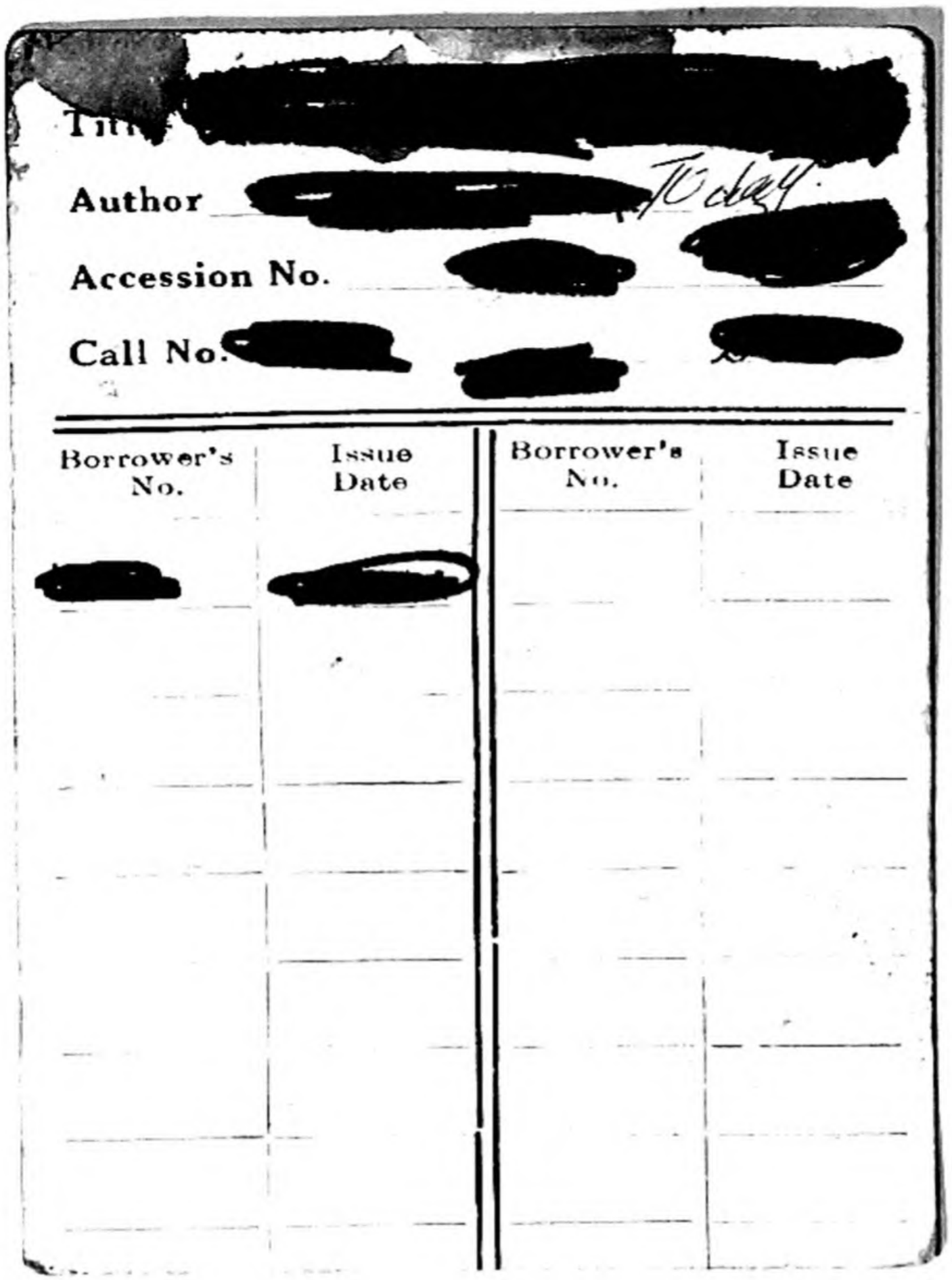
(1) 26 I.A. 113 = 22 M. 398.
(2) 3 I.A. 154 (191).
(3) 15 B. 110 (118-125).

not having the permission of her husband, to adopt a son. The tendency of later decisions has been in the direction of still further development. For instance, to take the question of a widow's motives in taking a son in adoption: the development of the law in force in this Presidency may be traced through the cases of *Patel Vandravan* v. *Patel Manilal* (1); *Mahableshvar* v. *Durgabai* (2); *Bhimawa* v. *Sangawa* (3); while now we have the ruling of our Full Bench—*Ramchandra* v. *Mulji* (4)—that a widow in this Presidency having the power to adopt, and a religious benefit being caused to the deceased husband by the adoption, any discussion of her motives in making the adoption is irrelevant.

This disposes of the last shred of an objection which might possibly be raised to the adoption in the present case. I have no doubt that the plaintiff's claim to set aside the adoption should be dismissed, and I would do so, setting aside the decrees of the lower Courts with all costs on plaintiffs.

Decree reversed and suit dismissed.

(1) 15 B. 565. (2) 22 B. 199. (3) 22 B. 206. (4) 22 B. 553.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24 B. 1=1 Bom.L.R. 254.

ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji.

BROMLEY (*Plaintiff*) *v.* THE G.I.P. RAILWAY COMPANY (*Defendants*).* [14th and 16th March, 1899.]

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ORIGINAL CIVIL.
24 B. 1=1 Bom. L.R. 254.

Railway Company—Negligence—Negligence of Railway Company in leaving door of railway carriage open or unfastened—Hurt caused to passenger while trying to secure door.

Leaving the door of a railway carriage open or unfastened amounts to negligence on the part of a railway company, and the company is liable for any injury caused thereby to a passenger.

If any inconvenience or danger is caused by the negligence of the company, a passenger may lawfully attempt to get rid of such inconvenience or danger, provided that in doing so he runs no obvious risk disproportionate to the inconvenience or danger, and is not himself guilty of any negligence; and, if in such attempt he is injured, the company is liable in damages.

The door of a railway carriage attached to a train running from Poona to Bombay was left open or unfastened when the train left the Khandala Station. The plaintiff was then asleep in the carriage. He subsequently awoke when the train was passing through a tunnel and found that the whole of the door, which opened outwards, had been torn away from its hinges, except the upper part or sunshade, which was flapping backwards and forwards against the side of the tunnel and the door post of the carriage. In attempting to secure it, the top of the plaintiff's finger was torn away and the bone of one of his fingers fractured.

Held, that the injuries were caused by the negligence of the Railway Company and that the plaintiff wae entitled to damages.

SUIT to recover damages for injuries caused to plaintiff by the alleged negligence of the defendants.

[2] On the night of the 13th October, 1898, the plaintiff travelled from Poona to Bombay in a first class carriage on the defendants' railway. The train left Poona at 9.30 o'clock P. M. At one of the intermediate stations (Khandala) one of the passengers in the same carriage alighted and the carriage door was left open. The plaintiff was asleep in the carriage, and the train left the station with the door open. This door opened outwards and towards the rear of the train. The plaintiff stated that shortly after the train left the station he awoke and found that the train had entered a tunnel and that the door was broken off, and "the sunshade or the remaining portion of the said door continued to frequently strike the side of the tunnel with such violence as to endanger the safety of the carriage." The plaint further stated :—

"The plaintiff endeavoured to secure the said sunshade or broken portion and to close the same, but in so doing the third finger of the plaintiff's right hand got jammed in the broken portion of the said door, the whole top of his said finger being torn away and the bone of his finger fractured."

* Suit No. 726 of 1898.

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24 B. 1 = 1 Bom. L.R. 254.

He claimed Rs. 4,600 as damages.

The defendants (*inter alia*) pleaded that there was no obligation or duty cast on the plaintiff to endeavour to secure the said sunshade, nor was there any necessity for him to do so; that his attempting to do so was a voluntary act, and that, therefore, they were not liable. They further pleaded that the plaintiff's injuries were caused by his own negligence, and that the negligence of the defendants (if any) was not the proximate cause of the injuries to the plaintiff.

Macpherson and *Scott*, for plaintiff.—The defendants' servants were negligent in leaving the door of the carriage open. The door was carried away when the train entered the tunnel, but the broken sunshade was left, and was an inconvenience to the plaintiff, and a danger to the carriage, and the plaintiff was justified in endeavouring to fasten it, so as to remedy the inconvenience and avoid the danger. In doing so he was injured and he is entitled to damages—*Gee* v. *Metropolitan Railway Company* (1); *Metropolitan Railway Company* v. *Jackson* (2); *Richards* v. *Great Eastern Railway Company* (3); *Adams* v. *Lancashire and Yorkshire* [3] *Railway Company* (4); *Robson* v. *North Eastern Railway Company* (5); *Lee* v. *Nixey* (6).

Lang (Advocate-General) and *Lowndes*, for defendants:—The plaintiff must prove negligence—*Wakelin* v. *L. & S. W. Railway Company* (7); *Engelhart* v. *Farrant and Co.* (8). The plaintiff does not allege there was any danger or inconvenience to himself. If there was, no doubt, he might try to remedy it—*Robson* v. *North Eastern Railway Company* (5); *Lee* v. *Nixey* (6). The plaintiff's act was reckless; it was his reckless act that caused the injuries.

JUDGMENT.

TYABJI, J.—The suit is filed by the plaintiff to recover the sum of Rs. 4,600 as damages sustained by the plaintiff by reason of the injuries caused to the third finger of the plaintiff's right hand by the alleged negligence of the company. The facts of the case may be shortly summarized as follows:—

The plaintiff is a dental surgeon carrying on business in Poona and Bombay in co-partnership with Mr. Charles Efford, the Poona branch being usually conducted by the plaintiff and the Bombay branch by his partner, Mr. Efford. On the 13th October, 1898, the plaintiff left Poona for Bombay by 9-30 P.M. train. He travelled in a first class carriage, and in the same compartment there was Mr. Saunders, an Assistant in Treacher and Co. Mr. Saunders alighted at the Khandala Station and the door of the compartment was left open. This door was not shut or fastened by any of the servants of the Railway Company and appears to have been broken or torn away from the carriage just before the accident in question happened. The circumstances leading up to the accident are described by the plaintiff in his evidence in the following words. He says:—

"I remember the 13th October last. I travelled from Poona to Bombay by the 9-30 P.M. train in a first class compartment. One gentlemen, Mr. Saunders, of Treacher and Co., was with me. I went to sleep.

(1) (1873) L.R. 8 Q.B. 161 (179).
(2) (1877) 3 Ap. Ca. 193 (205, 212).
(3) (1873) 28 L.T. (N. S.) 711.
(4) (1869) L.R. 4 C. P. 739.
(5) (1875) L.R. 10 Q.B. 271.
(6) (1890) 63 L.T. 285.
(7) (1886) 12 Ap. Ca. 41.
(8) (1897) 1 Q.B. 240.

I was asleep when the train arrived at Khandala. I was not conscious of Mr. Saunders leaving the carriage. I awoke with a start and I saw the door was gone except the [4] sunshade, the green part of the sunshade at the top. I saw it from the shaded gas light in the carriage flapping about. It seemed to be flapping against something—banging is the appropriate word. I could not say what it was banging against—banging to the door-post and back. I got up, and as the door came to, I went up to the door, and as the piece of door came towards me, I took hold of it. I mean the door was coming towards me. When I seized the door it nipped my finger. I cannot say how the door nipped my finger. It was all done of a sudden. I find the time from leaving Khandala to the place where we stopped before the catch-siding is about four and a half minutes. I felt the door nip me. It was not a pleasant feeling. I was in great pain, not at the moment but after. The pain gradually increased until I got to Karjat. After I was nipped I let go. It was done in a second. I do not know whether I got hold of the door. I got out at the reversing station and told the guard and asked him for water. He brought a pail of water. The guard tied up the door with his pocket handkerchief to prevent its swinging open. I then went on to Karjat. The door was fastened up with wire at Karjat."

In cross-examination, the plaintiff said :—

" When I went to sleep, one of us put the shade over the lamp in the carriage. When the accident happened to my hand I cannot remember whether the shade was on or not. The carriage I was in was a carriage with two compartments and a bath-room in the middle. There was a seat at each side of the carriage and one at the end. The door was at the end of the carriage. The door that flew open was on the left-hand side going to Bombay. Facing the engine it was on the left-hand side. I was sleeping on a seat at the left-hand side of the carriage with my feet towards where the door was. After I was started from my sleep I walked up, and seeing that the door was gone, and the piece was flapping, I got hold of it. I cannot say how long it took me to get on my legs. It was all done immediately. The train was moving when I tried to catch the door. I should not like to say I was fully awake before I was pinched. I think I must have got hold of it. I think I did, and it pinched my finger. It was dark in the tunnel. I distinctly saw what I was going to catch as it came to. I tried to catch it as it was coming towards me. Immediately afterwards the train slowed down and stopped in the tunnel directly afterwards. The train has to stop before you go to the reversing station. I knew we had to stop there. I imagine my finger was hurt in the middle of the tunnel. I think it was hundred yards between the accident and where we stopped. When I woke up I did not know we were in the tunnel. I had no time to think. It was all done in a moment. I cannot remember whether it was a hot or cold night. I cannot say whether the windows were open then. The door opened outwards. The hinge of the door is furthest from the engine. * * * I do not know how many boards of the sunshade were gone. The whole of the door was gone except two pieces hanging. There was a piece of iron hanging at each end. Some of the boards were gone. I think they were the lower ones. I think some of the boards were gone from the bottom. I cannot say whether the part left actually struck the tunnel. The door had gone a long time. When I [5] got up, there was only the sunshade left. After the door had gone, the noise continued. The noise continued after my finger was injured. I cannot say if the sunshade hit the tunnel after I received my injuries.

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But I heard a noise of its hitting. The noise was caused through the remnants of the door hitting against the tunnel and flapping against the carriage."

The above evidence, which is entirely uncontradicted and was given in a fair and ingenuous manner, seems to me to establish the following facts :—

(1) That the door was broken away in consequence of its having been left open, or not fastened, at the Khandala Station.

(2) That a sense of great present discomfort and a vague feeling of possible or impending danger crossed Mr. Bromley's mind when he was startled by the noise, and saw the door gone.

(3) That it was with a view to get rid of this inconvenience and real or supposed danger that the plaintiff attempted to seize and secure the sunshade or the remnant of the door.

(4) That it was in consequence of this attempt that he was injured.

The question for determination, then, is—whether the company is liable to the plaintiff under the above circumstances ?

Now a series of cases has laid it down, and indeed it was not disputed before me, that it is the duty of the Railway Company to see that the doors of the carriages are properly shut and fastened before the train leaves any particular station. (See *Gee* v. *Metropolitan Railway Company* (1), *Metropolitan Railway Company* v. *Jackson* (2), *Richards* v. *Great Eastern Railway Company* (3), and *Adams* v. *Lancashire and Yorkshire Railway Company* (4).) The above cases clearly establish that leaving the door open or unfastened amounts to negligence on the part of the Railway Company, for the consequences of which the company is liable to the passengers. These cases and also the cases of *Robson* v. *North Eastern Railway Company* (5), *Lee* v. *Nixey* (6), *Wakelin* v. *L. and S. W. Railway Company* (7) and *Engelhart* v. *Farrant and Co.* (8) seem to me to establish the legal proposition **[6]** that if any inconvenience or danger is caused by the negligence of the company, a passenger may lawfully attempt to get rid of any such inconvenience or danger, provided that in doing so he runs no obvious risk disproportionate to the inconvenience or danger, and is not himself guilty of any negligence, and that if in such attempt he is injured, the company is liable in damages. The *onus* of proving the company's negligence of course lies on the plaintiff, but the *onus* of proving the passenger's negligence lies on the defendants.

The first question, then, which I have to consider is—was there any sufficient inconvenience or danger to the plaintiff caused by the breaking away of the door or the banging of the sunshade which he was entitled to get rid of ? Now Mr. Bromley's evidence merely states the facts. He either did not or could not analyse his own motives and feelings before he attempted to secure the sunshade. He is evidently not of an analytical turn of mind and had great difficulty in placing before the Court clearly the reasons which must have influenced his conduct. It seems to me, however, a fair inference from his evidence and conduct that he must have apprehended a great inconvenience from the noise caused by the banging of the sunshade and a possible imminent danger from its striking against the tunnel or the side of the carriage itself. This state of

(1) (1873) L.R. 8 Q.B. 161.
(2) (1877) 3 Ap. Ca. 193.
(3) (1873) 28 L.T. (N.S.) 711.
(4) (1869) L.R. 4 C.P. 739.
(5) (1875) L.R. 10 Q.B. 271.
(6) (1890) 63 L.T. 285.
(7) (1886) 12 Ap. Ca. 41.
(8) (1897) 1 Q.B. 240.

things was admittedly produced by the defendants' negligence in not fastening the door at Khandala. It follows that Mr. Bromley was *prima facie* justified in attempting to remove this inconvenience and possible danger, though the extent and magnitude of it have not been clearly explained to the Court, and were from the very nature of the case incapable of being accurately ascertained or gauged at the time. Did he, then, run a risk disproportionate to the inconvenience and danger he was trying to remedy? What he attempted to do was to seize the flapping or banging sunshade in order to secure it in some way. He evidently did not consider there was any danger in doing so, and I am unable to see that there was any obvious danger in what he was doing. Was he, then, negligent in the mode in which he was carrying out his intentions? I cannot see how he could have attempted to catch hold of the sunshade otherwise than as he did. He had no other means to lay hold of it than his [7] own hands, and he used them, so far as I can see, in the ordinary way without any sense of danger.

Were there, then, any surrounding circumstances which made his act an act of negligence? It is true that the lamps were shaded and it was dark in the tunnel, but Mr. Bromley says, and I see no reason to doubt it, that he could distinctly see what he was attempting to catch. As to his statement that he would not like to say he was fully awake before he was pinched, I think it must not be taken too literally against him. This statement was evidently not meant seriously, and the words were put into his mouth in cross-examination, and were assented to by him in a humourous rather than a serious spirit. The only other circumstance relied on by the defendants is that Mr. Bromley knew the ground well, and that if he had thought for a moment he would have seen that he was near the reversing station, and that he ought to have waited till the train stopped, instead of trying to secure the sunshade himself. There is, no doubt, much force in this argument. Mr. Bromley admits that he acted on the spur of the moment, and that he had no time to think, and that the whole thing was done suddenly and without stopping to consider the bearings of all the surrounding circumstances. I am, however, of opinion that even after giving the fullest benefit to the defendants of Mr. Bromley's admissions, it would not be just to attribute any negligence to Mr. Bromley for what he did. It seems to me that considerable allowances must be made for a passenger who is suddenly startled from his sleep, with the door of the carriage smashed, and the remnant of the sunshade making a hideous noise (such as it made before me when produced in Court) and possibly striking against the tunnel. Whether there was any great actual or real danger in all this, I am unable to say. There is no evidence on the point, and I am left to draw my own inferences aided by nothing better than my own experience or imagination, but that Mr. Bromley must have felt a sense of possible, though perhaps a vague and undefined, danger, I cannot for a moment doubt.

Under these circumstances would it be reasonable to hold that Mr. Bromley ought to have remained quiet and done nothing till he got to the reversing station? As a matter of fact he did [8] not know where he was. He could, no doubt, by a process of reasoning have discovered that he was near the reversing station. But under the circumstances was it negligent of him to act immediately in the way he did? In other words, was there anything unreasonable in his immediately trying to avert a great present inconvenience from the hideous noise and an imminent and possible danger from the sunshade striking against the tunnel or even

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against the side of the carriage? I am fully persuaded that nine persons out of ten would, under the same circumstances, have done precisely what Mr. Bromley attempted to do. On the whole, therefore, I have come to the conclusion, though after much hesitation and doubt, that the injury to the plaintiff's hand was connected with and is the result of the defendants' negligence in not fastening the door at Khandala, and that the defendants are liable for the injuries according to the principles laid down in the authorities cited above.

As to the question of damages, I accept the plaintiff's evidence in the main, and I think that under the circumstances Rs. 2,000 for loss of income and medical charges and Rs. 2,000 for personal suffering would not be unreasonable. I accordingly award Rs. 4,000 in all for damages, and the costs of the suit.

Attorneys for the plaintiff:—Messrs. *Smetham, Bland and Noble.*

Attorneys for defendants:—Messrs. *Little and Company.*

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24 B. 8=1 Bom. L.R. 715.

TESTAMENTARY JURISDICTION.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF HAJI MAHOMED ABBA. MARIAMBAI AND ANOTHER (*Petitioners*).*

[1st September, 1899.]

Probate—Will—Nuncupative will of a Mahomedan—Probate and Administration Act (V of 1881), ss. 3, 24, 25, 26, 62—Indian Succession Act (X of 1865), s. 244, and chap. IX.

Probate may be granted of a nuncupative will.

[F., 25 A. 313 (315)=23 A.W.N. 63; R., 15 C.P.L.R. 101 (103).]

PETITION for probate of a nuncupative will. The petitioners were the testator's widow Bai Mariambai and one Haji Sulleman **[9]** Abdul Wahed, the executrix and executor appointed by the said will.

The testator, Haji Mahomed Abba, a Cutchi Memon merchant, died in Bombay on the 15th May, 1898. The petition (*inter alia*) stated as follows:—

"3. That the nuncupative will set out in the joint affidavit of Jacob Ebrahim and Aba Fakir Mahomed solemnly affirmed on the 26th day of August, 1898, and hereto annexed and marked A, is the last will and testament of the said deceased, the said deceased having left no other will.

"4. That the provisions of the said will were orally declared by the above named deceased on Saturday the 14th May, 1898, at his house near Jakeria Masjid in the presence of the said Jacob Ebrahim and Aboo Fakir Mahomed and the petitioners. The deceased requested the said provisions to be carried out as his will after his death, and the next day within a few hours thereafter he died.

"5. That the petitioners are the sole executors named under the said will."

The joint affidavit referred to in the above para. 3 set forth as follows:—

"On Saturday the 14th day of May last, we the abovenamed deponents and the above deceased's widow Mariambai and Haji Sulleman Abdul

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Wahed, of the firm of Messrs. Ludha Ebrahim and Co., were present at the deceased's house near Jakeria Masjid where the deceased was lying ill with asthma and heart disease. The deceased being desirous of making his last will and testament requested us to note the manner in which he wished his property to be disposed of after his death, and requested all present to see that such testamentary intentions were carried out after his death. The deceased at such time was in sound and disposing mind. The oral provisions he made, and which we distinctly without any likelihood of error remember, are as follows :—

" 1. He appointed his said wife Mariambai and the said Haji Sulleman Abdul Wahed the executors of his will.

" 2. He directed that a sum of Rs. 5,000 should be spent on the marriage expenses of his daughter Hawabai, and that Government promissory notes for the sum of Rs. 20,000 should be purchased out of his estate and invested in the name of the said Hawabai, and that the interest accruing due thereon should be paid to Hawabai and her heirs."

The subsequent clauses of the affidavit stated the rest of the will, and the last paragraph was as follows :—

" 11. The deceased gave no other directions, save the aforesaid, to be carried out after his death as his last will. We remained with him until his death, which took place on the 15th May last, but he did not add to or vary them."

[10] The executors having applied to the Registrar for probate, he referred the petitioners to the Court. The matter came before Russell, J., who was of opinion that no probate of a nuncupative will could be granted. His judgment was as follows :—

" The question in this case is whether probate can be granted of a nuncupative will of a deceased Cutchi Memon named Haji Mahomed Abba, who died at Bombay on or about the 15th day of May, 1898. The terms of the said nuncupative will are set forth in the affidavit of Jacob Ebrahim and Abba Fakir Mahomed affirmed on the 26th day of August, 1898, wherein it is stated that the said will was made on the 14th day of May, 1898. Prior to the Probate and Administration Act, 1881, I think there can be no doubt that a nuncupative will of a Mahomedan was valid and effectual (see *Nawab Amin-Ood-Dowlah* v. *Syud Roshun* (1) ; Wilson's Mahomedan Law), and consequently could be admitted to probate. It must be observed that Cutchi Memons are Mahomedans to whom in such case as the present Mahomedan law is to be applied—*In re Haji Ismail Haji Abdula* (2).

" The Probate and Administration Act, 1881, applies s. 2 (*inter alia*) to every Mahomedan dying before, on or after the first day of April, 1881, and on considering the following sections of the Probate and Administration Act, 1881, it appears to me that it is now necessary that 'the will' of a Mahomedan dying before, on or after the 1st day of April, 1881, must be in writing. Section 3 defines 'will' and 'codicil.' These two definitions clearly contemplate a written document. These definitions correspond with the definitions of will and codicil in the Indian Succession Act, and s. 62 deals with the application for probate, which is to be by petition with the will, or in cases mentioned in ss. 24, 25 and 26 a copy, draft or statement of the contents thereof annexed, stating (*inter alia*) that the *writing annexed* is his (the testator's) last will and testament. Section 24 provides for the probate of copy or draft of a last will. Section 25

(1) 5 M. I. A. 199.

(2) 6 B. 452.

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for the probate of the contents of a lost or destroyed will. Section 26 for probate of copy where the original exists. Section 63 provides for the translation of the will. Lastly, s. 27 provides for administration limited until *the will* or an authenticated *copy of it* be produced. It is impossible, in my opinion, to read the above provisions without coming to the conclusion that the purview of the Probate and Administration Act intended that no nuncupative will should be proved. If otherwise, why was provision therefor not made in the Act? *Expressio unius est exclusio alterius.* By making provision for the various cases in which wills in writing should not be forthcoming, the Legislature, in my opinion, intended to exclude the possibility of nuncupative wills being admitted to probate.

"I have been referred to two cases—*In re Haji Ahmed bin Haji Raju*, in which the petition for letters of administration with the will annexed was declared on the 18th January, 1898, and *In re Hajee Adum Hajee Fathe Mahomed*, [11] petition for probate wherein was filed on the 21st December, 1886. In the first of these cases it will be found that the nuncupative will had been established by the Court at Bagdad and a copy of the Court's order was annexed to the petition. In the latter case a draft of the will had been prepared and was annexed to the petition. It will be observed that in both these cases what was admitted to probate was an instrument in writing, and it, therefore, seems to me that neither of these cases affect the opinion which I had formed in this case and which I had written out before my attention was drawn to the two abovementioned cases."

The petitioners appealed.

Scott (Acting Advocate General), for the appellants.

JUDGMENT.

JENKINS, C. J.—This is an appeal from Mr. Justice Russell, who has decided that probate cannot be granted of the nuncupative will of a Mahomedan.

It is beyond question that prior to the Probate Act a Mahomedan could make a nuncupative will, and the learned Judge seems to have thought that such a will could have been admitted to probate, but in his opinion the Act has introduced a change which necessitated the conclusion he has expressed. He has based this conclusion on a consideration of ss. 3, 24, 25, 26 and 62 of the Act.

In my opinion there is nothing in the Probate Act that can be construed as taking from a Mahomedan the power to make an oral will. Had such a radical change been intended, it is difficult to suppose that it would not have been expressed in plain and decisive words, but none such are to be found.

Assuming, then, that a Mahomedan can make an oral will, why should it not be admitted to probate? The question is governed by the Probate and Administration Act, the object of which was to provide for the grant of probate to the estates of deceased persons in cases to which the Indian Succession Act does not apply.

Section 3 provides that "will" means "the legal declaration of the intention of the testator with respect to his property, which he desires to be carried into effect after his death." There is not a word in this interpretation about writing, nor is there anything to suggest that any instrument is required; and this is made the clearer from the definition of "codicil," which mentions [12] an instrument. Turning to the Succession Act, we find the words "will" and "codicil" have the same

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interpretation given to them in s. 3, and there can be no question that a will under that Act may be nuncupative, for Part IX of the Act so provides. It may, therefore, be safely said that, if the matter is to be determined on s. 3 alone, the Probate Act extends to nuncupative wills.

But, then, it may be suggested that this view is inconsistent with the terms of s. 62, which no doubt contemplates only a written will. I think, however, it would be attributing to that section a result that was never contemplated, to read it as excluding an oral will from the operation of the Act, seeing that the purpose of that section is to regulate the procedure according to which applications for probate should be made. Here, too, light may be extracted from the Succession Act. Section 244 of that Act is in identical terms with s. 62 which we have been considering, save that it has no reference to sections corresponding with ss. 24, 25 and 26 of the Probate Act, while s. 187 provides that no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed or shall have granted letters of administration under s. 180.

The result, then, is that if we accept the decision of the learned Judge by parity of reason we should be forced to hold that the Succession Act, though expressly permitting an oral will at the same time for practical purposes nullified its effect. We may also refer to the difficulties that would arise from that conclusion in connection with s. 4 of the Succession Certificate Act, 1889.

In my opinion, therefore, a nuncupative will can be admitted to probate in this country as well as in England, and we only now have to consider whether the existence of the will has been established.

The Courts naturally regard an oral will with suspicion and require it to be established by clear proof. We understand from the Advocate General that Mr. Justice Russell felt no difficulty [13] as to the proof, and we think that in view of the absence of all opposition notwithstanding the citations, the burden of proof has been under the circumstances of this case sufficiently discharged.

Differing, then, from Mr. Justice Russell on the question of law involved, we reverse his decree and direct that probate be granted, and that the costs of the application and the appeal come out of the estate.

Attorneys for the petitioner :—Messrs. *Framji and Dinshaw.*

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24 B. 13=1 Bom.L.R. 478.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

KESHAVLAL (*Original Defendant*), *Appellant v.* BAI GIRJA (*Original Plaintiff*), *Respondent.** [26th June, 1899.]

Defamation—Privileged communication—Excommunication—Caste question—Jurisdiction of Civil Court.

Plaintiff was a Hindu widow of the Modh Wania caste. Defendant was the head of the caste. He received anonymous letters imputing bad conduct to the plaintiff. He was requested to call a caste meeting to consider the matter; he did so, and placed the letters before the meeting, and it was then resolved to warn

* Appeals Nos. 117 and 120 of 1898.

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the plaintiff. The warning was, however, unheeded. So a second meeting was called by the defendant. Plaintiff sent her brother and sister's husband to the meeting in order that they might defend her. But they offered no explanation on her behalf. Witnesses were then heard and ten persons selected to decide what should be done. Defendant was one of those ten, and he communicated to the general meeting the decision they had come to—namely, that the plaintiff should be excommunicated. The meeting unanimously adopted this decision, and the defendant announced the decision of the caste to the *gor* for him to promulgate. The plaintiff thereupon sued to recover from the defendant Rs. 5,249 as damages for defamation.

Held, that the defendant was not guilty of defamation. He acted in the matter honestly, and as he was bound to act in the interest of the caste, and in the discharge of his duties as leader of the caste.

Per RANADE, J.—The defendant's act was privileged. Defendant was the head of the caste, and the caste men assembled were interested in the matter along with the defendant. Anonymous letters were received and the defendant had a duty to perform. The matter was discussed at a properly convened meeting, where the plaintiff's near relations were duly summoned and were in fact present. The occasion was lawful and properly exercised to protect mutual interests. The **[14]** privilege was, therefore, complete, and good faith was to be presumed, unless express malice could be shown.

The caste having presumably acted in good faith, and proceeded regularly according to the custom, the Civil Court could not interfere with its action, or examine the question on its merits.

[R., 26 B. 174 (189); 6 Bom.L.R. 131 (191).]

APPEAL from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad.

Suit to recover damages for defamation.

Plaintiff was a Hindu widow of the Modh Wania caste.

Defendant was the shet or head of the caste.

Defendant received certain anonymous letters imputing bad conduct to the plaintiff. Thereupon he called a meeting of the caste in Chaitra of Samvat 1953 (March, 1897). The anonymous letters were placed before the meeting, and the meeting decided to give a warning to the plaintiff. This warning was unheeded. Consequently in Bhadarva following (*i. e.*, September, 1897) the defendant convened a second meeting of the caste to consider the plaintiff's conduct. At this meeting ten persons were selected to decide what should be done. Defendant was one of those ten. They decided that the plaintiff should be excommunicated. This decision was communicated by the defendant to the general meeting. The meeting unanimously adopted the decision. And the defendant told the *gor* to announce the decision to the caste people. This led to the present suit. In this suit the plaintiff sought to recover from the defendant the sum of Rs. 5,249 as damages for having maliciously and falsely defamed her. It was alleged that the defendant, with a view to satisfy his malice against the plaintiff, falsely asserted at the caste meeting held in September, 1897, that she was a woman of bad conduct and caused her to be excommunicated on this false charge, without making any inquiry and without giving her any opportunity to clear herself.

Defendant pleaded (*inter alia*) that he acted as a leader of the caste, and if he said any thing to the plaintiff's prejudice at the caste meeting, his statement was privileged; that the caste meeting was regularly convened; that the plaintiff had an opportunity to explain the charges brought against her; that the caste had full authority to act in the matter; and that the Civil Court had no right to interfere with its decision.

[15] The Subordinate Judge found that the defendant defamed the plaintiff at the caste meeting as alleged in the plaint; that he was not

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justified in defaming her; and that he was liable to pay Rs. 100 damages to the plaintiff.

Against this decision both parties appealed to the High Court. Defendant contended that he was not liable to pay any damages at all, whilst the plaintiff urged that she was entitled to recover the full amount of damages claimed by her.

Branson (with him *L. A. Shah*), for appellant (defendant).—We contend that the defendant made no defamatory statement before the caste meeting so as to render himself liable to an action for damages. The occasion on which the defamatory statement is said to have been made was a privileged occasion. Defendant is the head of the caste; as such he had a duty to perform. He received anonymous letters about the plaintiff's conduct. He was asked to call a caste meeting and he did so. The whole caste was interested in the matter, and they eventually decided to excommunicate the plaintiff. The occasion was thus a privileged one, and the defendant in announcing the decision of the caste cannot be held to be guilty of defamation. He acted throughout in good faith in the discharge of his duty as the leader of the caste. The plaintiff has entirely failed in proving that the defendant was actuated by malice towards her. That being so, the plaintiff cannot recover any damages.

Ganapt S. Rao, for respondent (plaintiff).—It is contended that the occasion was privileged and that the defendant acted *bona fide* in the discharge of his duty as the head of the caste. But there is no rule or usage of the caste which imposes a duty on the head of the caste to take notice of the private conduct of a male or female member of the caste. No such rule is alleged or proved in the present case. It is admitted that this is the first instance of its kind, of a widow belonging to this caste being excommunicated for adultery. It is admitted that there are other widows of notoriously bad character in this caste, and yet the caste has never taken any notice of their conduct. There was, therefore, no duty cast upon the defendant to convene a caste meeting and procure her excommunication. The occasion was, **[16]** therefore, not a privileged one. Moreover, the inquiry was irregular and defective. It was made behind the plaintiff's back and without giving her any opportunity to clear herself. She was not heard before she was condemned. It is true that her brother and sister's husband attended the meeting, but they had no authority to represent or defend her. That being the case, the whole proceedings of the caste meeting were illegal—*Vallabha* v. *Madusudanan*(1); *Appaya* v. *Padappa* (2). And the defendant, who announced the decision of the caste and declared that the caste shall sever all connection with the plaintiff, is liable to an action for defamation. The plaintiff is entitled to substantial damages—*Praed* v. *Graham* (3); Odgers on Slander, pp. 339, 340.

JUDGMENT.

PARSONS, J.—This suit was brought by the plaintiff to recover from the defendant Rs. 5,249 as damages for defamation. The allegations on which it was based were that the defendant, with a view to satisfy his malice against the plaintiff, convened a caste meeting on the 1st September, 1897, falsely asserted thereat that she was of bad conduct, and caused her to be excommunicated on this false charge, without making any inquiry and without giving her any opportunity to clear herself.

(1) 12 M. 495. (2) 23 B. 122. (3) (1889) 24 Q.B.D. 53.

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The Subordinate Judge found, (1), that the defendant defamed the plaintiff before the caste meeting as alleged in the plaint; (2), that he was not justified in defaming her; and (3), that the defendant was liable to pay Rs. 100 as damages to the plaintiff.

Both parties have appealed, the defendant contending that there should be no decree at all against him, the plaintiff claiming that the full amount of damages should be awarded to her.

The following facts are stated by the Subordinate Judge:—"The plaintiff is a Hindu widow of the Modh Wania caste. She is now about thirty years old. Her husband died about six years ago. Defendant is the seth or head of the caste. He called a caste meeting at his shop in Chaitra, Shake 1953, where two anonymous letters received by defendant impeaching plaintiff's moral conduct were placed by him and read by some of the caste people. They decided to give warning to plaintiff to improve her conduct. After about five months, *i. e.*, in Bhadarva, Samvat 1953, (1st **[17]** September, 1897), defendant convened another caste meeting at his shop. Ten persons at that meeting retired to another room and decided that the caste should sever all connection with plaintiff. The whole meeting agreed to this, and the plaintiff was then declared as excommunicated." He then sets out certain evidence and says that the first point to be ascertained is whether the defendant made use of defamatory statements about the plaintiff as alleged in the plaint. He finds that point in the affirmative, but I cannot attach any weight to that finding, because it is clear from his judgment that it is based, not on the evidence, but on his own assumption of what must have been done. What the evidence shows is that the plaintiff's conduct was attracting notice prior to Chaitra, anonymous letters were received by the defendant about her, he was requested to call a caste meeting to consider the matter. he did so and placed these letters before the meeting, and it was then resolved to warn the plaintiff. The warning, however, seems to have been unheeded; so a second meeting was by request called by the defendant in Bhadarva, witnesses were then heard and ten persons selected to decide what should be done, the defendant was one of those ten, and he communicated to the general meeting the decision they had come to, namely, that the caste should sever all connection with the plaintiff. The caste unanimously adopted that decision, and the defendant announced the decision of the caste to the *gor* for him to promulgate. I am unable to see that the defendant is guilty of defamation in doing any of the above acts. He was in no way the accuser of the plaintiff, but merely discharged the duty which devolved upon him as the head of the caste. The Subordinate Judge seems to have thought that the *onus* lay on the defendant to prove in this suit that the plaintiff was immoral and adulterous, because he says "all that he has been able to prove is that there are bad rumours about her, such rumours cannot be held to be good evidence of the truth of the allegations. I, therefore, hold that defendant has failed to prove the truth of the statements." Nevertheless, in the latter part of his judgment, the Subordinate Judge has found almost exactly as the caste did, namely, that the plaintiff was not a woman of good reputation. His words are these:—"Plaintiff knew that the defamation was with regard to her conduct. Defendant affirmed that her conduct was bad. It **[18]** was, therefore, necessary for her to rebut the evidence as to bad reputation by bringing witnesses as to her good reputation. But there is no evidence whatever to show that she has good

reputation. On the contrary she herself admits in her notice (Ex. 29) to defendant bad rumours about her. Had plaintiff's reputation or character been unblemished, defendant could not have done any thing to her. Considering all these facts, I hold that plaintiff is not a woman of good reputation and that there are general rumours of her bad reputation." There seems, therefore, to have been a very solid foundation for the action of the caste, were we at liberty to review it and consider the evidence upon which it was based.

It was, however, argued that the caste proceedings were vitiated, because they were held behind the back of the plaintiff. This argument is completely opposed to the admission of the plaintiff herself to the effect that she sent her brother and her sister's husband to the meeting; it is true that she does not say that she instructed them to represent her but there can be no possible doubt that she did send them to the meeting in order that they might defend her. Her case, however, was so bad that no defence was possible, and the unanimous decision of the caste was against her.

The Subordinate Judge finds that the plaintiff has proved that the defendant was actuated by malice from three incidents. In my opinion the proof fails, and I can place no reliance on that portion of plaintiff's evidence which the Subordinate Judge has quoted. The defendant appears to have acted in this matter honestly, and as he was bound to act in the interests of the caste and in the discharge of his duties as the head of it, and we think the plaintiff's case entirely fails.

We reverse the decree of the lower Court and dismiss the plaintiff's suit with costs throughout.

RANADE, J.—These are cross-appeals from the decision of the First Class Subordinate Judge of Ahmedabad in a suit for defamation of character brought by a Hindu widow of the Modh Bania caste, who sought to recover from the defendant, one of the shetias of her caste, the sum of Rs. 5,249 as damages for having maliciously and falsely defamed her, and brought **[19]** about her excommunication from the caste. The defamatory statement complained of was that the plaintiff had been guilty of adultery and immoral conduct; and it was asserted that the defendant made no inquiry, and allowed the plaintiff no opportunity to explain the charges brought against her, even though plaintiff had given notice to the defendant beforehand. Defendant denied the alleged publication, and stated that he bore no enmity or malice, and his contention was that the caste meeting was properly convened, and came to the conclusion not to associate with the plaintiff. He contended, further, that he acted throughout as a leader of the caste, and even if he said any thing to plaintiff's prejudice, his communication was privileged. The plea of justification was also urged, and it was stated that plaintiff had been warned at a previous meeting of the caste to improve her conduct. The caste had full authority to act in the matter, and the Civil Court had no right to interfere with its decision.

The Subordinate Judge held that defendant defamed the plaintiff as stated in the plaint, and did so maliciously and falsely, and was, therefore, not protected. As the plaintiff did not suffer any loss of character, he awarded only Rs. 100 out of the sum claimed as damages.

Both parties appealed. Defendant contended that the lower Court was in error in holding (1) that defendant had defamed the plaintiff; and (2) did so falsely and maliciously; and that (3), therefore, defendant's conduct was not protected by privilege; and (4) as the privilege had been

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exceeded, the Civil Court had a right to examine the grounds on which the excommunication was based. The plaintiff also appealed on the ground that the lower Court was mistaken in reducing the damages claimed, and that the lower Court should not have given effect to rumours, or referred to previous criminal proceedings.

The points for consideration are: (1) Is the fact of the defamation proved; (2) was the imputation falsely and maliciously made; (3) was the defendant's act privileged, and whether the privilege was exceeded; (4) had the Civil Court power to examine the grounds on which the excommunication was based; (5) was the amount claimed improperly reduced?

[20] As far as the fact of the alleged imputation is concerned, the lower Court finds that the evidence proved the publication complained of. Defendant's own admission appears to be that he received anonymous letters imputing bad conduct to the plaintiff, and that, as shetia of the caste, he laid them before the caste at the first meeting in Chaitra, which was duly convened, and plaintiff had information of it, and her brother and another relation were present. At this meeting no final action was taken, but plaintiff was warned. Six months later, another meeting was convened, and at that meeting a committee of ten met and discussed the matter again, and it was then resolved that the caste should not keep communication with the plaintiff. Defendant appears to have made no particular imputation either of adultery or bad conduct. The caste people only took note of the fact that plaintiff did not enjoy in the caste estimation a good reputation, and he and they resolved to cut off their communication with her, and it was this decision which the caste arrived at, and which defendant told the *gor* to tell the caste people. This is evident from the deposition of defendant as also of the *gor* and the other witnesses examined on plaintiff's behalf. On the side of the defendant certain evidence was given to prove particular acts of improper familiarity, as also of drunkenness, but it is quite clear that these matters were not discussed at the caste meeting. The caste confined themselves to plaintiff's general reputation, and they were not satisfied with it. The imputation, of which alone plaintiff could complain, was what was said in the caste meeting, and the lower Court's finding must be supported in respect of this general imputation, and not of particular misconduct of adultery or drunkenness or immoral habits. The lower Court's finding on this issue must be modified to that extent. Defendant's denial of any individual part in the matter is plainly contradicted by his own evidence. He did take part in the caste meeting and acted as leader, and told the *gor* to publish the final decision. The defendant must be held to have given publicity to statements of general improper behaviour, but not of the particular charges stated in the plaint.

It is the second point which is the most important in this case. Defendant claims that his communication was privileged. The **[21]** law on the subject has been thus laid down. Under certain circumstances, communication of defamatory imputations, even when the justification of truth is not pleaded or established, may be protected, either absolutely in the public interest, or in a qualified way by the occasion, the relations of duty between the parties, and the manner and circumstances under which the communication was made. The cases of absolute privilege are protected in all circumstances, independently of the presence of good or bad faith. In respect of qualified privilege, it is only protected when the occasion is lawful, and is limited by the necessities of the case, if good

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faith is proved, but not where express malice is proved. The lower Court correctly laid down the law, but made a mistake in its application. If the parties have a duty in the matter, the occasion is lawful, and when such occasion is lawful, and the right properly exercised, it is not for the defendant to prove good faith, but for the complainant to establish positive malice. In the present case, the occasion was lawful. Defendant was the head of the caste, and the castemen assembled were interested in the matter along with the defendant. Anonymous letters had been received, and the defendant had a duty to perform. As regards the procedure, the matter was discussed at a properly convened caste meeting, where plaintiff's near relations were duly summoned and were in fact present. It is true plaintiff had given a notice to the defendant requiring him to disclose the names of his informers. It seems to have been assumed as if the service of the notice imposed a duty on the defendant and caste to take no further action in the matter. This is a clearly erroneous view. The autonomy of the caste is not destroyed by a mere notice, any more than in the case of a corporation or club. The law is the same in all such cases where qualified privilege can be pleaded. When the occasion is lawful, and the right properly exercised with a view to protect mutual interests, the privilege is complete, and good faith is to be presumed unless express malice can be shown. The lower Court appears to have assumed that, because notice had been served, the defendant and the caste were estopped from taking any action, and that they were bound to make full independent inquiries, and if they failed to do so, they made themselves liable to have their conduct [22] questioned in a Civil Court. None of the decided cases have gone to that extent. The party complained of has a right to be allowed an opportunity to know what is alleged against him, and to state his case if he likes to do so. This is insisted upon under the principle of general justice. In the present case, this opportunity was allowed, and apparently not availed of. The caste cannot be said to have been improperly convened, because the *gor*, who regularly made the invitation, did not disclose the particular business at the second meeting when everybody was aware of that business. The caste to which the parties belong, is a small caste about 200 in all, and nearly half of them attended and all had been invited. The lower Court appears to have assumed that defendant was bound to make independent inquiries and that some one in the caste should make the accusation and prove the same. A caste meeting is not a regular ecclesiastical Court. The parties interested are supposed to be witnesses themselves of their own knowledge. They had not to pass judgment upon facts on others, but to regulate their own conduct. A different set of principles must, therefore, apply to caste meetings than those which apply to Courts. Where the caste exercises jurisdiction on a subject which interests its members, it is enough if it proceeds according to caste usage, and exercises its power with due care and in accordance with custom—*Ganapati Bhatta* v. *Bharati Swami* (1); *Appaya* v. *Paddapa* (2). It must be ready to give opportunity to the person complained of for explanation—*Vallabha* v. *Madusudanan* (3). It must act *bona fide* and not be influenced by malice. These rules are common to caste as also to other private corporations or societies—*Advocate General of Bombay* v. *David Haim Devaker* (4); *Gompertz* v. *Goldingham* (5); *Jagannath Churn* v. *Akali Dassia* (6).

(1) 17 M. 222. (2) 23 B. 122. (3) 12 M. 495.
(4) 11 B. 185. (5) 9 M. 319. (6) 21 C. 463.

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It is not in this case alleged against the caste that there was any malice which prompted its action. They presumbly acted *bona fide*, and they proceeded regularly according to custom, and opportunity was allowed to the other side. Under such circumstances, the presumptions were all in favour of the defendant, and the qualified privilege was ample protection, and the Civil [23] Court could not interfere with its action or examine the question on merits.

The questions of privilege and jurisdiction must, therefore, be decided against the plaintiff and in defendant's favour, unless plaintiff proved that defendant was actuated by malice. The lower Court has found it proved that defendant was actuated by malice towards the plaintiff. There have been previous disputes in which plaintiff and defendant were interested on opposite sides, but that would not by itself prove actual malice. In two cases defendant was a witness on the side opposed to the plaintiff. Defendant was not directly interested in them, and he was not actually examined. In the third case, defendant was not even a witness. The evidence of private malice is clearly insufficient to justify the finding accepted by the lower Court. In the absence of malice the presumption of good faith prevails, and it is thus clear that the protection of privilege is complete. I accordingly decide 2nd, 3rd and 4th issues in defendant's favour.

The 5th issue need not, therefore, be considered. In fact, when the lower Court, after deciding the chief issues in plaintiff's favour, only allowed her Rs. 100 out of a claim exceeding Rs. 5,000, it is plain that the impression made on its mind by the whole evidence was decidedly not favourable as regards the general reputation of plaintiff's character. It is not necessary to consider this point further.

I accordingly reverse the decree of the lower Court and dismiss the claim with costs.

Decree reversed.

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Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Original Defendant*), *Appellant v.* SAKHARAM BAPUJI NAIK SAR DESAI & OTHERS (*Original Plaintiffs*), *Respondents.** [26th June, 1899.]

Limitation Act (XV of 1877), s. 10—Suit against Secretary of State to recover possession of a khoti village and mesne profits.

In the year 1892 plaintiffs brought this suit against the Secretary of State to recover possession of a khoti village with mesne profits. It was found as a [24] fact that Government had been in possession of the rights to which the suit related for upwards of fifty years, and during that time no acknowledgment of their title to khotship had been made either to plaintiffs or their predecessors.

Held, that the claim was time-barred; Government not being in possession or control of the village as stakeholder, s. 10 of the Limitation Act (XV of 1877) was not applicable.

SECOND APPEAL from the decision of M. P. Khareghat, District Judge of Ratnagiri, reversing the decree of H. L. Hervey, Assistant Judge.

* Second Appeal No. 314 of 1898.

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In 1892 the plaintiffs brought this suit to recover possession of the khoti village of Salpe. They alleged that the village was their ancestral khoti property; that they had held possession of it up to the year 1834, under the jurisdiction of the Vishalgad Chief, but in that year they had been dispossessed at the instance of one Ketkar. Subsequently, however, by a sanad dated 27th March, 1843, the Chief ordered the villages to be restored to them from the year 1845, but in the meantime it was transferred to the British Government. They further stated that on the 28th August, 1845, they applied for the restitution of the village, but a reply was given on the 9th July, 1849, that as there was a dispute with the said Ketkar about title, Government would retain possession, and the parties might, if they liked, get their title decided otherwise; that subsequently in 1887, in a correspondence which ensued on plaintiffs' application to the Collector for reinstatement, Ketkar admitted the plaintiffs' right, but in spite of that admission Government replied on the 12th December, 1888, that the village would not be restored as it had been entered in the *khalsa* list in 1859. Plaintiffs stated that the cause of action accrued on the aforesaid date, that the village had been decided to be khoti by the khoti settlement officer, and that mesne profits should be awarded from the year 1845, when the village was to have been restored.

The defendant pleaded that the plaintiffs were not the ancestral vatandars of the village and never its khots; that the sanad on which the suit was based was not genuine, and the Vishalgad Chief had no authority to grant it, and that, never having been acted upon, it could confer no rights on plaintiffs; that the defendant [25] had become full owner by adverse possession for more than twelve years; that in 1859 the village was entered in the Government records *khalsa*, and that the claim was, therefore, time-barred.

The Assistant Judge (T. Walker) dismissed the suit as time-barred.

On appeal by plaintiffs the Judge held the claim to be within time and remanded the case for decision on the merits.

On remand the Assistant Judge dismissed the suit.

On appeal the Judge reversed the decree and allowed the claim for possession on the ground that the sanad relied on in the plaint was genuine; that the plaintiffs were entitled to recover possession of the khoti by virtue of the sanad and a takid (Ex. 39) both of which were dated the 27th March, 1843; that the plaintiffs were not entitled to recover the khoti otherwise than under those documents, and that they were not entitled to recover anything for mesne profits.

The defendant preferred a second appeal:

Rao Bahadur *Vasudev J. Kirtikar* (Government Pleader), for the appellant (defendant).—We contend, first, that the Chief of Vishalgad had no authority to grant a sanad of the khoti, as he was only a subordinate jaghirdar of the Kolhapur State. Supposing that he had such authority, still the grant would be good only during his life-time, and it lapsed when all the rights of the Chief in the villages below the ghats were confiscated by the British Government on account of his active participation in the rebellion of 1844. Moreover, in 1859 the village was entered by the British Government in the list of *khalsa* villages. Whatever rights, therefore, the plaintiffs might have acquired, they were extinguished by this action of the paramount Government. Secondly, in 1849 in reply to the plaintiffs' application for possession of the village, they were informed by the Collector that Government retained possession of the village, as there was a dispute of title between them and one

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Ketkar, and that the parties might get their title established before a proper tribunal if they liked. Plaintiffs took no action since that time. The present suit, which was filed in the year 1892, [26] is, therefore, clearly time-barred—*East India Company* v. *Oditchurn Paul* (1).

Mahadeo R. Bodas, for the respondents (plaintiffs).—The Judge has, after a very careful consideration of the evidence in the case, recorded findings on all the issues of facts, and those findings cannot now be interfered with in second appeal unless a clear error of law has been committed.

As to the first objection, both the lower Courts held the sanad proved and they also held that the Vishalgad Chief had full authority to make the grant. These concurrent findings of the lower Courts cannot now be questioned in second appeal. Nor can a right once conferred by a ruler upon a private individual be taken away by a confiscation of the public rights of that Chief by the British Government. As a matter of fact the sanad relied on by us was not a new grant, but, it was simply an adjudication of our title to the khoti of the village which had been in the enjoyment of our family since 1793 at least. It was like a decree of a Civil Court and cannot be nullified by any subsequent forfeiture of the rights of the Vishalgad Chief in the villages. Besides, it is too late now for Government to raise an objection as to the competency of the Vishalgad Chief to grant khoti sanads, because many such sanads had been granted and acted upon in the past, and this High Court has recognized them as valid. See Nos. $\frac{18}{178}$ and $\frac{18}{549}$ mentioned by Sir Charles Sargent in his judgment in the Ambedu case, *Collector of Ratnagiri* v. *Antaji Lakshman* (2).

As to limitation we contend that Government by their reply to plaintiffs in 1849 placed themselves in the position of a stakeholder; therefore, time could never run against plaintiffs—*Tukaram* v. *Sujangir Guru* (3). The entry of the village in 1859 in the list of *khalsa* villages was no doubt an adverse act, but it had no binding force, first, because the entry was unauthorized and an error, inasmuch as the Government Resolution which sanctioned the preparation of the list clearly referred to villages that were under the direct management of the British Government since [27] the commencement of the British rule, that is, since 1818; secondly, because even if the entry was properly made, plaintiffs had no notice of it till the suit was filed, and hence it cannot make the possession of Government adverse. Section 10 of the Limitation Act (XV of 1877) is applicable and under it no lapse of time, however great, will bar a suit against Government who were trustees for the rightful owner. The plaintiffs renewed their application in 1877 and got a reply similar to the one given in 1849. Even if s. 10 be held not applicable, the possession of Government would not be adverse to the plaintiffs until they came to know of the erroneous entry of 1859 and, therefore, the suit is within time. Besides, even supposing that the entry of 1859 or the delay in bringing the suit rendered the previous possession adverse, still the reply to plaintiffs' application in 1877 ought to be construed as a fresh acknowledgment by Government that they held possession of the village as stakeholder and, therefore, limitation ought to run afresh from that time.

Lastly, we submit that in the year 1885 the Settlement Officer, after inquiry held under the Khoti Settlement Act (Bombay Act I of 1880),

(1) 5 M.I.A. 43 (68). (2) 12 B. 534. (3) 8 B. 585.

declared the village to be a khoti village although the name of the khot was not then entered, as his title was not established. That entry is binding upon all parties according to s. 22 of the Act until it is set aside by a regular suit. As that entry was not set aside within time, the defendant is now estopped from claiming the village as *khalsa*. Even if it be supposed that the decision of the Settlement Officer was *ultra vires* and, therefore, not binding, still it shows at any rate that till 1885 Government understood their position to be that of a stakeholder and had no serious intention of claiming the village as *khalsa*.

JUDGMENT.

JENKINS, C.J.—This appeal arises out of a suit to recover possession of the khoti village of Salpen and mesne profits, and the only point is whether the lower appellate Court has rightly held that the claim is not time-barred.

The Government has been in possession of the rights to which the suit relates, from the time it assumed control or possession upwards of fifty years ago, and during that period no acknowledgment of their title to the khotship has been made either to the plaintiffs [28] or their predecessors. It has, however, been contended before us on the part of the plaintiffs that any operation the lapse of time might otherwise have had is avoided by s. 10 of the Indian Limitation Act, 1877, or that at any rate the just inference to be drawn from those facts is, that the Government has, during the last fifty years, been in possession and control as stakeholder. As the case comes before us on second appeal, we are bound by the findings of fact, and I have no intention of questioning their correctness. I only propose to consider whether the proper legal conclusions have been drawn from those findings of fact.

Approaching the case, then, with this limitation, I will consider whether the case comes within s. 10 of the Limitation Act. That section provides as follows :—" Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, shall be barred by any length of time." Apart from the question whether the Government can be a trustee within the meaning of s. 10—(a point on which reference may usefully be made to the opinion of Lord Justice James in *Kinlock* v. *Secretary of State for India* (1)—there is, in the present case, no foundation for the inference that the property became vested in Government in trust for any specific purpose. I would only apply here the words of Lord Blackburn in the case of *Zemindar of Palcondah* v. *Secretary of State for India* (2) where he says (p. 124) : " It does seem to their Lordships not possible to make it clearer that that section does not apply to this case than by simply stating what that section is and what the case is." Nor does it seem to me that any stronger case is made in favour of the Government having assumed and continued the position of stakeholder with the ordinary legal incidents that would attach to that position. It may be that if fifty years ago, or within a reasonable time thereafter, a good title had been made to the rights now claimed, Government would, in pursuance of its ordinary policy, have made them over to the proper claimant, but not by reason of any binding legal agreement that it had made to that effect.

(1) (1880) 15 Ch. D. 1 (9).

(2) 12 I.A. 120.

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What has actually happened is that the [29] Government has throughout refused to give possession to the plaintiffs or their predecessors. It is not suggested that the plaintiffs have a better title now than their predecessors had in 1844; only that they are now in a better position to establish it by reason of the abandonment of the rival claim. If this be so, then such right of action as the plaintiffs now have, existed from the first, and there has been no agreement or conduct on the part of Government or its officers that could suspend the operation of the Statute of Limitations. The suit, therefore, is barred by time. The decree of the Court below must be reversed and the suit dismissed with costs.

CANDY, J.—The question is whether the suit is barred by limitation. The facts are set out in the judgment of the lower Court, with regard to which it is only necessary to allude to one or two points.

In the first place it is clear that the village was not attached by the British Government owing to the dispute between the Sar Desais (plaintiffs) and Ketkar. The sanad of reinstatement was granted to the Sar Desais by Amritrao, the Chief of Vishalgad, in March, 1843; but before any action was taken on it, Amritrao died, and the villages of the Chief were attached and placed under the management of the Collector of Ratnagiri, pending the question as to Amritrao's adopted son. Then occurred the rebellion, the result of which was the confiscation of the Chief's rights in this and other villages. Then the Sar Desais applied to the Collector for possession of the khoti of the village, to which application the Collector eventually replied on the 9th July, 1849: "The village is in dispute. Therefore, it being the practice that the property in dispute should remain in the hands of Government, you should, if you so wish, take steps in some other direction."

There is nothing in this language implying that Government agreed to hold the khoti in trust for an indefinite time on behalf of the rightful owner. No doubt the intention of the Collector was that the Sar Desais should be at liberty to establish their claim in the Civil Court. This is clear from his memorandum to the Political Superintendent of Kolhapur in April, 1849 (see Ex. 45); but it does not necessarily follow that unlimited [30] time was given to the rival claimants. It is impossible to say that the khoti was vested in the Collector for the specific purpose of management in trust for the Sar Desais, should they ever establish their right. The case quoted by the learned District Judge—*Tukaram* v. *Sujangir Guru*(1)—has no application to the facts of the present case. In that case the Government assumed the guardianship of the property at the request of some of the contending parties, and eventually Government restored the vatan. A dispute then arose between the vatandar and a rayat of part of the lands comprised in the vatan; and this Court held that Government as guardian for the real owners could not have given to the rayat rights contradicting those of the real owners. This principle would possibly be applicable to the present case had Government restored the khoti to the Sar Desais, and had the dispute then arisen between the khot and certain rayats in the village: it can have no application to the point now under consideration.

Then with regard to the action of Government in 1859:—The learned District Judge, and the pleader of the plaintiffs in this Court were not correct in thinking that the list (Ex. 35) had been prepared according to the orders of Government in Government Resolution No. 3939, of

(1) 8 B. 585.

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5th October 1859. It was prepared by the Collector in 1858; and there was no mistake in including Salpen, the village now in dispute, in a list of villages under the direct management of the Collector from the time of the late Government; that does not necessarily mean from 1817-18 when the Ratnagiri District was acquired by the British Government. The "remarks" in the list show that the description applies equally to the acquisition of villages from the Vishalgad State after 1818, and as a fact (as shown above) Salpen had been under the direct management of the Collector from a time anterior to the acquisition by the British Government of the Vishalgad villages. It is true that the decision of the British Government to treat Salpen as "khalsa" was apparently not communicated to the Sar Desais, and, therefore, if limitation was not running before 1859, the action of Government in that year might not cause it to commence.

[31] Lastly, as to the action of the Settlement Officers in 1885:—It is obvious on the face of their proceedings that they did not pretend to decide, or even to assert, that the village was still khoti; on the contrary, they were most guarded in their entries, the effect of which was that any decision given by them on the understanding that the village was khoti was not to be taken as admitting the rights of any one as khot. Section 39(*e*) of Bombay Act I of 1880 obviously can have no application to the present case; for that refers to s. 162 of the Land Revenue Code, which deals with the attachment of villages in respect of which there are arrears of revenue due. The attachment of Salpen never was in respect of any arrears.

We come back, then, to the conduct of the parties in 1849; and as nothing occurred in that year which would prevent the bar of limitation arising, we must reverse the decision of the District Judge and restore that of the Assistant Judge dismissing the suit. All costs throughout on plaintiffs.

Decree reversed.

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24 B. 31 = 1 Bom. L. R. 489.

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Before Mr. Justice Parsons and Mr. Justice Ranade.

KRISHNARAO (*Original Defendant*), *Appellant v.* BABAJI AND ANOTHER (*Original Plaintiffs*), *Respondents.** [27th June, 1899.]

Trees—Timber—Standing timber—Mango tree—Mango tree may be standing timber according to the custom of a locality—Registration Act (XX of 1866), s. 3.

By the term "timber" is meant properly such trees only as are fit to be used in building and repairing houses.

A mango tree, which is primarily a fruit tree, might not always come within the term "standing timber" used in the definition of immoveable property in s. 3 of the Indian Registration Act (XX of 1866). But it may be classed as a timber tree where according to the custom of a locality its wood is used in building houses.

[R., 31 B. 183 = 9 Bom. L.R. 50 (59); 10 A.L.J. 516 = 17 Ind. Cas. 910.]

SECOND appeal from the decision of Rao Bahadur A. G. Bhave, First Class Subordinate Judge, A. P., at Ratnagiri.

* Second Appeal No. 645 of 1898.

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[32] The plaintiffs sued to recover possession of a mango tree, alleging that the tree had been given to their father by defendant's grandfather by a deed of gift in Shake 1790 (1868 A.D.), and that the defendant wrongfully took away the fruit of the tree in April, 1893.

Defendant disputed the plaintiff's title under the deed of gift, which he alleged was a fabrication.

The Subordinate Judge at Devgad found that the deed of gift was genuine and awarded the plaintiff's claim.

On appeal the defendant contended that the standing tree in dispute was immoveable property; that under s. 17 of the Registration Act (XX of 1866) (which was in force at the date of the deed of gift), its registration was compulsory, and that it was inadmissible for want of registration.

This objection was overruled by the First Class Subordinate Judge with appellate powers. He held that a mango tree, though a fruit-bearing one, might also be classed as a timber tree, especially in the Ratnagiri District, where its wood was often used not only for building houses, but also for boats, fences, furniture, carriages, &c.

The Subordinate Judge, therefore, held that the mango tree, being "standing timber," must for the purposes of the Registration Act be regarded as moveable property, and that the registration of the deed of gift was, therefore, not compulsory. He, therefore, confirmed the decree of the Court of first instance.

Against this decision the defendant preferred a second appeal to the High Court.

M. V. Bhat, for appellant.—The deed of gift relates to a mango tree. A mango tree is planted principally for its fruit and not for its wood. It is immoveable property within s. 3 of Act XX of 1866. The section no doubt excepts "standing timber" from the definition of immoveable property. But the word "timber" does not include fruit trees. It applies to trees the wood of which is used for the purpose of durable and substantial buildings. Refers to Stroud's Judicial Dictionary, Craig on Trees, pp. 10 and 11; and *Honeywood* v. *Honeywood* (1).

[33] *Vasudev G. Bhandarkar*, for respondent.—The definition of "timber" given in Stroud's Dictionary includes all trees which by the custom of a locality are used for building purposes. The lower Court finds that in the Ratnagiri District the wood of mango trees is used for building purposes. That being so, a mango tree in this district is timber within the meaning of s. 3 of Act XX of 1866. The deed of gift, therefore, does not require registration.

JUDGMENT.

PARSONS, J.—It is argued that the deed of gift (Ex. 36) executed in the year 1868 upon which the suit was founded is invalid for want of registration, the subject of it, a mango tree, not coming within the term "standing timber" used in the definition of immoveable property in s. 3 of the Indian Registration Act, 1866. No doubt by the term "timber" is meant properly such trees only as are fit to be used in building and repairing houses. A mango tree, which is primarily a fruit tree, might not always come within the term, but in this respect the custom of a locality has to be considered. "In Dart it is laid down that timber includes by local custom beech and various other trees, even trees which

(1) (1874) L. R. 18 Eq. 306.

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are primarily fruit trees, as cherry, chesnut and walnut (*Chandos* v. *Talbot*, 2 P. Wms., 606)." (See Stroud's Judicial Dictionary, 1890, under the heading "Timber.")

In the present case, the Judge says "the mango tree, though a fruit-bearing one, may be classed as a timber tree, more especially in this part of the country (Ratnagiri), where its wood is often used for building houses."

We, therefore, hold the deed admissible and confirm the decree with costs.

Decree confirmed.

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24 B. 34=1 Bom. L. R. 505.

[34] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Crowe.

GANPARSHIBAI *(Original Plaintiff)*, *Appellant v.* TIMMAYA SHIVAPPA HALEPAIK *(Original Defendant)*, *Respondent.** [3rd July, 1899.]

Landlord and tenant—Land Revenue Code (Bombay Act V of 1879), ss. 56, 57, 81, 214 (e) and (i)—Lease Failure to pay Government assessment—Forfeiture—Payment of the arrears by tenant actually in possession—Forfeiture not followed by sale of occupancy—Lease not destroyed by the forfeiture—Tenant's liability for rent subsequent to the forfeiture.

A registered occupant of land having failed to pay the arrears of Government revenue, his occupancy was forfeited under s. 56 of the Land Revenue Code (Bombay Act V of 1879), but the forfeiture was not followed by sale of the occupancy, the Collector having allowed the registered occupant's tenant under a lease to be registered as occupant on his paying up all arrears of Government revenue due on the land. Afterwards a question having arisen as to the tenant's liability for rent under the lease subsequent to the forfeiture.

Held, that the tenant was liable. When a registered occupant's tenancy is forfeited under s. 56 of the Land Revenue Code, and that forfeiture is not followed by sale of the occupancy (the Collector allowing the person actually in possession to be registered as occupant on his paying up all arrears of Government revenue due on the land), the lease by which the person actually in possession was holding from the former registered occupant is not destroyed by the forfeiture, and the lessee is still under liability to his landlord.

[R., 30 B. 466 (472)=8 Bom. L.R. 360.]

SECOND appeal from the decision of H. L. Hervey, District Judge of Kanara, confirming the decree of Rao Saheb T. V. Kalsulkar, Subordinate Judge of Honavar.

Suit for arrears of rent due under a mulgeni lease dated March, 1886.

The defendant denied plaintiff's right to the rent, alleging that her (the plaintiff's) husband had failed to pay Government assessment, and had, therefore, forfeited his occupancy; that he (the defendant) had paid off the arrears, and being already in possession had thereupon become the registered occupant under the Land Revenue Code (Bombay Act V of 1879).

The Subordinate Judge found that the forfeiture had taken place in February, 1894, as alleged by the defendant. He allowed the plaintiff's claim for rent up to that date. On appeal, the [35] Judge confirmed the decree, holding that the plaintiff's interest in the land ceased at the date of forfeiture. The plaintiff appealed.

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* Second Appeal No. 18 of 1899.

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Scott (Acting Advocate-General) with *N. G. Chandavarkar*, for the appellant (plaintiff).—The defendant was in possession as the plaintiff's tenant, and when the plaintiff failed to pay the assessment it was no doubt recovered from the defendant as actual occupant. No sale took place, and the question is, was the relationship of landlord and tenant put an end to? We contend that it was not. The holding was forfeited by the plaintiff's default, but the forfeiture was removed by the payment made by the defendant, who was already in occupation as tenant—*Narayan* v. *Parshotam* (1). After the forfeiture the Collector did not adopt the course laid down in ss. 56 and 57 of the Land Revenue Code (Bombay Act V of 1879). Until the sale takes place, the tenure cannot be put an end to. Forfeiture by itself has no operation under the Code. Failure to pay assessment cannot alter the relation existing between a landlord and tenant. The defendant has by paying the arrears of assessment benefited himself. If the land had been sold to a stranger, he would have lost the benefit of his lease—*Bhau* v. *Hari* (2); *Mulchand* v. *Shapurji* (3).

Ganpatrao S. Mulgaonkar, for respondent (defendant).—As the holding was forfeited, there remained nothing in the landlord which entitles him to claim the benefit of the lease. In *Narayan* v. *Parshotam* (1) it was held that the forfeiture cannot operate to the prejudice of third parties. The plaintiff is a registered occupant, through whose neglect the forfeiture took place. If it is held that a forfeiture does not destroy all the rights of the defaulting registered occupant, and that there must be a sale after a forfeiture in order to produce that effect, then the provisions as to forfeiture are nugatory and it is useless to take the trouble to effect a forfeiture. A sale is a further step in the procedure, but there cannot be a sale without forfeiture. The Land Revenue Code has made no provision for such a sale. Under s. 81 of the Code, the Collector is empowered to transfer the holding to the name of another person after it is forfeited. It does not contemplate a sale at all.

JUDGMENT.

[36] CANDY, J.—The question as argued before us is simply this: when a registered occupant's occupancy is forfeited under s. 56 of the Land Revenue Code, and that forfeiture is not followed by sale of the occupancy, the Collector allowing the person actually in possession to be registered as occupant on his paying up all arrears of Government revenue due on the land, is the lease, by which the person actually in possession was holding from the former registered occupant, destroyed by the forfeiture, and does the person actually in possession hold the land from the date of the forfeiture free from any liability towards his landlord?

The District Judge held that the interest of the landlord (the former registered occupant) ceased on the day that the forfeiture was declared. Is there authority for that view? We think not. On the contrary we think that there is authority for the opposite view. In *Mulchand* v. *Shapurji* (3) this Court said (p. 10): "The forfeiture in itself has no direct legal consequences under the Court." The cases there quoted may not have been quite apposite; for in *Bhau* v. *Hari* (2) no forfeiture was shown to have taken place, and *Narayan* v. *Parshotam* (1) was the peculiar case of a superior holder (mulgar) seeking the assistance of the revenue authorities to recover the rent due to him from his permanent tenant (mulgenidar), and the revenue authorities thereupon declaring the mulgeni right to be forfeited, and

(1) 22 B. 389. (2) 20 B. 747. (3) P.J. (1898), p. 8.

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putting the mulgar into possession. It was held that the mulgar was not entitled to possession, and that the action of the revenue authorities did not free the land from a mortgage incumbrance created by the mulgenidar before his mulgeni right was forfeited. The head-note to the case in the reports is too broadly worded for the decision on the particular facts of that case, though there are expressions in the judgment of the late Chief Justice which perhaps justify the general rule. But it is unnecessary to examine the facts of that case in detail. It is sufficient to compare the simple facts of the present case, as presented to us in second appeal, with the words of the Land Revenue Code.

The lessor failed to pay the arrears of land revenue; therefore his "occupancy" was liable to forfeiture: it was so forfeited, [37] whereupon the Collector could have levied all sums of land revenue in arrear by sale of the occupancy, in which case the occupancy would have been freed of the rights created by the occupant in favour of the tenant (defendant) who was then actually in possession. The reason for such a provision is obvious: no purchaser would care to buy unless he could get a clean title. But the Collector is not bound to sell; he may otherwise dispose of the occupancy under rules or orders made in this behalf under s. 214. What he did was to take the arrears of land revenue from the person actually in possession (the tenant) and to register that person as the occupant. This action is not directly covered by any of the Rules 30 to 64 under Chap. IX—Rules for the disposal of forfeited holdings, ss. 56 and 214 (*e*) and (*i*), to be found in the existing rules in the Revenue Department. Therefore forfeiture, followed by such a disposition of the occupancy as is not justified by the rules under s. 214, would not put an end to the lease under which the person actually in possession was holding under the previous registered occupant. The District Judge takes for granted that plaintiff's interest in the land altogether ceased on the day that the forfeiture was declared. So it may have done as between him and Government. But the forfeiture *per se* did not destroy the relations existing between him and his tenant. The tenant by paying the arrears of land revenue, which, according to the contract between plaintiff and the tenant, should have been paid to Government by the plaintiff, is equitably entitled to deduct them from arrears of rent due from him to his landlord, but the lease under which he holds is still subsisting.

As noticed above, the Collector has not been shown to have acted under any rule under s. 214; nor did he take action under s. 57: he did not take immediate possession of the land, nor did he place in possession any purchaser or any one else: he left the plaintiff's tenant in possession. It may be conceded that the power given to the Collector by s. 56 of disposing of a forfeited occupancy under rules or orders under s. 214 would not exclude his power to take appropriate action under any other section of the Land Revenue Code. Turning to s. 81 we find that if it shall appear to the Collector that a sale of the [38] occupancy will operate unfairly to the prejudice of other persons interested in the continuance of the occupancy, it shall be lawful for him, instead of selling the occupancy, to forfeit only the registered occupant's interest in the same, and to substitute the name of any such other person as registered occupant on his payment of all sums due on account of land revenue for the occupancy. The Collector apparently acted under the above section: it might obviously have been to the prejudice of the tenant in possession if there had been a sale of the occupancy. Had the tenant not succeeded in becoming the purchaser, he

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would have lost all rights under his lease and would have been ejected. By preventing a sale he preserved his rights. But he cannot be said to have at the same time put an end to the lease under which he was in possession.

For the above reasons, we are of opinion that the District Judge should have found in the affirmative on the first issue framed by him, *i.e.*, that the plaintiff was entitled to recover rent from defendant for the period subsequent to the forfeiture of occupancy; and we amend the decree by awarding rent for the full amount claimed, deduction being of course made of the Government assessment paid by defendant. Defendant must pay all the costs up to date.

Decree amended.

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24 B. 38=1 Bom.L.R. 502.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Crowe.

SANGAPPA (*Original Plaintiff*), *Appellant v.* SHIVBASAWA (*Original Defendant*), *Respondent.** [3rd July, 1899.]

Receiver—Subordinate Judge, power of, to appoint—Appeal from order of refusal of Subordinate Judge—Jurisdiction—Civil Procedure Code (Act XIV of 1882), ss. 503 and 505.

A Subordinate Judge, when considering the expedience of the appointment of a receiver, is acting under s. 503 of the Civil Procedure Code (Act XIV of 1882) as explained by s. 505. When he does appoint, his order is passed under s. 503, and when he refuses to take the necessary step preliminary [39] to appointment, his order is also made under that section. An appeal lies from such an order made by a Subordinate Judge.

Circumstances under which a receiver is appointed, considered.

John v. *John* (1) referred to.

[F., 6 Ind. Cas. 659=36 P.R. 1910=72 P.L.R. 1910=53 P.W.R. 1910.]

APPEAL against the decision of Rao Bahadur B. S. Joshi, First Class Subordinate Judge of Sholapur.

In a previous litigation between the parties to this suit it was held by the High Court(2) that the defendant had adopted the plaintiff, and that the adoption was valid and binding upon the defendant. The defendant appealed to the Privy Council and that appeal was now pending.

The plaintiff, as adopted son, brought this suit for possession of the property and applied to the Subordinate Judge that a receiver should be appointed, alleging that the defendant was negligent in her management, and was allowing the rent to fall into arrears, and that she being a pardanashin widow was wholly unfit to manage so large a property.

The Subordinate Judge rejected the application. The plaintiff appealed.

Mahadeo B. Choubal, for the respondent (defendant) :—The appeal is made from the order of the Subordinate Judge, but no such appeal lies. Section 505 of the Civil Procedure Code gives the power to appoint a receiver only to the High Court or to a District Court. From orders made

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* Appeal No. 6 of 1899 from order.

(1) (1898) 2 Ch. 573.

(2) P. J. (1896), p. 743.

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by them an appeal may lie, but not from an order of a Subordinate Judge refusing to nominate a receiver under cl. 2 of s. 505—*Birajan Kooer* v. *Ram Churn* (1) ; *Chunilal* v. *Sonibai* (2) ; *Venkatasami* v. *Stridavamma* (3).

As to the merits, we say no case for a receiver is proved—*Dastur Kekobad* v. *Navajbai* (4). We have not mismanaged the property. The right to the property is as yet undecided, as our appeal to the Privy Council is still pending.

[40] *Narayan G. Chandavarkar*, for the appellant :—As to the right to appeal, the case of *Gossain Dulmir* v. *Tekait Hetnarain* (5) is conclusive. Our adoption being held proved, we have a right to possession—*Sidheswari* v. *Abhoyeswari* (6) ; *John* v. *John* (7). A receiver will manage the property in the interest of both parties.

JUDGMENT.

CANDY, J.—Mr. Choubal has taken the preliminary objection that no appeal lies from the order of the Subordinate Judge refusing to recommend to the District Judge the appointment of a receiver. In *Subramanya* v. *Appasami* (8) the facts were very similar: the Subordinate Judge, in whose Court the suit was pending, refused to recommend the appointment of a receiver : plaintiff appealed to the High Court, and their Lordships held that the main question for their determination was whether an appeal would lie against an order of a Court refusing to exercise the power of appointing a receiver. This question was answered in the negative ; but the authority of the decision is weakened by the fact that it was expressly overruled in the subsequent Full Bench case of *Venkatasami* v. *Stridavamma* (3).

Turning to the overruling authority quoted above, it will be seen that in that case the application for the appointment of a receiver was made to the District Court in which the suit was pending. The order refusing the application was passed under s. 503, and the ruling of the Full Bench was that an order of refusal to appoint a receiver is an order under s. 503 and is appealable under s. 588 (24). This proposition, as regards an order of refusal, passed by a District Court, is unassailable, because the order must have been passed under s. 503 and under no other section.

That does not directly touch the case before us, in which the order of the Judge of a Court subordinate to the District Court is as follows :—" I do not consider it expedient that a receiver should be appointed in the suit before me." Must that order have been passed under s. 505, in which case no appeal is given by the Code? The other cases quoted do not help us.

[41] In *Gossain Dulmir* v. *Tekait Hetnarain* (5) it was laid down that an order made by a Subordinate Judge dismissing an application for the appointment of a receiver *after obtaining sanction from the District Judge* is an order under s. 503, and not under s. 505, and, therefore, appealable. As Mr. Justice Parker said in Appeal against Order, 115 of 1885, reported in the note at pp. 180-1 of Indian Law Reports, 10 Madras : " This would favour the view that after sanction given, it is the Subordinate Court which makes the order under s. 503, and not the District Court, the Subordinate Court having been authorized thereto under s. 505." That may be so ; but that does not touch the question whether a Subordinate Court, refusing to ask sanction from the District Court, can be said to

(1) 7 C. 719. (2) 21 B. 328. (3) 10 M. 179.
(4) P.J. (1896), p. 286. (5) 6 C. L. R. 467. (6) 15 C. 818.
(7) (1898) 2 Ch. 573. (8) 6 M. 355.

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be passing an order under s. 503. In *Birajan Kooer* v. *Ram Churn Lall Mahata* (1), which has been quoted with approval by this Court in *Chunilal* v. *Sonibai* (2) it was held, as pointed out by Mr. Justice Parker in the case in the notes in I. L. R. 10 Mad. 180-1, that the first step taken by the Subordinate Judge is to nominate, and that from this proceeding there is no appeal: the Judge then approves, and under s. 505 authorizes the appointment, and from this also there is no appeal: then the Subordinate Judge appoints the receiver previously nominated, and from this order there is an appeal. Thus (to still quote Mr. Justice Parker) this ruling also corroborates the view that the action of the District Court is not taken under s. 503, but under s. 505, and that the appeal is from the order of the Subordinate Court under s. 503. Can the same principle be applied here? Can it be said that a Subordinate Judge, passing an order that he does not consider it expedient that a receiver should be appointed, is passing an order under s. 503? If not, then we have this strange anomaly, that when a District Judge refuses to appoint a receiver, there is an appeal against his order of refusal, but when a Subordinate Judge refuses to nominate a receiver, there is no appeal from his order.

Mr. Choubal attempts to get over this anomaly by contending that a plaintiff, in such a case as the present, can always apply [42] to the District Judge. We do not agree with this contention. "The Court," in s. 503 must be the Court in which the suit is pending, and we think that the correct way in which to regard the question is by holding that a Subordinate Judge, when considering the expediency of the appointment of a receiver, is really acting under s. 503 as limited and explained by s. 505. He cannot exercise the powers conferred by the chapter, that is, the powers of appointment of receivers, but he is enjoined on application to consider the expediency of the appointment of a receiver (s. 505),— that is, he has to consider whether it appears to him to be necessary for the realization, &c., of the property to appoint a receiver (s. 503), and though he has not the power till authorized by the District Judge under s. 505 to appoint the receiver (s. 503 (*a*)), still when he does appoint, his order is passed under s. 503, and equally when he refuses to take the necessary steps preliminary to appointment his order is under s. 503.

Turning, then, to the merits, we have to see whether it is expedient that a receiver should be appointed in this case, *i.e.*, whether it appears to be necessary for the realization, preservation, or better custody or management of the property, that a receiver should be appointed. We need not refer in detail to the litigation which has been going on between the parties. It is true that the present defendant has obtained leave to appeal to the Privy Council against the decision of this Court by which her title has been decisively denied. It may be that she will eventually succeed: all that we can say is that at present she has apparently no title. Then we must consider the fact that owing to the position of the parties the tenants are in a hazardous position and must be exposed to a double claim. It is impossible to read the judgments of the Court of Appeal in *John* v. *John* (3) without seeing that in England such a case as the present one would be pre-eminently considered as one in which it is "just and convenient" to appoint a receiver.

We must reverse the order of the Subordinate Judge and remand the case to him that he may nominate a fit person for [43] the appointment

(1) 7 C. 719. (2) 21 B. 328. (3) (1898) 2 Ch. 578.

of receiver, and submit his name with the grounds for the nomination to the District Court. We may point out that under s. 503 (*d*) power may be granted for the disposal of the rents and profits in such a way as to ensure a proper allowance to the defendant for such objects as the Court may think fit. Costs to be costs in the suit.

Order reversed and case remanded.

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24 B. 43 = 1 Bom.L.R. 493.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

SHITAWA (*Original Defendant No.* 1), *Appellant v.* BHIMAPPA (*Original Plaintiff*), *Respondent.** [3rd July, 1899.]

Evidence—Commissioner appointed to prepare a map—Civil Procedure Code (Act XIV of 1882), s. 392—Statements of village officers made to such commissioner and recorded by him—Practice.

In a suit as to a right of way a commissioner was appointed under s. 392 of the Civil Procedure Code to prepare a map of the locality in question.

Held, that the statements of the village officers made to him with regard to the right of way were inadmissible in evidence.

[Disappr., 22 Ind. Cas. 526 = 72 P.L.R. 1914 = 45 P.W.R. 1914.]

SECOND appeal from the decision of T. Walker, District Judge of Dharwar, varying the decree of Rao Saheb N. B. Muzumdar, Subordinate Judge of Gadag.

The plaintiff sued for a declaration that certain land belonged to him and also for an injunction restraining the defendants from interfering with a certain right of way which he claimed. In the course of the proceedings, a commissioner was appointed under s. 392 of the Civil Procedure Code (Act XIV of 1882) for the purpose of making a map of the locality showing the land in dispute and the direction of the right of way claimed by the plaintiff. The Subordinate Judge allowed the plaintiff's claim to the land, but refused the injunction prayed for.

On appeal by the plaintiff the Judge granted the injunction, holding that the right of way was proved. He based his decision on certain statements made to the commissioner appointed under s. 392. In his judgment he said :—

[44] "What has induced me to take plaintiff's view of the case is Ex. 11, the statements to the commissioner appointed to make the map. The patil and kulkarni and five other persons have signed and given a statement to the commissioner that the land is Government land which defendants are misappropriating by using it as a dung-heap, and that they have no right over it. This statement appears to me as good as the seven separate depositions on oath. Under the Civil Procedure Code, s. 399, the commissioner is a Civil Court, and the witnesses were bound to answer truly whether an oath was administered or not; and under s. 393 the report of the commissioner and the evidence taken by him are evidence in the suit and form part of the record. The commissioner's report on the back of Ex. 9 does not express any opinion on the merits.

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* Second Appeal No. 340 of 1898.

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24 B. 43 = 1 Bom. L.R. 493.

"This evidence is not alluded to in the judgment, and is, I think, the strongest evidence in the case."

Defendant No. 1 preferred a second appeal.

S. S. Patkar (for *D. P. Kirloskar*) appeared for the appellant (defendant No. 1).—The Judge has based his decision on the record of the statements made by persons who were questioned by the commissioner on the spot as to the right of way. The provisions of the Evidence Act (I of 1872) are applicable to commissions—Ameerali's Law of Evidence, p. 13. We had no opportunity of cross-examining the persons whose statements were recorded—Ameerali's Law of Evidence, p. 259. The commissioner was appointed only for the purpose of making the map and not to take evidence—*Buroda Churn Bose* v. *Ajoodhya Ram* (1); *Shadhoo Singh* v. *Ramanoograha Lall* (2); *Bindabun Chunder Sirkar* v. *Nobin Chunder Biswas* (3); *Doorga Churn Surmah* v. *Neemchand Surmah* (4); *Bustee Sahoo* v. *Jeo Narain Singh* (5); *Sangili* v. *Mookan* (6). It was for the Court to take evidence, and this duty could not be delegated to a commissioner.

Balaji A. Bhagvat, for the respondent (plaintiff).—The statements referred to were signed by the village officers. Under s. 393 of the Civil Procedure Code, the report of the commissioner and the evidence taken by him are evidence and form part of the record. The Judge has found as a fact, after considering the evidence in the case, that the plaintiff had a right of way which the defendants were not entitled to interrupt.

JUDGMENT.

[45] PARSONS, J.—In this case the commissioner was appointed only to draw a map showing the houses of the parties and the way claimed by the plaintiff as well as that mentioned by the defendants, and no power was given to him to take evidence. Therefore the panchnama or statement of the opinions of the village officers and other persons, recorded by him as to the vahivat or use of the way, was not evidence, and ought not to have been looked at by the Judge. In any case evidence in proof or disproof of the second issue ought to have been considered by the Judge, and not by the commissioner. We ask the Judge of the lower appellate Court to record a fresh finding on his second issue, based on the evidence on the record, and certify it to this Court within two months.

Issue sent down.

(1) 23 W.R. 287.
(2) 9 W.R. 83.
(3) 17 W.R. 282.
(4) 24 W R. 208.
(5) 24 W.R. 398.
(6) 16 M. 350.

24 B. 45=1 Bom. L.R. 509.

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APPEL-
LATE
CIVIL.

24 B. 45=
1 Bom. L.R
509.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Crowe.

DAMODARBHAT AND OTHERS (*Original Plaintiffs, Applicants*), *Appellants* v. BHOGILAL KARSONDAS AND OTHERS (*Original Defendants, Opponents*), *Respondents.** [5th July, 1899.]

Decree—Execution—Charity—Temple—Scheme of management—Failure of trustees to carry out—Mode of enforcing proper management—Removal of trustees—Practice—Civil Procedure Code (Act XIV of 1882), ss. 539 and 260.

A decree was passed in a suit under s. 539 of the Civil Procedure Code (Act XIV of 1882) settling a scheme of management of a certain temple. The scheme provided that the defendants and their heirs were, during their good conduct, to be retained as trustees and managers of the temple, and as such to maintain a proper system of worship, and to keep regular accounts, &c.. &c. Subsequently plaintiffs applied for execution of the decree specifically setting forth various clauses of the scheme which had been infringed by the defendants. The plaintiffs prayed that the defendants should be removed from their office and that the decree be enforced by their imprisonment and the attachment of their property. The Judge dismissed the application on the ground that the defendants could not be removed from the managership in execution proceedings, the plaintiff's remedy lying in a regular suit.

Held, that, in order to obtain the removal of the trustees, the procedure would be to amend the scheme of management so as to include a provision for the removal of the trustees if necessary, and not to file a separate suit.

[46] *Held*, also, that in so far as the decree ordered particular acts to be performed by the defendants in the management of the temple it might be enforced by the imprisonment of the defendants or by the attachment of their property or by both.

[F., 28 M 319 (327) = 15 M.L.J. 133; 24 Ind. Cas. 915; R., 16 C.L.J. 431 = 17 C.W. N. 941=17 Ind. Cas. 969.]

APPEAL against the decision of T. D. Fry, District Judge of Ahmedabad.

By the decree passed in this suit on the 30th September, 1896, a scheme was settled for the management of the temple of Koteshvar Mahadev (see I. L. R., 22 Bom., 493). The following were the principal provisions of the scheme :—

"1. The defendants and their heirs shall, during their good conduct, be the trustees and managers of the temple of Koteshwar Mahadev at Ahmedabad, and of the property belonging to the said temple.

"2. They shall, as Tapodhan Brahmins, be bound to maintain a proper system of worship. The doors of the temple shall be open daily from 7 A. M. till noon and from 2 to 9 P. M.

"3. The income of the temple consists of offerings made to the idol, of rents for temple buildings and temple lands, and of an annual cash allowance of two rupees from Government.

"4. The managers shall not allow persons of low caste to reside on the temple lands, either inside or outside the temple compound, and they shall not allow Kolis or Marwadis to reside within the temple compound.

"5. It shall be the duty of the managers to keep the compound and other temple lands in a clean and sanitary condition, and to keep the temple buildings in repair so far as the funds permit.

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* Appeal No. 30 of 1899.

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"6. One-third of the rents shall be expended in repairing the temple, compound wall, and buildings belonging to the temple. Out of the remaining income of the temple, the managers shall defray the temple expenses and maintain themselves.

"7. The managers shall keep regular accounts of all rents and of expenditure on repairs. The accounts shall be submitted to the District Court annually within one month after the Divali, and shall be examined by an auditor appointed by the Court at the cost of the managers. A copy of the accounts shall be supplied by the managers and shall be fixed to the notice-board of the District Court for the information of the public.

"These accounts shall be kept from the date of the High Court's decree.

"8. The scheme shall be subject to such modifications as may be made hereafter by the High Court on the application of the parties interested in the said temple."

In 1898 the plaintiffs applied for execution of the decree. They alleged specific instances of the misconduct of the defendants [47] and of the infringement of various clauses of the scheme of management. They prayed for the removal of the defendants from the management and for the attachment of their property and imprisonment.

The Judge dismissed the application, holding that, even if the plaintiffs had proved their allegations, the defendants could not be removed from their office in execution proceedings, and that the plaintiffs' remedy lay in a regular suit.

The plaintiffs appealed.

K. M. Ghodi, for the appellants (plaintiffs-applicants):—The Judge was wrong in rejecting our application for execution. He should have allowed execution of the decree in the usual way as prayed for. Section 260 of the Civil Procedure Code (Act XIV of 1882) is applicable, inasmuch as there was a wilful failure on the part of the defendants to carry out the provisions of the scheme—*Sha Karamachand* v. *Ghelabhai* (1). See *Protap Chunder Doss* v. *Peary Chowdhrain* (2). We have also presented an application to this Court for the amendment of the scheme.

Lallubhai A. Shah, for respondents Nos. 1 and 2 (defendants Nos. 1 and 2):—We are not the managing trustees and, therefore, cannot be held liable for any alleged misconduct on the part of those in actual charge of the temple. The case of *Sha Karamchand* v. *Ghelabhai* (1) was decided on a preliminary point, and the question whether or not s. 260 of the Civil Procedure Code applies to such a case was neither argued nor decided. Section 260 is not applicable, and the provisions of the scheme cannot be carried out by holding the trustees liable under the section. The only remedy open to the plaintiffs is to get the defaulting trustees removed from their office by filing a regular suit. The plaintiffs cannot move under s. 244 of the Civil Procedure Code.

M. K. Mehta, for respondent No. 3 (defendant No 3):—Section 260 of the Civil Procedure Code cannot apply unless the defendant is given an opportunity to carry out the provisions of the scheme.

JUDGMENT.

[48] CANDY, J.—In this case the plaintiffs applied to execute a decree which was passed in a suit under s. 539 of the Civil Procedure Code. The decree settled "a scheme for the management" of a certain temple at

(1) 19 B. 34.

(2) 8 C. 174.

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Ahmedabad, and the terms of the scheme in eight clauses will be found at pages 495-6 of the 22nd Volume of the Indian Law Reports, Bombay Series. Briefly, defendants and their heirs were, during their good conduct, to be retained as the trustees and managers of the temple, and as such to maintain a proper system of worship, not to allow persons of low caste to reside on the temple lands, to keep the compound, &c., clean, and the temple buildings in repair, to keep regular accounts from the date of the decree, which should be submitted annually to the District Court within one month after each Divali, an auditor being appointed by the Court to examine the same. The High Court decree settling the above scheme was dated 30th September, 1896.

The present application for execution of the decree was made by the plaintiffs on 27th June, 1898. They specifically went through the clauses of the "scheme" and averred that defendants were not maintaining a proper system of worship, were allowing persons of low caste to reside on the temple lands, were not keeping the compound clean or the buildings in repair, were not keeping proper accounts, and so forth. In some of the clauses of the application for execution, plaintiffs prayed that defendants be removed from their office: in some they prayed that the terms of the decree might be enforced by imprisonment of the defendants and attachment of their property. The District Judge, without considering the application in detail, dismissed it on the ground that even if the applicants proved their allegations, he did not consider that the defendants could be removed in execution proceedings, the plaintiffs' remedy lying in a regular suit.

The District Judge is possibly right in holding that as the scheme is at present framed, there is no provision for removing the defendants for proved misconduct. They are by the scheme appointed trustees and managers "during their good conduct;" they are directed to perform certain acts but no provision is made for their removal in case of their proved disobedience to [49] the orders of the Court as contained in the decree. We doubt whether the proper course, in order to remove the trustees, if necessary, is for the plaintiffs to bring a fresh suit under s. 539: the more convenient and obvious procedure is for the scheme to be amended so as to include in it a provision for the removal of the trustees, if necessary. Clause 8 allows of applications to be made to the High Court for the modification of the present scheme, and Civil Application No. 91 of 1899 is at present on our board for disposal. It is an application purporting to be made by the plaintiffs in accordance with cl. 8 of the scheme asking for such modifications therein as will ensure the defendants performing the duties enjoined on them by the decree.

But this does not fully meet the present application for execution. The District Judge is mistaken in supposing that the plaintiffs simply ask for the removal of the defendants: they ask, for instance, that according to cl. 7 of the scheme, regular accounts should be kept, submitted and audited. We are unable to hold that s 260 would not apply to such an application. It is clear that the decree has been made against defendants for the performance of a particular act: if they have had an opportunity of performing that act, and have wilfully failed to do so, the decree may be enforced by their imprisonment or by the attachment of their property or by both. We do not see how the District Judge can refuse to call on defendants to produce the accounts which the High Court ordered should be kept from 30th September, 1896, and should be submitted within a certain time every year and should be audited. If the defendants—or such of them as

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are responsible for the accounts from 30th September, 1896—wilfully fail to produce those accounts, we do not see why they should not be held to be in contempt of the Court's orders.

For these reasons, without expressing any opinion on the merits of the plaintiffs' various allegations in their application, we reverse the order of the District Judge and remand the application to him to be dealt with according to law. He will deal with the matter of costs, including costs of this appeal.

Order reversed and application remanded.

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24 B. 50 (P.C.)=2 Bom. L. R. 516=4 C.W.N. 23=26 I.A. 199=7 Sar. P.C.J. 659.

[50] PRIVY COUNCIL.

PRESENT:

Lord Macnaghten, Lord Hobhouse and Sir Richard Couch.

[On appeal from the High Court at Bombay.]

CHOTALAL LAKHMIRAM AND OTHERS (*Appellants*) *v.* MANOHAR GANESH TAMBEKAR AND OTHERS (*Respondents*). [28th April, 1899.]

Charitable trust—Decree, form of—Account to be taken first—Matters to be considered in framing scheme.

The plaintiffs sued as persons interested in the maintenance of a religious and charitable institution, and prayed that the defendants, as recipients of the offerings at the idol's shrine, should be made accountable, as trustees, for the right disposal of the property thus acquired. They also prayed for an account, a receiver, for the removal of the shevaks, the defendants, from their office, and for the settlement of a scheme for future management. The High Court directed the District Judge (1) to take steps either by appointing a receiver, or otherwise, in his discretion, for guarding the property of the temple; (2) to take an account of the property and of the receipts and disbursements of the temple; (3) to make the requisite orders for recovering property appropriated by the shevaks; and (4) to draw up a scheme for the future management of the temple and its funds, regard being had to the established practice of the institution and to the position of the shevaks and of other persons connected with it.

Held, that the decree was right, no further directions being necessary; the first thing to be done being to take an account of the trust property.

[R., 37 C. 128=10 C.L.J. 355 (F.B.)=14 C.W.N. 18=3 Ind. Cas. 642; 2 C.L.J. 460 (472).]

APPEAL from a decree (3rd May, 1887) (1) of the High Court, reversing a decree (28th November, 1882) of the District Judge of Ahmedabad.

This suit was brought on the 3rd May, 1880, by the late Manohar Ganesh Tambekar and four other plaintiffs, under s. 539 of the Civil Procedure Code, with the consent of the Advocate-General, the first claiming as hereditary patron and manager of the temple.

Sri Ranchod Raiji, an institution of the Vaishnava Hindus in the Dakor District, and the other plaintiffs claiming as residents on the temple property entitled to secure its trust. The defendants, now appellants, were the shevaks, or hereditary ministering priests, who conducted the rites and ceremonies for, and on behalf of, the numerous worshippers, who made offerings of money and valuables at the shrine.

(1) 12 B. 247.

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The first plaintiff having died was now represented by Gopal Manohar a minor, who proceeded by his guardian, the Talukdari [51] Settlement Officer of Ahmedabad. The first defendant also having died, was represented on the record by his son and heir, Chotalal Lakhmiram, a minor, appearing by his mother and guardian, Bai Diwali.

The foundation was an ancient one, dating, according to tradition, from the 12th century. Brahmans having ministered there, the office became hereditary in their families, and the name of "shevak" was taken. About the middle of the 18th century two villages were assigned by the then ruling power for the benefit of the temple. Both inams were stated in the appellants' case to have been granted in the name of the head of a family spoken of as the Tambekar, now represented by the first plaintiff, respondent. Until 1841, when the Government disconnected themselves from religious institutions, these were in the care of the revenue officers. By an order of 3rd June, 1841, the management of them was handed over to Ganpatrav Manohar of that family. The rights of the Tambekar and those of the shevaks were involved in much litigation down to 1870.

The principal question on this appeal was whether the absolute ownership of the shevaks as to the offerings made to the deity, and other moveables, should have been determined before the making of any decree for an account, or for a scheme of future management of the trust.

In the suit, the main subject of dispute had been the rights of the shevaks in respect of this property offered by the worshippers, and a large amount of evidence was on the record relating to the question of their ownership in this respect.

The plaint alleged that the shevaks were paid wages out of the temple funds, and that they had no right to appropriate, as they had done in violation of an agreement of 1772, articles offered to the deity, and that they had no right to refuse to the plaintiff inspection of the accounts. The prayer was for an account, payment into Court of any balance found due, removal, if necessary, of the shevaks, an injunction, a receiver, and the preparation of a scheme for the management of the trust.

The defendants in their answer set up that they were the owners of the whole institution, and of all its property, including the offerings of worshippers and donors generally.

[52] The principal issues fixed by the first Court were whether the plaintiffs had an interest entitling them to sue, and whether they had shown any breach of trust by the defendants. Whether the latter had been shown to be bound to render accounts; and whether they were owners to any, and what extent of the temple property, and offerings made.

The District Judge dismissed the suit. He went upon the short ground that only the first plaintiff had a direct interest in the suit, within the meaning of s. 539 of the Civil Procedure Code, and that, therefore, the suit was not rightly brought.

That decree was reversed by the High Court (West and Birdwood, JJ.) whose judgment is reported at length in Indian Law Reports, 12 Bom., 247, where the reasons for the decree herein stated are fully given, as well as all material details.

The Judges were of opinion that all the plaintiffs had a sufficient interest, and that there was a trust which the Court had jurisdiction to enforce.

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The conclusion of their judgment was as follows :—

"For the reasons we have given, we must reverse the decree of the District Court, and order that the costs of the suit and appeal be borne by the defendants. The District Judge will take steps, either by arpointing a receiver, or otherwise in his discretion, for guarding the property of the temple without disturbance of its services. He will take an account of the property and of the receipts and disbursements of the temple, such latter account being carried back to the year 1872 and beginning with such property as can be ascertained to have been then in existence. He will make the requisite orders for recovering property misappropriated and sums due to the foundation as well from others as from the shevaks or any of them. He will draw up a scheme for the future management of the temple and its funds, giving due consideration to the established practice of the institution and to the position of the shevaks and of other persons connected with it. Lastly, should there appear to be a surplus of revenue that may reasonably be counted on as durable, he will frame a scheme for the disposal of such surplus, or a part thereof, consistently with the general purpose of the foundation and [53] complementary to the arrangements made under this Court's orders in *Manohar* v. *Keshavram* (1) on the appeal in the suit brought by the shevaks against Ganesh Manohar as defendant."

The decree followed the terms of the judgment.

On this appeal,

J. D. Mayne and *A. K. Donald*, for the appellants, argued that there was error in the judgment of the High Court. The evidence, taken as a whole, had been to the effect that by the custom and practice of the religious institution the shevaks had power to deal with the offerings of the worshippers, and had, to a considerable degree, the ownership of the moveables. There could hardly be a decree for an account until the question raised by the issue whether they were owners or not should have been decided. This applied also to the direction for the settlement of a scheme of management. The ancient custom of the temple should have been regarded. The decree should have declared that, subject to the obligation upon the shevaks to perform the religious ceremonies and apply all the offerings suitable for the worship and the service of the deity, all the moveable property belonged to them. The nature of the scheme of management depended upon the rights of the appellants having been previously determined. Moreover, to render the direction for that scheme justifiable, it should have been accompanied by distinct findings for the guidance of the lower Court as to the immemorial customs alleged to regulate the present practices. It was also to be observed that any relief upon an account dating from so far back as 1872 would be, to some extent, barred by limitation. It was the fact that a receiver had been appointed twelve years ago. But it was hardly the case that the whole of the subordinate questions between the parties would range themselves under the decree which had been made for an account and a scheme.

J. Jardine, Q. C., and *A. V. Frere*, who appeared for the respondents, were not called upon.

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(1) 12 B. 267 (*n*).

JUDGMENT.

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Their Lordships' judgment was then delivered by

LORD MACNAGHTEN.—The suit in which this appeal has been brought was a suit for the administration of a trust for religious [54] purposes in connection with the temple of Sri Ranchod Raiji, in the district of Dakor.

The plaintiffs claimed to have a sufficient interest to support the suit. The defendants originally disputed the plaintiffs' title to sue and denied that there was any trust. They alleged that they were "owners of the god, and of all his property."

The Judge of first instance dismissed the suit on technical grounds, but on appeal to the High Court a decree was made directing that a scheme should be settled for the administration of the trust. An account was to be taken "of the property, and of the receipts and disbursements of the temple, such latter account being carried back to the year 1872, and beginning with such property as can be ascertained to have been then in existence." Then the learned Judge was directed to "draw up a scheme for the future management of the temple and its funds, giving due consideration to the established practice of the institution, and to the position of the shevaks, and of other persons connected with it."

From that decree the appeal has been brought. In their printed case the same claim was made by the appellants which was set up by them as defendants in the suit. They submitted that the suit ought to be dismissed with costs. Mr. Mayne, who opened the case very fairly, was compelled to admit in the course of the discussion that he could not maintain that position. He admitted that there was a religious foundation, and that there must be a scheme. He desired, however, that certain questions should be determined before entering upon the consideration of the scheme.

It appears to their Lordships that that decree is perfectly right, and that the first thing to be done is to take an account of the trust property. Much must depend upon the result of that account. Until the trust funds are ascertained, it seems impossible that any scheme can be settled. The decree does not prejudge anything. It directs that due consideration is to be given to the established practice of the institution and to the position of the shevaks. It appears to their Lordships that the appellants cannot ask for any direction more in their favour.

[55] The result is that their Lordships think that the appeal must be dismissed, and they will humbly advise Her Majesty to that effect; the appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitor for the appellants :—Mr. *Arthur Cheese.*

Solicitors for the respondents :—Messrs. *Ranken, Ford, Ford and Chester.*

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ADMIRALTY JURISDICTION.

Before Mr. Justice Russell.

THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY AND ANOTHER (*Plaintiffs*) *v.* THE S S. "CASHMERE," HER CARGO AND FREIGHT (*Defendants*) *

AND

RAFFIN AND OTHERS, (*Plaintiffs*) *v.* THE S.S. "CASHMERE," HER CARGO AND FREIGHT, (*Defendants*). † [20th and 21st April, 1899.]

Shipping—Salvage—Amount of salvage awarded—Mode of estimating salvage services—Allocation of salvage amongst officers and crew—Bail—Costs.

On the 13th August, 1898, the S. S. "Cashmere," being (as found by the Court) in a position of risk and hazard, which by a change in the weather might have at once become one of danger, was in need of assistance which the "Naseri" afforded her. The services, however, rendered by the "Naseri" were not of an extraordinary or protracted character. The owners of the "Naseri" sued claiming Rs. 1,00,000 for salvage services and the master and crew of the "Naseri" filed a second suit claiming Rs. 50,000. The defendant ship paid into Court Rs. 5,000 for the owners of the "Naseri" in the first suit, and Rs. 2,257 for the crew in the second suit. The value of the S.S. "Cashmere" was Rs. 78,000 and that of the cargo on board was Rs. 56,510.

Held, that the amount paid into Court by the defendant ship was sufficient for the salvage services rendered.

Held, also, that the cargo was liable in the same proportion.

Principles regarding (*a*) salvage generally, (*b*) allocation of salvage amongst officers and crew, (*c*) costs, and (*d*) bail discussed.

SUITS for salvage. The first suit was by the owners of the S. S. "Naseri" claiming Rs. 1,00,000 for services rendered by the [56] "Naseri" to the "Cashmere." The second suit was brought by the master and crew of the "Naseri." They claimed Rs. 50,000.

On the 1st August, 1898, the "Cashmere," a crew steamer of 1,695 tons nett register of the value of Rs. 78,000 with a cargo on board of the value of Rs. 56,510, was on her voyage from Massowah to Bombay, when her rudder was carried away to the extent of about fifteen feet from the bottom of the rudder. The captain then tried to steer with a hawser, but found it was impossible. He then stopped the engine and set sails and kept in a northward course. On the 3rd August he fell in with the "Clan Shaw," which rendered assistance until the 6th August, and then left. While in the "Clan Shaw's" company the captain had gone betwen 230 and 240 miles towards Bombay, and was then about 258 miles from that port. It was then (as stated by the captain) blowing a strong monsoon but nothing unusual.

At noon on the 12th August, the "Cashmere" was 82 miles from Bombay. The wind had then moderated very much, and there was only a swell with a light breeze. Here she sighted the "Haddon Hall," but did not get assistance from her. At 2 o'clock A.M., on the 13th, when between 45 and 50 miles from Bombay, the "Naseri" was sighted. There was then a fresh breeze and a heavy sea from west-south-west. The "Naseri" was a steamship of 911 tons nett register of the value of Rs. 1,75,000 and had a cargo of the value of about six lakhs,

* Admiralty Suit No. 1 of 1898. † Admiralty Suit No. 2 of 1898.

and 45 passengers on board. She had left Bombay on the 12th August for the Persian Gulf, and had got permission to deviate a little from her course and keep a look out for the "Cashmere." On getting within sight of each other the two vessels exchanged signals and attempts were made by the "Naseri" to tow the "Cashmere," first by a steel-wire hawser and then by a chain, but both broke. The captains then agreed that the "Cashmere," whose engines were in good order, should tow the "Naseri," and the "Naseri" was, therefore, made fast to the stern of the "Cashmere" in order to act as a steerage power upon her.

The remaining facts of the case are stated in the following passage taken from the judgment:—

[57] "Accordingly the towage gear was shifted from aft to forward of the 'Naseri,' and here again a line was thrown to get the 'Cashmere's' hawser. After the 'Cashmere's' wire hawser had been hauled on board the 'Naseri' she came upon the starboard quarter to the 'Cashmere' to get the stream chain, and in the course of this operation the 'Naseri' collided with the stern of the 'Cashmere' and smashed a boat and about 15 to 20 feet of her bulwarks. The captain of the 'Naseri' says that his starboard bow caught the port quarter of the 'Cashmere,' but although the captain of the 'Cashmere' says this damage was done by the negligence of the 'Naseri,' I really do not think, upon the evidence in the case, I would be justified in holding that this was so. It is perfectly true, no doubt, that the 'Naseri's' captain was on the forecastle while this operation was going on, and a subordinate on the bridge, but I cannot find from that fact alone that there was negligence on the part of the captain of the 'Naseri.' But I will deal with this matter more particularly hereafter. According to Captain Raffin, shortly after the 'Cashmere' began to tow him, his stream chain parted, but Captain Souter says that one of the chains slipped, but did not actually break. Whatever happened, however, the 'Cashmere' at 3-30 or 3-45 P.M. when 44 miles off Bombay began to tow the 'Naseri' towards Bombay and arrived off the outerlight ship at about 11 P.M. on the 13th. After waiting for about an hour for the pilot they proceeded up the harbour, in the course of doing which the stream chain parted, but the wire hawser held, and eventually the two ships anchored off middle ground at 3-45 or 4 A.M. of the 14th August. The above are, shortly, the facts of the case."

Scott and *Lowndes*, for the plaintiffs.

Lang (Advocate-General) with *Branson* and *Raikes*, for the defendants.

The following authorities were cited:—Kay on Shipping (2nd Ed.), ss. 720, 721; *The Golondrina* (1); *The Chetah* (2); *The Glenduror* (3); *The Amerique* (4); *The Thomas Allen* (5); *The Cleopatra* (6); **[58]** *The Kenmure Castle* (7); *The Accomac* (8); *The Spree* (9); *The Lady Jocelyn* (10); *The Rathbone* v. *The Secretary of State for India* (11); *The Chilka* (12); *The Champion* (13). As to costs occasioned by excessive bail having been compelled, the counsel cited *The George Gordon* (14).

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(1) (1867) L. R. 1 Adm. and E. 334.
(2) (1868) L. R. 2 P.C. 205.
(3) (1871) L. R. 3 P. C. 589.
(4) (1874) L. R. 6 P. C. 468.
(5) (1886) 12 Ap. Ca. 118.
(6) (1878) 3 P. D. 145.
(7) (1882) 7 P.D. 47.
(8) (1891) P. 349.
(9) (1893) P. 147.
(10) 2 M.H.C.R. 355.
(11) Unreported.
(12) 7 B. 196.
(13) 17 C. 84.
(14) (1884) 9 P.D. 46.

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ADMIRALTY JURISDICTION.

24 B 55 = 1 Bom. L.R. 557.

JUDGMENT.*

RUSSELL, J. (after stating at length the facts of the case continued) :—The plaintiffs have, in my opinion, exaggerated largely the value of the services done by them, and the state of the weather and other circumstances under which that aid was rendered. The defendants, on the other hand, have unduly tried to minimise the value of the services done. I shall endeavour myself to steer a middle course between these two lines of conduct. The first and the most important question in salvage cases is the amount of risk to which the salved ship was exposed. (See *Janet Court* (1), although in *The Werra* (2) it was held that the Court first considers the value of the property saved, and then the actual perils.) I, therefore, deal with this point first. On the one hand, it is clear to my mind that the "Cashmere" was really in want of assistance. She had signalled for it continuously. She had got it for two days from the "Clan Shaw." She had asked for it, but failed to get it from the "Haddon Hall." She asked for and got it from the "Naseri." Captain Souter's evidence on this point, to my mind, is not satisfactory. Furthermore, the "Cashmere" was not only rudderless but had on two occasions failed to extemporise steering apparatus. Next, the time of the year was the monsoon, and, although possibly weather charts and nautical handbooks may say that after the middle of August the sting of the monsoon is gone, it is a matter of common knowledge that high seas and heavy winds are liable to occur. Another matter to be considered is that the "Cashmere" was as light as she could be with safety. She was only drawing about 14' 7" forward and 17' 7" aft, her mean draught being **[59]** 22' 6" when deeply loaded. Her height out of the water would obviously render her more unmanageable. It is, to my mind, impossible to say that the position of the "Cashmere" was not one of risk and hazard, and might by a change in the weather at once become one of great danger. As against this, however, the views of those on board the "Naseri" are, to my mind, somewhat extravagant. As regards the weather, it appears to me that it was not more than the ordinary monsoon weather which may be expected between Aden and Bombay in the month of August. The wind was W.S.W., and, to use the words of Mr. Barron, the chief officer of the "Naseri," was a fresh breeze. The sea according to him was a stiff sea or good fresh sea. Therefore, as regards wind and sea there was nothing to render the salvage services very hazardous. Moreover, it must be remembered that the "Cashmere" had from the time she left the "Clan Shaw" down to the time that she fell in with the "Naseri," been steadily making her way towards the direction she wanted to go. It seems to me that, although she may not have been actually able to get up into Bombay harbour, she would have been able, unassisted, to get within the arc of light either of the Prongs or of Kennery Island. It has been suggested that she must have gone on a lee shore and not have been able to anchor. I confess I see no foundation for these suggestions. Her engines were in perfectly good working order. She had got four anchors, two of them bent on to their cables, one on her fore castle deck ready, and another spare one. There does not appear to me to be any reason to suppose that her anchors and cables would not have held. It must especially be borne in mind that the "Cashmere" was not in what has been described as "a condition of impotence" such as she might

*[For a fuller text of the judgment, see 1 Bom. L. R. 567 at p. 568.—ED.]

(1) (1897) P. 59.

(2) (1886) 12 P. D. 52.

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that she must inevitably have been taken by the current somewhere north of Bombay. On the other hand, witnesses are called, and authorities and charts produced, to show that she must have been taken to the southward of Bombay. In this [60] conflict of authorities I cannot say that I have formed an opinion one way or the other.

I would sum up the position thus—The "Cashmere" without a rudder and approaching Bombay was in need of assistance which the "Naseri" afforded her, and in so doing conferred meritorious services upon her. At such time the position of the "Cashmere" was one unquestionably of risk and might possibly have become one of danger, but the services rendered by the "Naseri" were not of an extraordinary or protracted character. I am, therefore, of opinion that the "Naseri" is entitled to salvage reward and in the usual course to salvage from all the properties salved. I would here refer to a point made by Mr. Scott, *viz.*, the absence of the scrap log. No doubt its absence is to be regretted, but I cannot find that it has been wilfully suppressed. The ship's log unquestionably is kept in an utterly incomplete way; moreover, the Ex. No. 4, Captain Souter's log, has a peculiarly clean appearance, but having seen Captain Souter in the witness-box I cannot find that he has had anything to do with the suppression of the scrap log, or that he has manufactured Ex. No. 4. It is quite possible, as suggested by the Advocate-General, that the scrap log did contain entries as to the stranding of the "Cashmere" in the Red Sea which the chief officer was not anxious should be disclosed.

I now deal shortly with the pleadings and proceedings in the case.

The plaint by the owners of the "Naseri" was filed on the 16th August, 1898, and that by her master and crew on the 18th. In the former a sum of one lakh was claimed; in the latter, Rs. 50,000.

I agree with the Advocate-General's observations about these claims. They are, to my mind, excessive. I think also it was unnecessary to file two suits. The written statements of the defendants were filed on the 7th of October, on which date they paid in the sums of Rs. 5,000 and Rs. 2,257, respectively. The cargo owners did not put in any written statement, and have taken no part in the proceedings, but the exhibits from M to W inclusive satisfy me that they were duly served and have [61] had ample notice of the proceedings. At the hearing I alluded to an amendment of the written statements by an alternative assertion that, in the event of the services being held to be salvage, a sufficient sum was paid in. Although it appears from the evidence of Captains Potts and Macaulay that they calculated the amounts paid in on the basis of towage, I do not think that the defendants should be held bound by those gentlemen taking what I find to be an erroneous view of the services rendered. At all events, the Advocate-General, the defendants' counsel, admitted unreservedly that the services were salvage services.

I next deal with the law applicable to the whole state of facts.

The defendant ship has paid into Court the sum of Rs. 5,000 for the owners of the "Naseri" and Rs. 2,257 for the crew. The question is: Is that sufficient so far as regards the defendant ship?

It must be remembered that salvage services have been described as giving rise to an equitable claim. It has also been held that, in dealing with the amount, all the circumstances must be taken into consideration. In s. 720 of Kay on Shipping (2nd Ed.) the various elements to be considered in salvage cases are set out. I deal with them, so far as applicable, *seriatim*. The value of the property saved, I take to be: ship Rs. 78,000, cargo Rs. 56,510. As to the actual perils from which the "Cashmere"

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and cargo were saved, I say she was in a position of risk which by change of weather might have become one of danger. As to the possibility of assistance from elsewhere, seeing that she met the "Naseri" within twenty-four hours of her leaving the "Haddon Hall," I think it may fairly be said that the probability of her falling in with another steamer was considerable. As to the state of the weather when the services were rendered, it was ordinary monsoon weather such as is usually met with in the middle of August near Bombay. With regard to the degree of risk and peril incurred by the salvors, I do not consider that with proper seamanship any such was incurred. With regard to the degree of labour and skill exerted by them I cannot think it was of the highest character. As regards the value of the "Naseri" and her cargo, the latter was, I have said, six lakhs. The value of the former is Rs. 1,75,000. **[62]** As regards the time occupied by the services I find that the "Cashmere" commenced to tow the "Naseri" at 3-30 on the 13th, and stopped about the same hour next morning, but of course she had been trying to assist her before that as above set forth. As regards injury and loss occasioned to the salvors, I do not find any.

I now give a tabular abstract of the cases referred to by counsel on both sides for convenience of reference :—

Ships.	Citation.	Value of Ship, &c.	Amount awarded.	Remarks.
	IN ENGLAND.			
"The Golondrina" ...	(1867) L. R. 1 Adm. and E., 334.	£26,000	£1,800	
"The Chetah" ...	(1868) L. R. 2 P.C., 205	£50,000	£3,150 reduced to £1,500	
"The Glenduror" ...	(1871) L.R 3 P. C., 589.	£46,000	£1,000 increased to £2,000	Very meritorious services life saved.
"The Amerique" ...	(1874) L. R. 6 P.C., 468.	£190,000	£30,000 reduced to £18,000	Derelict.
"The Thos. Allen" ...	(1886) 12 App. Ca., 118.	£126,775	£12,000 reduced to £7,500	
"The Cleopatra" ...	(1878) 3 P. D., 145.	£25,000	£2,000	
"The Kenmure Castle."	(1882) 7 P. D., 47.	£75,000	£4,000	10 days' work.
"The Accomac" ...	(1891) P., 349.	£22,138	£1,000 increased to £1,800	
"The Spree" ...	(1893) P., 147.	Value not given.	£12,000 paid	
	IN INDIA.			
"The Lady Jocelyn" ...	(1865) 2 Mad. H.C.R., 355.	£120,000	Rs. 12,000	9 hours' work.
"The Rathbone" v. Secretary of State for India.	Unreported (*vide* I.L.R. 7 Bom., 207).	£160,000	Rs. 26,000	5 days' work.
"The Chilka" ...	(1883) 7 Bom., 196.	Rs. 3,00,000	Rs. 34,000 paid to ship; Rs. 10,000 awarded to crew.	11 days' work.
"The Champion" ...	(1889) 17 Cal., 84.	£43,000	£1,500 raised to £2,400	

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While agreeing with the proposition of law contended for by Mr. Scott, and stated in s. 721 of Kay on Shipping (2nd Ed., p. 589), *viz.*, that in fixing a proportion of the value the Court usually gives a smaller proportion where the property is large, and a larger proportion where the value is small ; still looking at the amount awarded in those cases I am of opinion that the sum paid in by the defendant ship is amply sufficient. It is considerably more *pro rata* than was paid in the cases I have referred to above. As regards, therefore, the defendants, the "Cashmere" and her freight, I am of opinion that a decree should be passed for the plaintiffs in these two suits, respectively, as against the defendant ship and freight for Rs. 5,000 and Rs. 2,257, respectively, **[63]** the plaintiffs to have their costs down to 7th October, 1898, inclusive. The plaintiffs respectively to pay the costs of the defendant ship and freight after that date.

I am of opinion that the amount paid in is sufficient to cover all the charges which the plaintiffs may have been put to as regards the arrest of the "Cashmere," &c. One set of costs, if necessary, to be set-off against the other.

As regards the cargo on board the "Cashmere," which, as I have said before, was of the value of Rs. 56,510, the matter is, of course, on a different footing. By maritime law all property saved from danger is liable individually for its proportion of the salvage awarded against the whole of the adventure to which it belongs. Therefore the cargo on board the "Cashmere" is individually liable. The owners of that cargo although they had notice of these proceedings as I have pointed out above, in the usual way, have not paid anything into Court, and have not appeared. I have, therefore, to decide what, in my opinion, the cargo ought to pay ; and I think that a proper amount would be the sum of Rs. 5,257. I have arrived at this figure by the ordinary rule of three as applied to the sum paid in by the defendant ship. If I have erred on the side of liberality with regard to the cargo, the cargo owners ought to have appeared to prevent such error. I am aware that in valuing the cargo all necessary expenses attendant on transhipping and storing the goods and their valuation ought to be deducted as well as the freight and customary charges, *e.g.*, brokerage, weighing and commission. The cargo owners have not chosen to show me what should be deducted, and I must treat the cargo as of the value as aforesaid proved before me. But, of course, if either party wish or insist, the matter must be referred to the Commissioner.

With regard to the claim of the "Cashmere" for damages alleged to have been caused by the "Naseri" running into her, I do not think the evidence would justify me in coming to any finding. The occurrence, it seems to me, was either an inevitable accident which happened in the performance of the services and was one of the necessary risk of the undertaking, and created no liability on the part of either party, or, as I am inclined to think, it was **[64]** a bit of bungling on the part of each of the two captains, and I think I may safely say that, if the plaintiff company had taken out the sum of money paid in by the defendant ship, we should have heard nothing more of this claim for damages. Moreover, when Captain Macaulay says the damage would come to Rs. 2,000, and Mr. Ditchbourne says it would come to Rs. 9,500, I do not see how I could assess the proper amount.

I must now proceed to allocate the sums paid into Court and awarded as above. I do not propose to interfere with the allocation as already carried out by the defendant ship, which, therefore, will stand as follows, *viz.*, Rs. 5,000 to the owners of the "Naseri" and Rs. 2,257 to her crew.

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I allocate the Rs. 5,257 in respect of cargo as follows :—Rs. 3,622 to the owners of the "Naseri," and Rs. 1,635 to the crew. The owners of the "Naseri," will, therefore, get altogether Rs. 8,622, and her crew will get Rs. 3,892. Of this sum I would allot to Captain Raffin Rs. 700, to First Officer, C. H. Barron, Rs. 400, to the Second Officer Rs. 250, and to the Third Officer Rs. 200, to Govind Jacko, Serang, for his conduct which deserves special recognition, Rs. 200, to the three engineers Rs. 250, Rs. 180 and Rs. 150, respectively, the balance to be divided amongst the rest of the crew according to their rating. But in accordance with the usual practice (see *The Spree* (1)) the non-navigating members of the crew get only one-half.

With regard to the costs of this suit, I have dealt with them so far as the defendant ship is concerned, but the defendants cargo-owners must pay the plaintiffs the cost of and incidental to the first day's hearing, as the plaintiff's case as against the cargo must have been proved, but I do not think the cargo should bear any more costs. The cargo lately on board the "Cashmere" or such portion of it as may be sufficient to satisfy the amount above awarded and costs must be sold to pay the amounts. After taxation of costs against the cargo, notice under Rule 15 of Admiralty Rules to be given to consignees of cargo.

The bail given by the defendant ship will be vacated and the title-deeds handed back to their owner.

[65] With regard to the question of costs, his Lordship recorded the following judgment on the 21st April, 1899:—

I have considered the question of the point raised by Mr. Branson yesterday with regard to the costs the owners of the "Cashmere" have been put to by reason of excessive bail having been compelled. In a matter of this sort the Court must, of course, allow for the plaintiffs taking a generous view of the value of their services, but I think in this case the bail that was compelled, although it was in the three suits, was excessive. Mr. Justice Butt says in "*The George Gordon*" (2): "Parties should not arrest a ship for an exorbitant sum, and if they do, it is no excuse to say that the defendants did not, as it were, struggle to get free by applying to have the bail reduced." This case was directly followed in "*The Champion*" (3), where the costs occasioned by the bail required being excessive were directed to be paid by the promovents. I think in the present case the plaintiffs ought to pay the costs of and incidental to bail being compelled beyond the sum of Rs. 50,000.

Decree accordingly.

Attorneys for the plaintiffs :—Messrs. *Crawford, Brown and Co.*
Attorneys for the defendants :—Messrs. *Smetham, Bland and Noble.*

(1) (1893) P. 147. (2) (1884) 9 P.D. 46. (3) 17 C. 84.

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Before Mr. Justice Russell.

HUNSRAJ PURMANAND (*Plaintiff*) v. RUTTONJI WALJI AND OTHERS (*Defendants*).* [4th 7th and 8th September, 1899.]

Forgery—No title through forgery—Shares, debentures, Government promissory notes having a forged indorsement—Holder has no title—Government promissory notes surrendered for renewal—Title to renewed notes—English Bills of Exchange Act (Stat. 45 and 46 Vict., c. 61)—Negotiable Instruments Act (XXVI of 1881)—Holder in due course.

The plaintiff as administrator of Purmanand Cooverji, a deceased Hindu, sued to recover from the defendants (thirty-one in all) certain shares, debentures and [66] Government promissory notes which he alleged belonged to the estate of the deceased, but which the first four defendants had stolen, and, by means of forged indorsements, sold to the other defendants and received the purchase-money. Those of the defendants who had purchased the Government promissory notes contended that as innocent purchasers for value they were entitled to retain them.

Held, that the plaintiff was entitled to recover all the shares, debentures and Government promissory notes from the defendants.

Some of the Government promissory notes on which the forged indorsements had been made had been surrendered for renewal and fresh promissory notes issued in their place.

Held, that the plaintiff was entitled to recover the renewed notes from the holders.

[**F.**, 28 A. 428 (430)=3 A.L.J. 203=26 A.W.N. 77; 36 C. 239 (250); **R.**, 12 C.L.J. 470 (472)=8 Ind. Cas. 796; **D.**, 32 C. 799 (815)=9 C.W.N. 443.]

THE plaintiff as administrator of the estate of his father Purmanand Cooverji sued the defendants (thirty-one in number) to recover certain shares, debentures and Government promissory notes belonging to the estate. He alleged that after his father's death his (plaintiff's) step-mother (since deceased) and the first four defendants had fraudulently taken the share certificates, debentures and Government promissory notes out of a safe in which they had been kept, and had, by means of forged indorsements, sold them to the various defendants and had received the purchase-money. The particulars of the various securities were set forth in a schedule annexed to the plaint.

Six of the Government promissory notes, each for Rs. 1,000, bearing (as was alleged) forged indorsements purporting to be indorsements by the deceased Purmanand Cooverji to Narrondas Ruttonsey (defendant No. 2), had been sold by the said Narrondas Ruttonsey in July, 1898, to one Premchand Roychand.

Of these notes, two (Nos. 1322 and 5418) had been subsequently sold by Premchand Roychand to the Bank of Bombay (defendant No. 23). The Bank had got the note No. 1322 renewed and now held a new note No. 003300 in its place. In this new note the Bank of Bombay was the payee. The old note (No. 1322) was surrendered by the Bank to the Public Debt Office, where it was retained. The plaintiff prayed that the Bank should be ordered to indorse and hand over to him this new note (No. 003300) as well as the note No. 5418 together with all interest received in respect of them.

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[67] Another of these six notes (No. 5357), which had been purchased by Premchand Roychand, had also been surrendered and a new note (No. 007850) had been issued in its place, the old one being retained by the Public Debt Office. This new note had been purchased in the open market by Sir Dinsha Manekji Petit and had been presented by him to the trustees of Petit Orphanage (defendants Nos. 24, 25 and 26) in Bombay. The plaintiff prayed that this note should be indorsed and handed over to him.

The defendants, who had purchased the shares, did not defend the suit. They appeared in person and stated to the Court that they had purchased the shares in the open market for value and without notice or knowledge that any of the signatures on the share certificates were forged. They submitted to any order that the Court might make.

As to the Government promissory notes, the Bank of Bombay (defendant No. 23), who as above stated held two (Nos. 5418 and No. 003300) and the trustees of the Petit Orphanage (defendants Nos. 24, 25 and 26), who held one, *viz.*, No. 007850, put the plaintiff to proof of the alleged forgery, and alleged that they and their vendors were holders in due course of the said notes, and denied that the plaintiff was entitled to recover them.

Kirkpatrick and *Robertson*, for the Bank of Bombay; *Branson* and *Viccaji* for the trustees of the Petit Orphanage:—The claim against us is to recover Government promissory notes. We contend that we are innocent holders for value of these notes, *i.e.*, holders in due course (s. 9 of Act XXVI of 1881), and that, therefore, we have a good title as against the plaintiff. The law on the point is laid down in the Negotiable Instruments Act (XXVI of 1881) amended by Act II of 1885. This Indian Code is to be construed without reference to English law—*Norendra Nath Sircar* v. *Kamalbasini Dasi* (1). It applies to Government promissory notes: see Act XIII of 1886. The law as to the effect of forged indorsements as laid down by this Indian Code is different from English law. The English Bills of Exchange Act (Stat. 45 and 46 Vict., c. 61, s. 24) deal separately and expressly with the case of forgery, and it provides that no title shall be obtained through a forgery except in [68] one specified class of cases. But where in the course of dealings with a bill or note some offence other than forgery has been committed, a good title may be obtained by a holder in due course as against the true owner (see ss. 29 and 30 of English Act). The effect of forgery is thus dealt with separately by English law. But Indian law (Act XXVI of 1881) makes no distinction between the effect of forgery and that of any other offence. It has no section corresponding to s. 24 of the English Act. The only section in it which deals with the matter is s. 58, which gives the holder in due course a good title no matter what offence has been committed in course of negotiation. Offence inciudes forgery. See Penal Code Act XLV of 1860, s. 40. The title of a holder in due course is again asserted in s. 118, cl. (*g*), of the Negotiable Instruments Act. When that Act was passed, the Indian Legislature had before it the report of a then recent case, in which the effect of a forged indorsement had been fully discussed, so that the difference between the Indian and English Act cannot have been accidental—*Bank of Bengal* v. *Mendes* (2). We contend that by Indian law once a holder is shown to be a holder in due course he has a good title notwithstanding a forged indorsement. They also cited *London Joint Stock Bank* v. *Simmons* (3).

(1) 23 I.A. 18=23 C. 563. (2) 5 C. 654. (3) (1892) Ap. Ca. 201.

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As to the renewed notes held by these defendants, the plaintiff cannot be entitled to them. He may be entitled to the old notes which have been surrendered, but the new notes are a new contract by the Government with the new payee. There is no forged indorsement on these new notes, and the plaintiff has no right to them. If the present holders of these Government notes are now declared to have no title, the effect will be disastrous. The public buy Government notes freely in open market. Trustees invest trust money in them. But these buyers know nothing of the previous holders. They cannot verify prior indorsements. The prior indorsements may be on a note which has been surrendered for renewal and cannot even be referred to by the buyer. If a single forged indorsement is to destroy the title of any subsequent innocent holder, no one will venture to buy Government notes.

[69] *Macpherson* (with *Scott*, Acting Advocate-General, and *Davar*), for plaintiff.—There is no difference between the English and Indian law with respect to the effect of a forged indorsement. Purmanandas Cooverji was the holder of these notes at his death, but they were never negotiated afterwards. They could only be negotiated by indorsement and delivery (s. 46). He did not indorse them to Narrondas Ruttonsey, and the latter, therefore, never became the holder of them—s. 8. He could give no title, and no one taking through him has any title. Section 58 of the Negotiable Instruments Act, 1881, deals with cases of defective title. But the position of a person with a defective title is different from that of a person with no title at all. The latter is the position of a person who claims through a forgery. See Chalmers on the Negotiable Instruments Act, notes to s. 58. As to the meaning of "offence" in s. 58 of the Indian Act, see s. 29 of the English Act. Section 58 of the Indian Act merely reproduces ss. 24, 29 and 38 of the English Act. They cited *Smith* v. *The Union Bank of London* (1). As to the renewed notes, we claim that they stand in the place of the old notes. The plaintiff's right with respect to the old notes are transferred to the new notes—Byles on Bills (15th Ed.), p. 165; *Lee* v. *Zagury* (2).

JUDGMENT.

RUSSELL, J.—In this case, the plaintiff as administrator of his deceased father Purmanand Cooverji claims to recover from the various defendants as hereinafter detailed the moveable property of the said Purmanand Coverji, deceased, consisting of shares, debentures and Government promissory notes. It appears that Purmanand Cooverji died in Bombay on the 18th December, 1897, leaving his widow Motivahu since deceased, three sons including the plaintiff, and three daughters. The first defendant is the father of Motivahu, the second is her brother, and the third is her maternal uncle.

According to the evidence of Purmanand Lilladhar and Thackersey Hari, which I see no reason to disbelieve, the first three defendants and Motivahu conspired together to misappropriate all the said moveable property of the said deceased, which was in a safe in one of the rooms in his house which was occupied by **[70]** Motivahu. In pursuance of such conspiracy several meetings were held by the conspirators, the details of which are given in the evidence of Purmanand Lilladhar and Thackersey Hari. The result of those meetings was that forgeries were committed in respect of all the shares, debentures and Government promissory notes

(1) (1875) L.R. 10 Q. B. 291 (295-6).
(2) (1817) 8 Taunton 114.

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which are specified hereafter, whereof, as here in after appears, the respective defendants are transferees. None of the transferees of the shares and debentures raised any question before me as to the relief claimed by the plaintiff in respect of such securities, and consequently the plaintiff must be held entitled to the relief he claims in respect of them, and the only question as to them will be with regard to costs, which I shall deal with hereafter. But the defendant No. 23, the Bank of Bombay, in respect of two Government promissory notes for Rs. 1,000 each, No. 5418 (Ex. P) and No. 1322 (Ex. I) in respect of which the renewed note (Ex. L) No. B 003300 was issued; defendants Nos. 24 to 26 (whom I call the Petit Trustees) in respect of Government promissory notes for Rs. 1,000, original note No. 5357 (Ex. K) and renewed note B. 007850 (Ex. M), and the defendants Nos. 27 to 29 (whom I call the Allbless Trustees) in respect of two Government promissory notes of Rs. 1,000 each, No. 14705 (Ex. N) and No. 14706 (Ex. O), raised various questions of law which I now proceed to deal with.

As I have stated above, it was proved that the indorsements on these notes as well as the other Government promissory notes which are claimed in this suit, were forged, in some cases by writing the indorsement 'Pay to Narrondas Ruttomsey or Order' above the genuine signature of Purmanand Cooverji, and in other cases by writing the said indorsement and forging the name of Purmanand Cooverji. It was argued that inasmuch as there was no section in the Indian Negotiable Instruments Act (XXVI of 1881) corresponding with s. 24 of the English Bills of Exchange Act, 1882, the Indian Legislature intended that although an indorsement on a negotiable security as defined by that Act was forged, still a *bona fide* indorsee for value without notice might become the holder thereof in due course. The Act defines "negotiable instruments" in s. 13 as a promissory note, bill of exchange, or cheque expressed to be payable to a [71] specified person or his order, or to the order of a specified person or to the bearer thereof. Government promissory notes would come within that definition, and looking at s. 6 of Act XIII of 1886 (Indian Securities Act) it would appear that the Negotiable Instruments Act is intended to apply to Government promissory notes.

It was further argued that the English Act distinguishes between no title, *e.g.*, by forgery, save by estoppel and a defective title, whereas the Indian Act makes no such distinction; but, on the contrary, the provisions of ss. 9, 58 and 118 of that Act are intended to cover the cases of an offence which includes forgery in respect of the note. This argument requires careful consideration of the sections of the Indian Negotiable Instruments Act. Section 46 provides (*inter alia*) that a promissory note, bill of exchange or cheque payable to order is negotiable by the holder by indorsement and delivery thereof. Section 48 provides, subject to the provisions of s. 58, that a promissory note, bill of exchange or cheque payable to the order of the specified person, or to a specified person or order, is negotiable by the holder by indorsement and delivery thereof. The 'holder' by s. 8 means any person entitled in his own name to the possession of the instrument and to receive or recover the amount due thereon from the parties thereto. By s. 9 "a holder in due course" means any person who for a consideration becomes the possessor of the instrument if payable to bearer or the payee or indorsee thereof, if payable to, or to the order of, a payee, before the amount mentioned in it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

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By s. 14 when an instrument is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated. By s. 15 when the maker or holder of a negotiable instrument signs the same otherwise than as such maker for the purpose of negotiation on the back or face thereof * * * he is said to indorse the same and is called the "indorser." By s. 16 if the indorser signs his name only, the indorsement is said to be "in blank" and if he adds a direction to pay the amount mentioned in the instrument to or to the order of a specified person, the [72] indorsement is said to be "in full" and the person so specified is called the "indorsee" of the instrument.

Now it appears to me, as was argued by Mr. Macpherson, that there is a very great distinction between a defect in title and no title at all, the latter being the case where the indorsement is forged. "The Law Merchant never recognized a forger of another man's name as a real mercantile drawer," per Lord Esher, M.R., in *Vagliano Brothers* v. *Bank of England* (1). "Bills of exchange or promissory notes, whether payable to order or to bearer, are by the Law Merchant negotiable in both senses of the word. The person, who by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it," per Blackburn, J., in *Crouch* v. *Credit Foncier of England* (2). The law is the same in America: "Suppose a thief should erase the name of the maker of a note, and then forge the same signature, could he give a *bona fide* purchaser for value title to the paper? I am clearly of opinion he could not. The paper is not fair upon its face. There is a forgery, and although the purchaser may be ignorant of it, the Law Merchant does not protect him against such ignorance. He must know at his peril that the signatures are genuine. We are asked, suppose the name of the payee indorsed upon negotiable paper fades out so as to be invisible, does it affect the negotiable character of the paper. Most certainly it does. The title and the rights of the owner remain the same as before, but a thief could give no title to such paper to any one, because he cannot be the apparent owner thereof, and there is nothing on the face of the paper to induce the belief that he is the owner"—*Colson* v. *Arnot* (3). The French law is to the same effect. See Chalmers' Negotiable Instruments Act, p. 63, where in the note to s. 58 he says: "The indorsement through which a holder in due course claims must be genuine. This principle is of universal application."

[73] It would be impossible to say that Narrondas Ruttonsey was within s. 8 of the Negotiable Instruments Act the person entitled in his own name to the possession of the Government promissory notes, or to receive or recover the amount due thereon from the parties thereto. That being so, the Government promissory notes could not be said to be negotiated within s. 14. If he was not the holder, he could not indorse within ss. 15 and 16. Again, the Bank of Bombay and the Petit and Allbless Trustees cannot be held to be holders in due course within s. 9, inasmuch as Narrondas Ruttonsey not being the holder and, therefore, not the indorser was not qualified to give the direction to pay the amount of

(1) (1889) 23 Q.B.D. 243 (248).
(2) (1873) L. R. 8 Q.B. 374 (382).
(3) (1874) 54 New York Rep., 253 (260).

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the note mentioned in s. 16, and, therefore, they could not be the indorsees of the instrument.

Taking all these circumstances into consideration, I am of opinion that these defendants must fail in their contention, as their title to the Government promissory notes in question cannot be held to be independent of the titles of their predecessors.

With regard to the point urged by Mr. Kirkpatrick, that these notes are not proved to have been the property of Purmanand Cooverji, the evidence has satisfied me that this contention is not well founded. Another point raised by Mr. Kirkpatrick with regard to alleged negligence on the part of the plaintiff is answered by the following extract from the judgment of Bramwell, L. J., in *Patent Safety Gun Cotton Co.* v. *Wilson* (1): "The plaintiff's case is this : 'We were possessed of a cheque which was stolen from us ; an indorsement was forged ; the cheque got into the hands of you, the defendant, and now we want our money back.' The defendant admits all this, but says in answer that what happened was through the fault of the plaintiffs in not taking sufficient care of the cheque ; that the plaintiffs employed a clerk of known bad character, and gave him many opportunities of acting dishonestly. I have a difficulty in dealing with the proposition that those facts afford any answer to the claim, because I am at a loss to find any reason in support of the proposition. The only answer to it is it is not the law."

[74] With regard to the Government promissory notes 003300 and B 007850, the renewed notes, it was argued that the plaintiff could have no title to these, and with regard to Mr. Branson's clients, the Petit Trustees, it appears that the note which they bought was the renewed note, which had no forged indorsement upon it. Whether or not the holders of these renewed notes have any claim against the Government in respect of them, is not the question, but as against the plaintiff I must hold that the fact of the notes having been renewed, can make no difference. If the prior holder of the original notes had no title to them, he could confer no title, and the effect of the renewal is merely to substitute one document of title for another. It is difficult to see how the accident of a note being renewed could be held to deprive the plaintiff of his rights to the note if not renewed. Moreover, the analogy of a bill or note applies, with regard to which it has been held that if they be given for an illegal consideration and are renewed, the new instrument, as the case may be, is also void. See Smith's Mercantile Law (10th Ed.), p. 286 ; Byles on Bills of Exchange (15th Ed.), p. 165, and the cases there cited.

I must, therefore, pass a decree for the plaintiffs in the following terms :—(His Lordship then stated the terms of the decree and continued) :—

As to costs, it appears that the plaintiff has given an undertaking to defendants Nos. 15 to 21 and 31 not to apply for costs against them, so nothing need be said with regard to these defendants.

Plaintiff will be entitled to his costs from the defendants Nos. 2, 3 and 4 and 22.

As to the other remaining defendants (except No. 30, against whom the plaintiff may file a fresh suit as aforesaid), Mr. Macpherson contended that the plaintiff was entitled to the costs of the suit except the costs of the hearing occupied by proof other than that of the respective forgeries, and that as to such excepted costs they should be distributed among the

(1) (1880) 49 L. J. (C. P.) 713 (715).

different defendants. But I am of opinion that the plaintiff should, as administrator of the estate of Purmanand Cooverji, take his costs of suit and all other proceedings relative thereto out of that estate as between attorney and client, and the defendants [75] other than the Bank of Bombay should bear their own costs. My reason for this is that the plaintiff was extremely careless with regard to the shares, debentures and Government promissory notes left by his father, and that this carelessness in great measure led to the forgeries being committed. I do not think he was free from all blame as the plaintiff was in *Barton* v. *North Staffordshire Railway Co.*(1), which in that case was a circumstance which inclined the Court to give the plaintiff his costs.

As to the Bank of Bombay, I am of opinion that they must pay their own costs and also pay one day's costs of the plaintiff of the hearing, as they did not adopt the same line as the Allbless and Petit Trustees, but contested the plaintiff's case as to the forgeries to no purpose, and took up quite one day's hearing in that way.

I find on the issues (His Lordship stated the findings and concluded :—) and pass a decree for the plaintiff in the terms above set out.

Attorneys for the plaintiff :—Messrs. *Thakurdas, Dharmsi and Cama.*

Attorneys for the defendants :— Messrs. *Crawford, Brown and Co.*; *Mulji and Raghavji*; *Nanu and Hormasji*; *Craigie, Lynch and Owen*; and Mr. *Jamsetji Cursetji Cama.*

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SEP. 8.
ORIGINAL CIVIL.
24 B. 65 = 1 Bom. L.R. 734.

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24 B. 75 = 1 Bom. L.R. 431.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IN RE KHIMJI JAIRAM.* [12th July, 1899.]

***Municipality**—Bombay City Municipal Act (Bombay Act III of 1888), s. 249—Notice to construct urinals in a particular place in the owner's premises—Illegality of such notice.*

Accused was convicted and fined Rs. 50 for not complying with a notice issued by the Municipal Commissioner of Bombay under s. 249 of Bombay Act III of 1888. The notice required him to construct a urinal of six compartments in the open space inside the entrance gateway to the Cloth Market from Champawady, and a water closet in the corner of the entrance from 1st Ganeshwady near the fire-engine station.

[76] *Held*, reversing the conviction and sentence, that the notice was *ultra vires* inasmuch as it required the accused to construct urinals in a particular place in his premises.

[R., 29 B. 35=6 Bom. L.R. 667 (671).]

APPLICATION under s. 435 of the Code of Criminal Procedure (Act V of 1898).

The accused was the managing director of a cloth market (called the New Piece Goods Market) in Bombay.

On the 2nd December, 1898, the Municipal Commissioner of Bombay issued a notice to the accused under s. 249 (2) of the Bombay Municipal Act III of 1888.

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* Criminal Revision No. 109 of 1899.

(1) (1888) 38 Ch. D. 458 (467).

(2) Section 249 of Bombay Act III of 1888 provides as follows :—" Where it appears to the Commissioner that any premises are, or are intended to be used, as a market,... the Commissioner may, by written notice, require the owner or occupier of the said premises to construct a sufficient number of water closets or latrines or privies and urinals for the separate use of each sex."

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CRIMINAL REVISION.

24 B. 75 = 1 Bom. L.R. 431.

The notice required the accused to construct a urinal of six compartments in the open space inside the entrance gateway to the cloth market from Champawady and a water-closet of four seats in the corner of the entrance from 1st Ganeshwady near the fire-engine station.

The accused was convicted and sentenced to pay a fine of Rs. 50 by J. S. Slater, Chief Presidency Magistrate, for not complying with the notice.

Against this conviction and sentence the accused applied to the High Court under its revisional jurisdiction, contending (*inter alia*) that s. 249 of Bombay Act III of 1888 did not authorize the Municipal Commissioner to require the accused to erect urinals in a *particular* spot in the cloth market.

Scott, for the applicant.

Crawford, for the Municipality.

JUDGMENT.

PER CURIAM :—The notice being admittedly *ultra vires* of s. 249 of the Bombay Municipal Act, 1888, inasmuch as it requires the applicant to construct urinals in a particular place in his premises, the Court reverses the conviction and sentence, and orders the fine paid to be refunded.

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24 B. 77 = 1 Bom.L.R. 534.

[77] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Crowe.

LAKSMISHANKAR DEVSHANKAR (*Original Plaintiff*), *Appellant v.* VISHNURAM AND OTHERS (*Original Defendants*), *Respondents.**

[27th July, 1899.]

Partners—Joint contract—Liability of partners—Joint liability—Judgment recovered against one partner—Judgment of a foreign Court—Res judicata—Civil Procedure Code (Act XIV of 1882), ss. 13 and 14—Consent decree.

The defendants were partners trading in the name of Vishnuram Gopinath and Company. On 6th July, 1895, at Ahmedabad the first defendant borrowed from the plaintiff, for the purposes of the partnership business, a sum of Rs. 10,000 and passed a *khata* in the name of his firm. On 25th April, 1896, at Baroda he passed another agreement to plaintiff, under which the plaintiff was to recover the debt due to him from the partners jointly and severally.

On 2nd October, 1896, plaintiff obtained a decree on an award against the first defendant in the Civil Court at Baroda for Rs. 13,909-4-0 and in execution of this decree he recovered a sum of Rs. 7,000.

In 1897 plaintiff filed this suit in the Court of the first Class Subordinate Judge at Ahmedabad to recover the balance, *viz.*, Rs. 6,909-4 0, from all the partners (defendants Nos. 1 to 8).

Defendants Nos. 6 to 8 resided in Baroda territory, the rest in British India. Defendants Nos. 2, 3 and 4 defended the suit. The rest did not appear.

The Subordinate Judge dismissed the suit holding on the authority of *King* v. *Hoare* (1), that the judgment of the Baroda Court against one partner (the first defendant) was a bar to a fresh suit against the other partners on the same cause of action.

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* Appeal No. 91 of 1898.

(1) (1844) 13 M. and W. 494.

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The plaintiff appealed to the High Court.

Held, that the principle of *King* v. *Hoare* did not apply and that the suit was not barred. The Baroda Court had no jurisdiction over the defendants, who were British subjects residing in British territory. The judgment of the Baroda Court was, therefore, no bar to the present suit under s. 14 of the Code of Civil Procedure (Act XIV of 1882).

Held, also, that the original liability of the partners being a joint liability, the first defendant had no authority, without the consent of his partners, to change the joint liability of each partner, which was the ordinary incident of the partnership, into a joint and several liability.

A judgment by consent raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter.

[R., 22 A 307 (311); 25 Ind. Cas. 224 = 12 A.L.J. 1011; 15 M.C.C.R. 293 (296).]

[78] APPEAL from the decision of Rao Bahadur Lalshankar Umia Shankar, First Class Subordinate Judge of Ahmedabad.

The defendants were partners trading in the name of Vishnuram Gopinath and Company. They took up the Baroda opium farm for the year 1895. In connection with this farm they had to deposit in the Baroda treasury a sum of Rs. 33,732.

On the 6th July, 1895, the first defendant borrowed from the plaintiff Rs. 10,000, and passed a *khata* for the amount in the name of his firm Vishnuram Gopinath and Company. The money was borrowed and the *khata* executed at Ahmedabad.

On the 25th April, 1896, the first defendant passed an agreement to the plaintiff to the following effect :—

"Samvat 1952, Vaisak Sudhi 12th, Sunday, 25th April 1896. To Vakil Lakshmishankar Devshankar, inhabitant of Ahmedabad. By Vishnuram Gopinath, present opium farmer of Baroda Prant, inhabitant of Poona City, and Company. I had taken Rs. 13,000 in all from you in July of 1895 in order to pay the deposit money for the opium contract by giving you a *khata* for Rs. 10,000 dated Asad Vadi 9th and another for Rs. 3,000 dated Asad Vadi 30th of Samvat 1951. I have paid in part Rs. 500. Deducting this Rs. 12,500 remain due on account of principal and Rs. 900 on account of interest up to date, in all Rs. 13, 400. This sum you are entitled to recover with interest at 12 annas per cent. per month either from me or from my partner, Girdharbhai Dadabhai of Broach or Chhagonlal Surchand, or Jivanlal Narsi and others of Nadiad, or from any one of the partners at Bhadran, because I have borrowed the money on behalf of our partnership in the opium farm to pay the deposit money for opium. Rs. 33,732 are lying as deposit in the office of the Personal Nayab Suba of Baroda Prant. Though I may give a mukhtyarnama to any one to withdraw this amount, yet you have the first right to take the amount due to you out of that sum. Hereafter, though any one of my partners or any other person may take an assignment in writing from me of the said deposit amount, he must first of all pay your money with interest, and he will then be entitled to take only the balance. In addition to this, I am personally as well as my property and in the same way my partners are answerable to pay your debt."

On the 1st October, 1896, the plaintiff and the first defendant at Baroda referred the question of what was due to the plaintiff to arbitration, and on the same day an award was made. On the next day (2nd October, 1896) a decree upon the award was made by consent by the Civil Court at Baroda awarding the plaintiff Rs. 13,909-4-0. The decree directed that plaintiff should recover this sum out of the money deposited in the Baroda treasury.

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[79] In execution of this decree plaintiff recovered Rs. 7,000 out of the deposit money.

On 12th October, 1897, plaintiff filed the present suit against all the defendants as partners to recover the balance of Rs. 6,909-4-0 with interest.

The suit was filed in the Court of the First Class Subordinate Judge at Ahmedabad.

Defendants Nos. 6 to 8 were subjects of His Highness the Gaekwar, residing in Baroda territory.

Defendants Nos. 1 to 5 were British subjects residing in British India.

Only the defendants Nos. 2, 3 and 4 appeared and defended the suit. They pleaded (*inter alia*) that the Court had no jurisdiction to try the suit.

The Subordinate Judge held that he had jurisdiction to try the suit. He also held that the decree of the Baroda Court operated as *res judicata* as against the first defendant, and was a bar to the present suit as against defendants Nos. 2 to 8, on the principle laid down in *King* v. *Hoare* (1) and *Hemendro Coomar* v. *Rajendrolall* (2) that a judgment obtained against one of several joint debtors was a bar to a subsequent suit against the others. The suit was, therefore, dismissed.

Against this decision plaintiff appealed to the High Court.

Ganpat Sadashiv Rao, for appellant (plaintiff).—The present case does not fall within the rule laid down in *King* v. *Hoare* (1). The original liability of the partners for the debt in question was, no doubt, a joint liability, and not a joint and several liability. But the agreement of the 25th April, 1896, subsequently passed by the first defendant on behalf of the firm, converted the joint liability into a joint and several liability. That being the case, the judgment of the Baroda Court against one partner (defendant No. 1) is no bar to a fresh suit against the others—*Dhunput Sing* v. *Sham Soonder* (3); *Bhukhandas* v. *Lallubhai* (4). Moreover, the judgment of the Baroda Court is a judgment of a foreign Court. As such, [80] it does not operate as a merger of the original cause of action. The plaintiff has the option either to resort to the original cause of action or to sue upon the foreign judgment—*Smith* v. *Nicolls*(5); *The Bank of Australasia* v. *Harding* (6); *The Bank of Australasia* v. *Nias*(7); Smith's Leading Cases, Vol. 2, p. 765 (10th Ed.); Lindley on Partnership, pp. 225, 251. The present suit is based on the original cause of action. That cause of action is not merged in the Baroda decree. The suit will, therefore, lie. Defendants will rely on s. 13, Explanation VI, and s. 14 of the Civil Procedure Code. But even under those sections of the Code the judgment can be no bar to the present suit. The Baroda judgment was not given on the merits of the case. It is a judgment passed in terms of an award. It is a decree upon a compromise, or a consent decree. And a consent decree does not operate as a *res judicata*—*Sheik Budan* v. *Ramchandra* (8); *Jenkins* v. *Robertson* (9). In the next place, the defendants themselves plead in their written statement that the judgment was obtained by fraud and collusion, and as such not binding on them. This was also the ground on which they resisted execution of the decree in the Baroda Court. If so, the case falls under s. 14 (*d*) of the Civil Procedure Code. Further, the Baroda Court had no jurisdiction over defendants

(1) (1844) 13 M. and W. 494.
(2) 3 C. 353.
(3) 5 C. 291.
(4) 17 B. 562.
(5) (1839) 5 B.N.C. 208 (221).
(6) (1850) 19 L.J. (N.S.) C.P. 345 (350).
(7) (1851) 16 Q.B. 717.
(8) 11 B. 537 (540).
(9) (1867) 1 H. L. Sc. 117.

Nos. 2, 3 and 4, who now alone defend this suit. They all reside in British India, and are, therefore, not amenable to the jurisdiction of the Baroda Court. The decree of the Baroda Court is, therefore, a nullity, so far as they are concerned—*Gurdyal Singh* v. *Raja of Faridkot* (1) ; *Nalla Karuppa* v. *Mahomed* (2) ; *Mathappa Chetti* v. *Chellappa Chetti* (3). The decree of the Baroda Court is, therefore, no bar to the present suit, and the plaintiff can rely either on his original cause of action or on the agreement of 25th April, 1896, under which the defendants are both jointly and severally liable for the debt.

Gokaldas K. Parekh (with him *K. M. Jhaveri*), for respondents (defendants).—It is admitted that the liability of the partners for the partnership debt is a joint liability. The first defendant had no authority to change that liability into a joint and several **[81]** liability by the agreement of the 25th April, 1896. It is not pretended that the other partners ever consented to, or ratified, that agreement. That agreement is, therefore, not binding on us, and the suit so far as it is based on the agreement does not lie. *King* v. *Hoare* (4), therefore, applies, and the judgment of the Baroda Court is a bar to the present suit against the other partners. That judgment, though it is the judgment of a foreign Court, operates as a *res judicata*. It is conclusive between the parties, and a second suit upon the same cause of action cannot lie—*Bababhat* v. *Narharbhat* (5) ; Pigot on Foreign Judgments, pp. 39-49. The original cause of action is now merged in the decree of the Baroda Court. It is not now open to the plaintiff to impeach the validity of that decree, or to question the jurisdiction of the Court which passed the decree, as he himself submitted to its jurisdiction and invoked its aid : Hukamchand on *Res Judicata*, p. 505. The decree is, therefore, binding on the plaintiff, and he cannot again raise the same questions by a fresh suit. His proper remedy is to execute the decree of the Baroda Court.

JUDGMENT.

CANDY, J.—Defendants Nos. 2 to 8 were partners with defendant No. 1 in a Baroda opium farm for the year 1895. Defendants Nos. 6 to 8 reside in Baroda territory ; the rest in British India. In order to make the necessary deposit in the Baroda treasury in connection with the said farm, defendant No. 1, in the name of Vishnuram Gopinath and Co., borrowed from plaintiff in Ahmedabad on 6th July, 1895, the sum of Rs. 10,000. The usual entry was made in plaintiff's account book and signed by defendant No. 1. Interest was to run at 9 per cent. Rs. 500 were repaid in August, 1895.

On 25th April, 1896, defendant No. 1 passed to plaintiff in Baroda an agreement reciting the above transaction, and the fact that the balance of the debt with interest up to date was Rs. 13,400. This sum with interest at 9 per cent. plaintiff was to recover from defendant No. 1, or from defendant No. 2, or from defendant No. 5, or from Jiwanlal (father of defendant No. 3) and others of Nadiad, or from any one of the partners at Bhadran (Baroda territory), "because I have borrowed the money on behalf of our partnership in the opium farm to pay the deposit money." The **[82]** agreement went on to recite that Rs. 33,732 were lying as deposit in the Baroda treasury, and proceeded :—

"Though I may give authority to any one to withdraw this amount, yet you have the first right to take the sum due to you out of that

(1) 22 C. 222. (2) 20 M. 112. (3) 1 M. 196.
(4) (1844) 13 M. and W. 494. (5) 13 B. 224.

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amount; though any one of my partners or any one may take from me an assignment in writing of the said deposit, he must first of all pay your money with interest, and he will then be entitled to take the balance only. In addition to this I am personally as well as my property is liable; and in the same way my partners, personally and their property, are liable to pay your dues."

On the 1st October, 1896, plaintiff and defendant No. 1 being in Baroda referred to the sole arbitration of a gentleman in Baroda the settlement of what was due to the plaintiff on the loan. That arbitrator made an award on the same day. No copies of the reference to arbitration or of the award have been produced, and their exact terms are not before the Court. But on the following day—2nd October, 1896—an application was made to the Civil Court at Baroda producing the award and asking for a consent decree. No copy of the application to the Baroda Civil Court has been produced in the present case, but the decree (copy of which has been produced) shows what the reference and the award must have been, for it directed that out of the deposit lying in the Baroda treasury, defendant No. 1 should get Rs. 13,909-4 paid to plaintiff.

In execution of that decree plaintiff, on 6th December, 1896, got Rs. 7,000 through the Baroda Court from the deposit in the treasury. Plaintiff brought the present suit in the Court of the First Class Subordinate Judge, Ahmedabad, to recover the balance —Rs. 6,909-4-0— with interest from all the defendants, defendant No. 1 and defendants Nos. 2 to 8, his partners. Plaintiff filed with his plaint a copy of the original account signed at Ahmedabad, and also the above-mentioned agreement dated 25th April, 1896. Defendant No. 1 did not appear and plead. Defendants Nos. 2, 3 and 4 did appear, and pleaded that the Court had no jurisdiction to try the suit.

The Subordinate Judge held that, as some of the defendants lived within the jurisdiction of the Court, the Court had jurisdiction to entertain the suit, independently of the accrual of the cause of action. But he held that on the allegations made in the [83] plaint the present suit would not lie. He held that the original loan, as evidenced by the account, was merged in the agreement of 25th April, 1896, and that the said agreement was merged in the decree of the Baroda Court of 2nd October, 1896; therefore the suit against defendant No. 1 was *res judicata*. Further, he held that defendants Nos. 2 to 8 were jointly liable for the debt, but not jointly and severally. As then a judgment recovered against any one of several joint-debtors merges the remedy for the joint debt and is a bar to an action against a co-debtor upon the joint liability, the suit was bad. He also held the suit to be bad for misjoinder, quoting the case of *Lakshmanan* v. *Karuppan* (1). Against that decision plaintiff now appeals.

No objection was taken before us by the pleader for the only defendant-respondent No. 3, who appears in this appeal, as to the jurisdiction of the First Class Subordinate Judge to dispose of this suit, and no argument was addressed to us on the question of misjoinder. The contention of the learned pleader for plaintiff-appellant is, briefly, that as this is a case of joint and several liability as shown by the agreement of 25th April, 1896, the decree obtained in the Baroda Court against defendant No. 1 does not bar the present suit. He quoted the case of *Bhukhandas* v. *Lallubhai* (2);

(1) 6 M. 273.

(2) 17 B. 562.

which was the case of joint and several liability, and, therefore, according to the principle laid down in *King* v. *Hoare* (1), which was treated as a binding authority in the case in the House of Lords of *Kendall* v. *Hamilton* (2), the suit in Bombay against one of the contractors did not bar a suit in Surat against the remaining contractors.

But for this contention to prevail in the present case, it must be shown that the liability of the partners is several as well as joint. To establish that proposition Mr. Rao points to the agreement of 25th April, 1896, by which defendant No. 1, besides giving to plaintiff a charge on the deposit in the Baroda treasury, also recited that each partner was both jointly and severally liable for the debt. To that the obvious answer is that defendant No. 1 had no power so to bind his co-partners. Such an act was not necessary for, or usually done in, carrying on the business of such **[84]** a partnership (s. 251, Act IX of 1872). It may have been proper for defendant No. 1 to give a charge on the deposit in the Baroda treasury: but certainly he had no authority, without the consent of his partners, to change the joint liability of each partner, which was the ordinary incident of the partnership, into a joint and several liability. As regards defendants Nos. 2 to 8, therefore, the principle laid down in *King* v. *Hoare* (*supra*) would so far remain in force.

But, then, there arises a question which was not present to the minds of the learned pleaders when this case was first argued, and that is, whether the decree of the Baroda Court, being the decree of a foreign Court, does create a merger. Mr. Rao, quoting Lindley on Partnership and several English cases, contends that it does not. We do not think it necessary to refer to those English authorities in detail, as the present case is governed by the provisions of ss. 13 and 14 of the Civil Procedure Code.

Now, we agree with the Subordinate Judge that the original contract evidenced by the khata purported to be merged in the agreement of 25th April, 1896. A new contract was substituted. The original contract was to pay a single partnership debt of Rs. 10,000 with 9 per cent. interest. The new contract was to pay a partnership debt of Rs. 13,400 with interest at 9 per cent., with a first charge on the deposit in the Baroda treasury, and a further several liability of each partner, this latter liability being one which we have held defendant No. 1 had no authority to create without the assent of his partners. So far the case is clear. It is not for plaintiff to say that the old contract has not merged in the new. Also it may be taken that the charge on the deposit in the Baroda treasury was not a collateral concurrent remedy given by one of the partners alone, and creating a separate cause of action apart from the contract arising from the partnership debt. Further, it would appear from the terms of the decree of the Baroda Court that the submission to arbitration had been made in order to obtain "a settlement in respect of the sum due." If this be so, there was no matter in difference excluded from the arbitration. Also, we do not agree with the contention of Mr. Rao, who quoting the remarks of West, J., in *Sheik Budan* v. **[85]** *Ramchandra* (3) and the case of *Jenkins* v. *Robertson* (4) argued that the decree of the Baroda Court being a consent decree could never be a bar as *res judicata*. The case of *Jenkins* v. *Robertson* (*supra*) has been explained in *In re South American and Mexican Co.* (5) by Vaughan Williams, J., who showed that it has always been the law that a judgment by consent raises an estoppel just in the

(1) (1844) 13 M. and W. 494. (2) (1879) 4 App. Cas. 504. (3) 11 B. 537 (540).
(4) (1867) 1 H.L. Sc. 117. (5) (1895) 1 Ch. 37 (45).

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same way as a judgment after the Court has exercised a judicial discretion in the matter. But, in our opinion, the fatal objection to the bar of *res judicata* is that the Baroda Court had no jurisdiction over the present defendants, who were British subjects and resided in British territory. The suit in the Baroda Court was, on the face of it, against defendant No. 1 alone, personally. Explanation V to s. 13, Civil Procedure Code, does not help the defendants, for that refers to *bona fide* claims, not to *bona fide* defences—*Vasudeva* v. *Narayana* (1). It was alleged, and not denied, that certain of the partners, among whom was defendant No. 3 (the only partner who has appeared before us to resist the plaintiff's prayer that the Ahmedabad Court had jurisdiction to hear this suit), had protested in Baroda when plaintiff attempted to realize all the debt due to him from the firm from the deposit in the Baroda treasury. They said that they were not parties to the Baroda decree and were not bound by it. If so, then it does not bar this suit, and it does not lie in the mouth of any one of them to plead that it does. It is not contended now that defendant No. 3 was subject to the jurisdiction of the Baroda Court. No doubt it is the right of persons jointly liable to pay a debt to insist on being sued together. They are now being all sued together. They could not all have been sued together in the Baroda Court. Defendant No. 1 takes no objection to the present suit.

For these reasons, we are of opinion that the principle of *King* v. *Hoare* does not apply. We think that it is still open to plaintiff to recover on the joint liability of the partners ; and we, therefore, reverse the decision of the First Class Subordinate Judge and remand the case for trial. Costs to abide the result.

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[86] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

MAYARAM AND ANOTHER (*Original Plaintiffs*), *Appellants v.* RAVJI AND ANOTHER (*Original Defendants*), *Respondents.** [31st July, 1899.]

Foreign judgment—Suit on a foreign judgment—Civil Procedure Code (Act XIV of 1883) s. 14, as amended by Act VII of 1888.

A suit will lie on a judgment of a Court in Native State.

[R., 27 M.L.J. 535.]

SECOND appeal from the decision of C. H. Jopp, District Judge of Ahmednagar.

Plaintiffs sued to recover Rs. 550 from the defendants on a judgment obtained by them in a Court in the territory of His Highness the Nizam.

The Subordinate Judge dismissed the suit, holding, on the authority of *Bhavanishanker* v. *Pursadri* (2) and *Himmatlal* v. *Shivajirav* (3), that a suit would not lie on the judgment of a foreign Court.

This decision was confirmed, on appeal, by the District Judge.

Plaintiffs appealed to the High Court.

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* Second Appeal No. 195 of 1899.

(1) 6 M. 121. (2) 6 B. 292. (3) 8 B. 593.

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24 B. 86 = 1 Bom. L.R. 539.

N. G. Chandavarkar, for appellant, referred to *Gurdyal Singh* v. *Raja of Faridkot* (1); *The Collector of Moradabad* v. *Harbans Singh* (2).

Ghanasham Nilkanth, for respondents.

JUDGMENT.

PARSONS, J.—The lower Court has held that a suit will not lie on the judgment of a Court in the territory of His Highness the Nizam on the authority of the ruling of this Court in *Bhavanishanker* v. *Pursadri* (3) and *Himmatlal* v. *Shivajirav* (4). It is not necessary to determine whether that ruling was correct or not (see *Gurdyal Singh* v. *Raja of Faridkot* (1), because those cases were decided before the passing of the Civil Procedure Code Amendment Act, VII of 1888. The addition to s. 14, made by that Act, clearly contemplates the institution of suits on the **[87]** judgment of a foreign Court in Asia, providing only that the Court in which the suit is instituted shall not be precluded from inquiry into the merits of the case in which the judgment was passed. This is the view taken by the Allahabad High Court in *The Collector of Moradabad* v. *Harbans Singh* (2), and we have no doubt that it is correct.

We reverse the decrees of both the lower Courts and remand the case to the Court of first instance for trial on the merits. We make all costs costs in the cause.

RANADE, J.—This was a suit brought on a foreign judgment obtained by the appellants-plaintiffs in a Court in the Nizam's Dominions, and both the Courts below have held, chiefly on the authority of the rulings of this Court in *Bhavanishanker* v. *Pursadri* (3) and *Himmatlal* v. *Shivajirav* (4), that no such suit could be maintained. These decisions were passed in 1882 and 1884, but since then the old s. 14, Civil Procedure Code, has been amended by Act VII of 1888. As the section first stood, it only provided that no foreign judgment shall operate as a bar to a suit in British India, under certain circumstances. It thus only permitted such judgments to be pleaded as *res judicata* in the particular circumstances noted therein. It did not provide for a suit being brought on such a judgment. The addition made by Act VII of 1888, however, expressly enacted that "where a suit is instituted in British India on the judgment of any foreign Court in Asia or Africa * * * the Court in which the suit is instituted shall not be precluded from inquiry into the merits of the case in which judgment was passed." The effect of this addition to s. 14 has not been precisely considered by this Court, but in *Bababhat* v. *Narharbhat* (5) it was held that, reading the earlier part of s. 13 with Explanation VI, the term 'Court of competent jurisdiction' includes a foreign competent Court. The foreign Court whose decision was under consideration in that case was the Kurandvad Court. The judgment refers to Mr. Justice Field's note on ss. 13 and 14, and his opinion is quoted with approval to the effect that the judgment of a foreign Court cannot, when sued upon in **[88]** British India, be impeached on the ground that it was erroneous on the merits. In respect of foreign Courts in Asia and Africa to which the addition to s. 14 refers, it appears that Courts in India are not precluded from inquiry into the merits of the decision passed by these foreign Courts. In other words, the ruling in *Bababhat* v. *Narharbhat* may be said to qualify considerably the effect of the previous rulings of this Court. These

(1) 22 C. 222. (2) 21 A. 17. (3) 6 B. 292.
(4) 8 B. 593. (5) 13 B. 224.

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rulings, it may be noted, had been dissented from by Sir C. Turner, C. J. —*Kaliyugam* v. *Chokalinga* (1)—and the practice in the Madras Presidency and in Bengal—*Boloram Gooy* v. *Kameenee* (2)—had always been to permit suits in British India on foreign judgments. The reasons given by the Judges who decided *Bhavanishanker* v. *Pursadri* (3) and *Himmatlal* v. *Shivajirav* (4) indeed recognized a distinction between the Courts attached to the European settlements in British India and the foreign Courts in Native States. These reasons were to some extent extra-legal, and the Madras High Court (Kindersley and Hutchins, JJ.) took exception to the relevancy of such a distinction—*Sama Rayar* v. *Annamalai* (5). The more recent decisions of the same Court—*Bangarusami* v. *Balasubramanian* (6), *Fazal Shau Khan* v. *Gafar Khan* (7) and *Nalla Karuppa* v. *Mahomed* (8)—have made no such distinctions between the foreign Courts in *Native States and foreign Courts in the † European settlements, but placed both in the same category. In all these cases the suits were brought on foreign judgments, and the new s. 14, which permits Courts to inquire into the merits, was brought in force in *Fazal Shau Khan* v. *Gafar Khan*, and the earlier portion of s. 14 was given effect to in the other two cases. In *The Collector of Moradabad* v. *Harbans Singh* (9) similar effect was given to the latter part of s. 14 in a suit brought on a foreign judgment of the Rampur Court.

The question has now been set at rest by the decision of the Privy Council in an appeal from the Punjab Chief Court—**[89]** *Gurdyal Singh* v. *Raja of Farridkot* (10). Their Lordships held that there was no ground for supposing that no suit will lie upon the judgment of a recognized foreign Indian State. As the amended section permits the Court in British India to inquire into the merits, if necessary, the dangers of miscarriage of justice referred to in the earlier decisions of this Court have been effectively provided for—*Haji Musa* v. *Purmanand* (11). If some of these Courts have been privileged to execute their decrees under s. 229 in British India, there is no particular reason why the foreign judgments of those Courts, to which s. 229 does not apply, should not be sued upon in British Indian Courts of Justice. I would, therefore, reverse the decrees of the Courts below and direct that the suit be disposed of according to law.

Decree reversed.

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APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

PANCHAPPA (*Original Plaintiff*), *Appellant v.* SANGANBASAWA (*Original Defendant*), *Respondent.*‡ [21st July, 1899.]

Hindu law—Adoption—Gift of a son in adoption by a widow after remarriage—Widow Remarriage Act (XV of 1856), ss. 2 and 3.

A Hindu widow has no power, after her remarriage, to give in adoption her son by her first husband, unless he has expressly authorized her to do so.

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* Basker. † Kandy Karikal. ‡ Second Appeal No. 104 of 1899.

(1) 7 M. 105. (2) 4 W.R. 107 (108). (3) 6 B. 292. (4) 8 B. 593.
(5) 7 M. 164. (6) 13 M. 496. (7) 15 M. 82. (8) 20 M. 112.
(9) 21 A. 17. (10) 22 C. 222. (11) 15 B. 216.

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[Appr., 15 Ind. Cas. 602=12 M.L.T. 158 ; 17 Ind. Cas. 133=8 N.L.R. 128 ; R., 31 A. 161=6 A.L.J. 107 (111)=1 Ind. Cas. 761 ; 33 B. 107 (115)=10 Bom. L.R. 1134 =1 Ind. Cas. 659 ; 38 C. 862=13 C.L.J. 558=15 C.W.N. 579 (584)=10 Ind. Cas. 69 ; 8 C.L.J. 542 (545) ; 6 N.L.R. 103 ; D., 25 B. 551 (554)=3 Bom. L. R. 89.]

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum.

Suit by an alleged adopted son to recover the property of his adoptive father.

The property in dispute had been the property of one Fakirappa. He had a wife Tippawa, and he married as his second wife a widow Dyamawa, who had by her first husband a son Panchappa (the plaintiff).

After Fakirappa's death, Dyamawa gave Panchappa in adoption to Tippawa.

[90] Panchappa filed the present suit to recover possession of Fakirappa's estate from his sister Sanganbasawa.

The Subordinate Judge dismissed the suit, holding that plaintiff's natural mother had no power to give him in adoption after her remarriage, and that his adoption by Tippawa was, therefore, invalid.

The decision was upheld, on appeal, by the District Judge.

The plaintiff appealed to the High Court.

Manekshah Jehangirshah, for appellant (plaintiff).—The plaintiff's mother could give him in adoption although she had remarried. By the Hindu law the mother is empowered to give her son in adoption. By her remarriage she does not cease to be his mother, and, therefore, her right remains. Under Act XV of 1856 she no doubt forfeits by remarriage certain rights of inheritance and succession in her deceased husband's family. But the Act does not take away her right of giving her son in adoption. Nor is her right of guardianship over her children in any way affected, if no property is left by her deceased husband. No doubt, if her husband had expressly forbidden her to give his son in adoption, the adoption would have been invalid. Remarriage does not destroy a mother's right of succeeding as heir to her deceased son—*Akora Suth* v. *Boreani* (1). If so, how can it affect her right to give her son in adoption ?

Daji Abaji Khare, for respondent (defendant).—When a widow remarries, she forfeits all her rights in her deceased husband's family. Her right of giving her son in adoption rests upon the presumption that her husband had given his consent to such an act. But on remarriage she is to be treated as if she were dead, and, therefore, such consent cannot be presumed after her remarriage. Act XV of 1856 deprives her of her right of guardianship over her minor children. And her authority over her children comes to an end when she remarries. A mother has, no doubt, the right of giving her son in adoption ; but when she remarries, this right is lost, as all other rights she had in her former husband's family.

JUDGMENT.

[91] PARSONS, J.—The undisputed facts are these. Fakirappa had a wife, Tippawa, and he married as his second wife a widow, Dyamawa, who had by her first husband an only son, Panchappa. After Fakirappa's death, Dyamawa gave and Tippawa took Panchappa in adoption, and Panchappa has brought this suit to obtain Fakirappa's estate.

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(1) 2 B.L.R. 199=11 W.R. 82.

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24 B. 89 = 1 Bom. L.R. 543.

The question is whether his adoption is legal. The answer depends upon the power of Dyamawa to give Panchappa in adoption. The sole argument advanced in support of the adoption was based upon the use of the word 'mother' in the Hindu texts. A mother is said in them to have the power to give in adoption: Dyamawa in spite of her remarriage was still the mother of Panchappa: she could, therefore, give him to Tippawa to adopt. On the other side it was argued that by remarriage the widow lost all rights in her late husband's family and had, therefore, no disposing power left in her. The latter is the view which was accepted by the Judges of both the lower Courts, and I have no doubt that it is correct. It seems almost useless to refer to Hindu texts for assistance in the case of a status the existence of which they never contemplated. It is, however, I think clear that the power to give in adoption was only conferred upon the father and mother, because they were the owners and natural guardians of their son and it follows that, if the mother should lose that position, then her power to give in adoption would be lost also. The provisions of s. 3 of Act XV of 1856 declare in no uncertain tone that the effect of remarriage is to deprive the mother of the right of the guardianship, unless she has been expressly constituted guardian by the will or testamentary disposition of her deceased husband, and the Act gives the Civil Court the power of appointing a guardian for the children as if they had neither father nor mother. I would apply the same rule here, and hold that the adoption is invalid, as the mother had remarried, and no power to give in adoption had been conferred on her by her deceased husband. The decree is confirmed with costs.

RANADE, J.—Both the Courts below have rejected the appellant-plaintiff's claim on the ground that his adoption was invalid, as his natural mother, Dyamawa, who gave him in adoption, had [92] contracted a remarriage with Fakirappa before the adoption took place. The property in dispute belonged to Fakirappa, who had a *lagan* wife named Tippawa, and who married Dyamawa as his *pat* or *udki* wife. Dyamawa's first husband's name was one Ningappa, and a son was born to her by this marriage. On Ningappa's death, Dyamawa with her son went to live with Fakirappa, and she subsequently became his *pat* wife. On Fakirappa's death, she gave in gift her son by the first marriage to her co-wife Tippawa, and it is the validity of this adoption that is now in dispute. The Court of first instance held that, by reason of Dyamawa's second marriage, she forfeited all her rights in the family of Ningappa, and she could not make a valid gift of her first husband's son, who must be treated as an orphan. The District Court, in appeal, took the same view, holding also that the boy could not be regarded as a self-given boy.

Mr. Manekshah, the appellant's pleader, however, contended before us that the natural mother's relationship to her son by first marriage is not affected by her second marriage, and that the texts speak only of the right of the *mother* as such to give her son in adoption, and the mother's authority is independent of the continuance or otherwise of the first marriage relationship. Reliance was placed chiefly on the ruling in *Akora Suth* v. *Boreani* (1), in which it was held that the right of the mother to succeed as heir to her deceased son is not destroyed by reason of her having contracted a second marriage. If a mother can thus succeed as her son's heir notwithstanding her remarriage, it was contended that by analogy she

(1) 2 B.L.R. 199=11 W.R. 82.

could make a valid gift of her son by adoption, though she had married a second husband. In another case decided by the Allahabad High Court—*Har Saran Das* v. *Nandi* (1)—it was also held that where parties belonged to castes in which remarriage was customary before Act XV of 1856 was passed, the widow did not forfeit her rights of inheritance by reason of her second marriage. The parties in the present case belong to the Lingayat caste, among whom remarriage has always been customary, and it was, therefore, contended that Dyamawa did not forfeit her rights (among others the right of giving her son in adoption) by reason of her [93] remarriage. In both these cases it was held that s. 2 of Act XV of 1856 did not restrict the already existing rights of widows, and that the Act was only an enabling Act in the interest of those who could not marry a second time by caste custom. This view of the Calcutta and Allahabad High Courts was, however, expressly dissented from by a Full Bench of this Court in *Vithu* v. *Govinda* (2), which held that, even in castes where remarriage was permitted by caste usage, a Hindu widow, who may have inherited property as heir to her son, forfeited her rights to such property after she remarries, and the property passed to the next heir. This ruling was based upon what may be described as a liberal construction of s. 2 of Act XV of 1856.

In an earlier case—*Omkar* (3)—this Court had held that remarriage was equivalent to the civil death of the widow by reason of the operation of s. 2 of Act XV of 1856, and this operation extended to the forfeiture of interests in possession as also in respect of rights still unrealized. In a more recent case, the Calcutta High Court has adopted the same construction of s. 2 when it held in *Matungini* v. *Ram Rutton Roy* (4) that a Hindu widow forfeited all her interests in her first husband's property when she subsequently took a second husband, and this result followed even when remarriage might be customary in the caste—*Rasul Jehan Begum* v. *Ram Surun Singh* (5). The Madras High Court took the same view in *Murugayi* v. *Viramakali* (6).

The three High Courts of Madras, Calcutta and Bombay have thus accepted the same construction of s. 2 of Act XV of 1856, by which all the rights and interests which a widow may have in her deceased husband's property by way of maintenance, or inheritance, or by will or testament, * * shall upon her remarriage cease and determine as if she had then died. The rights and interests of Dyamawa thus ceased and determined when she became the *udki* wife of Fakirappa, and as stated further on in s. 3, though Dyamawa was alive, her first husband's son (the minor plaintiff) became an orphan, [94] without father and mother. The construction placed upon this s. 3 by the High Court of Allahabad is that a new guardian should be appointed in place of the widow when she is remarried (*Khushali* v. *Rani* (7)). Where this is the case, it is clear that there can be no reservation intended of the widowed mother's right to give her son in adoption. On Dyamawa's remarriage, she was dead in relation to her first husband's family, and her son was as an orphan, being one without a mother. In West and Bühler, p. 999, it was laid down that a Shudra's widow, who married another person, cannot adopt a son to her deceased husband. If she cannot take in adoption, she cannot for the same reason give a son in adoption after remarriage. It is true s. 5 of the Act reserves to the widow

(1) 11 A. 330. (2) 22 B. 321. (3) P.J. (1883), p. 280. (4) 19 C. 289.
(5) 22 C. 589. (6) 1 M. 226. (7) 4 A. 195.

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certain rights of inheritance not covered by the exceptions in cls. 2, 3, 4. It cannot, however, be contended that the right of giving a son in adoption is of the nature of a right reserved to her by s. 5. It is a right subordinate to the right of inheritance from her husband and the guardianship of her sons, both which rights are excepted by name in ss. 2 and 3 of the Act.

Her right to succeed as heir to her deceased son obviously comes under the reservation made in s. 5, and the Calcutta decision—*Akora Suth* v. *Boreani*—first noted above, and on which the appellant chiefly relies, may be justified by this reservation. The Allahabad ruling in *Har Saran Das* v. *Nandi* (1) cannot, however, be so explained, and, therefore, it was expressly disapproved in the Calcutta case of *Rasul Jehan Begum* v. *Ram Surun Singh* (2) for the same reason as that adopted by the Bombay High Court. The right to give a boy in adoption is a right of disposition, a portion of *patria potestas*, which comes to the widow by reason of her connection with her deceased husband's estate, and being a part of the rights and interests she acquires as a widow, it is included within the provisions of ss. 2 and 3 of the Act, and is not a reservation which the Act concedes to the widow.

The decision of the Courts below was, therefore, correct, and I would accordingly confirm the decree and reject the appeal with costs.

Decree confirmed.

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24 B. 95=1 Bom. L. R. 547.

[95] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

GANGADHAR B. MULE (*Original Applicant*), *Appellant v.* SHIVLINGRAO JAGDEVRAO AND OTHERS.* [1st August, 1899.]

Guardian—Minor—Remuneration of guardian—Order refusing remuneration not appealable—Guardian and Wards' Act (VIII of 1890), ss. 22, 45 and 47.

A Nazir of the District Court was appointed guardian of the property of certain minors, but no provision as to his remuneration was made at the time of his appointment. Subsequently he applied for remuneration on his transfer to another appointment. The Judge passed an order refusing to allow any remuneration, on the grounds that his accounts had been badly kept and the estates had been mismanaged. The Nazir appealed against the order.

Held, that the order was not appealable.

APPEAL against the order of E. M. Pratt, District Judge of Sholapur-Bijapur, in the matter of an application by a guardian of the property of certain minors for the payment of his remuneration.

The applicant, who was a Nazir of the District Court of Bijapur, had acted as guardian to certain minors. Being about to be transferred to another appointment, he was required by the Court to furnish accounts of the estates which had been under his management, and an auditor was appointed to audit them. The applicant furnished the accounts and applied for remuneration for his management. The auditor, however, having reported unfavourably with respect to the accounts, the Judge refused to allow any remuneration. The applicant now appealed from

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* Appeal No. 15 of 1899.

(1) 11 A. 330.

(2) 22 C. 589.

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24 B. 95 = 1 Bom. L.R. 547.

the order of refusal. He made the minors and the new guardians respondents to his appeal.

Mahadeo V. Bhat, for the respondent No. 1.—No. appeal lies against the order refusing remuneration. No allowance was fixed by the Court under s. 22 of the Guardian and Wards' Act (VIII of 1890) at the time of the applicant's appointment as guardian, and none could be allowed subsequently.

Mahadeo B. Chavbal, for the appellant (applicant)—The effect of the order disallowing remuneration will be to fine the applicant Rs. 1,772-2-7 which he has drawn as fees at 5 per cent. according to general practice. It is substantially an order [96] imposing a fine under s. 45 of the Guardian and Wards' Act. It is, therefore, appealable under s. 47 of the Act.

JUDGMENT.

PARSONS, J.—In this case the appellant, who was the Nazir of the District Court of Bijapur, was appointed at various times guardian of the property of the ten minors who have been made the respondents. Having been transferred from Bijapur, he was ordered to hand over charge of the estates to his successor and submit accounts of his management. He did so and asked for remuneration. The District Judge refused to allow him any remuneration on the grounds that the accounts were irregularly and badly kept, that the estates had been mismanaged, and that considerable expense had been incurred by the employment of paid karkuns to write the accounts and manage the estates. Against that order the present appeal has been filed. We think that no appeal lies.

Section 22 of the Guardian and Wards' Act, 1890, provides that "a guardian appointed or declared by the Court shall be entitled to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties." In the present case no allowance was fixed and made payable to the guardian in the orders of appointment. A claim, therefore, to remuneration could only be based upon a *quantum meruit*, and the Judge apparently has considered and disposed of it as such. The Act clearly gives the Judge a discretion in the matter, and it allows of no appeal against his order.

It was sought to bring the order in the present case within the terms of s. 45, which would be an appealable order under s. 47. It was argued that the order disallowing remuneration was virtually one which fined the appellant in the sum of Rs. 1,772-2-7, since that was the amount of remuneration which the appellant was entitled to, and claimed, at 5 per cent. under the general practice. We do not, however, think this argument is sound. The appellant has not been shown to be contumacious and was not fined as such under s. 45. The Judge merely exercised the discretion vested in him by s. 22 and thought fit to allow him no remuneration. Against that order there is no appeal allowed by the Act. We dismiss the appeal with costs.

Appeal dismissed.

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24 B. 97.

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[97] ORIGINAL CIVIL. *

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Russell.

THE BENGAL COAL COMPANY, LIMITED (*Original Defendants*), *Appellants v.* HOMEE WADIA AND CO. (*Original Plaintiffs*), *Respondents.*†
[12th October, 1899.]

Offer—Contract—Continuing offer—Successive contracts—Reasonable notice.

The plaintiffs were the agents of two mills in Bombay. The defendants were a coal company carrying on business in Bombay by their agents, the Bombay Company, Limited.

The defendants on the 19th of August, 1897, signed a memorandum in the form of a letter addressed to the plaintiffs, of which the first two clauses were as follows:—

"The undersigned have this day made a contract with Messrs. Homee Wadia and Co. for a period of twelve months, *viz.*, from 1st September, 1897, to 31st August, 1898.

"Sellers to supply them with Bengal Coal Co's Deshurghur from time to time as required by purchasers; reasonable notice to be given of such requirements. The total quantity indented for during the year shall not exceed, without seller's consent, the maximum average of 350 tons per month."

Up to the 16th July, 1898, the plaintiffs had indented for 1,752 tons, of which 1,552 tons had been delivered. On that date they indented for 500 tons more. On the 18th July, the plaintiffs further indented for an additional 1,500 tons. The defendants replied offering to deliver 500 tons in August, but declining to deliver 1,500 tons. The plaintiffs on the 22nd July gave notice to the defendants that they would require delivery of the balance, *viz.*, 2,648 tons (that is, 4,300 *minus* 1,552 tons already delivered), on or before the 31st August, 1898.

The defendants subsequently delivered 200 and 500 tons, leaving 1,948 tons undelivered. The plaintiffs claimed Rs. 6,600-13-5 as damages for non-delivery.

Held, that the memorandum of the 19th of August, 1897, was not a contract, but simply a continuing offer, and that each successive order given by the plaintiffs was an acceptance of the offer as to the quantity ordered. The offer of the defendants and each successive order of the plaintiffs constituted a series of contracts. The failure alleged was one to comply with orders given after the defendants' offer was cancelled and withdrawn.

Held, further, that the plaintiffs were not entitled to obtain more than 350 tons in any one month without the defendants' consent.

Held, further, that the notice given by the plaintiffs on the 22nd July, 1898, to supply 2,648 tons was not a reasonable notice within the meaning of the memorandum of the 19th August, 1897.

[F., 72 P.R. 1904=1 P.L.R. 1905.]

[98] APPEAL from Candy, J. ‡

Suit to recover damages for non-delivery of coal.

The plaintiffs were the agents of two mills in Bombay, *viz.*, the Dhun Mill and the Diamond Mill, the latter of which at the date of the contract hereinafter stated had not yet begun to work. The defendants were a coal company carrying on business in Bombay by their agents, the Bombay Company, Limited.

On the 19th August, 1897, the following agreement to supply the plaintiffs with coal for a year was made by the defendants:—

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* ["Appellate" seems to be more appropriate for "Original."—ED.]

† Suit No. 520 of 1898. Appeal No. 1029.

‡ For the judgment of Candy, J., which is referred here, see 1 Bom. L.R. 407.—ED.]

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" *Bombay*, 19*th August*, 1897.

" HIRJIBHAI F. R. WADIA,
" Broker.

" The undersigned have this day made a contract with Messrs. Homee Wadia and Co. for a period of 12 months (twelve), *viz.*, from 1*st September*, 1897, to 31*st August*, 1898.

"Sellers to supply them with Bengal Coal Co.'s Deshurghur from time to time *as required by purchasers* ; reasonable notice to be given of such requirements. The total quantity indented for during the year shall not exceed, without sellers' consent, the maximum average of 350 tons per month.

" Price Rs. 13 (thirteen) per ton, usual office terms of ½ per cent. Cash on delivery from alongside steamer in harbour.

" If sellers fail to give them delivery, purchasers to buy Deshurghur either from alongside or from the bandar at market rate, or if it be not obtainable they to buy any other description of Bengal coal and recover the difference in price, if any, from the sellers. Should buyers fail to take delivery of the required quantity after indenting for same as aforesaid, sellers to sell on their account.

" For the Bombay Company, Limited,
" (Sd.) H. R. DUNK,
" For Managing Director,
" Agents to the Bengal Coal Co., Ld."

Under this contract the plaintiffs indented for and the defendants delivered 200 tons in September, 1897, and 100 tons in each of the months from October, 1897, to February, 1898, inclusive, 150 tons in March, 1898, 200 tons in April, 1898, 300 tons in June, 1898, and 200 tons in July, being a total of 1,552 tons.

This amount of coal having been actually delivered, a further indent for 200 tons was made by the plaintiffs *prior* to the 16th **[99]** July, 1898, and on that day they indented for a further quantity of 500 tons by the following letter :

" DEAR SIRS,—With reference to the contract dated 19th August, 1897, for the supply of 4,200 tons Deshurghur coal, we have up to date indented for 1,752 tons, out of which we have taken delivery of 1,552 tons. We have already handed you an indent for another 200 tons. You have, therefore, still 2,448 tons to deliver. We learn from your reply of 8th July to our memo. of the previous day that you expect the next boat at the end of the month, so please hand us a delivery order for 500 tons (beyond the 200 indented for) from this boat.

" Probably next week we might again indent for another similar or larger quantity for delivery at the end of this month.

" Yours faithfully,
" (Sd.) HOMEE WADIA & Co."

Two days later, *viz.*, 18th July, 1898, the plaintiffs indented for a further supply of 1,500 tons by the following letter :—

" DEAR SIRS,—As intimated in ours of 16th instant we have now to indent for another 1,500 tons (one thousand five hundred tons) of Deshurghur coal besides the 500 tons therein asked for, and will thank you to hand us a separate delivery order for this quantity (1,500 tons) or

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only one delivery order for all 2,000 (two thousand) tons as might suit you. We suppose we need not repeat that these 2,000 tons don't include the 200 (two hundred) tons previously indented for or that we want these two thousand tons from the next boat which your reply of 8th July said is expected at the end of the current month.

"Yours faithfully,
"(Sd.) HOMEE WADIA & Co."

This letter Candy, J., was of opinion had been written after an interview between the plaintiff and Mr. Dunk which took place on the 18th July. At that interview Mr. Dunk told the plaintiff he would not deliver any more coal beyond the 200 tons already ordered. The defendants wrote the following letter to the plaintiffs on the 19th July:—

"*Bombay*, 19*th July*, 1898.

"Messrs. HOMEE WADIA & Co.,
Bombay.

"DEAR SIRS,—In reply to your two letters of 16th instant, received yesterday, we do not read the contract of 19th August, 1897, as you appear to do.

"Your request for 500 tons beyond the 200 tons, we cannot comply with, as your notice is too short. Your request for delivery order for 1,500 tons contained in your letter of yesterday--received this morning—is of course quite out of the question.

[100] "As to the 500 tons, we are, however, prepared, as a concession, to let you have them by a later steamer arriving in August, if you will let us know this month that this will suit you; this concession is without prejudice to our Mr. Dunk's intimation to you of yesterday that we cannot supply more than the 200 tons indented for in the early part of this month.

"It was represented to us that you were the agents of two mills and that your contracts were made to meet the requirements of those mills, and we entered into them on that understanding.

"We beg to inform you that your business does not suit us, and we, therefore, withdraw from the arrangement for 1899 contained in the writing of 14th instant."

The plaintiffs contended that, under the contract, the defendants were bound to deliver within the year 4,200 tons of coal, (*i. e.*, 350 tons per month), and on the 22nd July, 1898, they gave notice to the defendants that they would require delivery of the balance, *viz.*, 2,648 tons (*i.e.*, 4,200—1,552) on or before the 31st August, 1898, as in the following letter:—

"In order to avoid misunderstanding we shall be glad to know whether we rightly understand that you are prepared to deliver (1) 200 tons out of the S.S. 'Samoa,' and (2) 500 tons out of the next boat, and will not deliver the remaining 1,500 tons indented for, nor recognise our client's claim, either in respect of the late delivery of 500 tons nor non-delivery of 1,500 tons.

"Our clients maintain that the notice given by them is quite ample and that you are bound to deliver the balance of coal under the contract before the 31st August next.

Without prejudice to the notices previously given, we are instructed to give you notice that our clients require you to deliver them the whole of the remaining quantity of coal, *viz.*, 2,648 tons, on or before the 31st

August next in such lots as may suit you. Our clients will accept the 200 tons per S. S. 'Samoa' in part delivery of the above quantity.

"We are, therefore, instructed to inquire whether you are ready and willing to give delivery of the remaining 2,448 tons on or before the 31st August or not."

The defendants subsequently delivered the 200 and 500 tons, which left a balance undelivered of 1948 tons. They refused to deliver any more coal. The plaintiffs, therefore, filed this suit claiming Rs. 6,600-13-5 as damages.

The defendants contended (*inter alia*) that the writing of the 19th August, 1897, was not a contract on their part to supply coal, but was, at most, an offer to supply coals on the orders of the **[101]** plaintiffs; that their offer might be withdrawn by them at any time, unless such order had already been given by the plaintiffs. Their contention is stated in the following prayers of their written statement:—

"3. The defendants submit that upon the true construction of the said document it contains no contract on their part to supply any coals, but is, at most, an offer to supply coals, which offer it was open to the defendants at any time to withdraw as to any coals unless the same had then been ordered by the plaintiff. The defendants say that on the 18th of July, 1898, the plaintiff, who had previously ordered two lots of coal of 200 and 500 tons respectively of which he had not then obtained delivery, was informed by the defendants' agents that the defendants would not supply more than the said 200 tons of coal then already ordered. The defendants submit that they were justified in giving the plaintiff such notice, and were thereby absolved from the necessity of complying with any further requirements of the plaintiff. The defendants deny that they had by the 18th July, 1898, received any notice from the plaintiff that he would require the 1,500 tons of coal in the 3rd paragraph of the plaint mentioned.

"4. Defendants also say that they did not receive from the plaintiff reasonable notice requiring them to supply the 500 and 1,500 tons of coal in the plaint mentioned, or the balance of coal in the plaint referred to, having regard to the shortness of the interval between the dates on which such coal was ordered and the 31st of August, 1898, when the year provided for by the said document terminated. The defendants submit that by reason of such want of reasonable notice they were under no obligation to supply any of the said coal.

"5. As to the said 500 tons of coal, the defendants say that as a concession to the plaintiff, and without admitting any liability in respect thereof, they delivered the said coal to the plaintiff and the same was accepted by him."

The lower Court passed a decree for the plaintiffs.

The defendants appealed.

Scott and *Jardine*, for the appellants.

Macpherson and *Anderson*, for the respondents.

The following authorities were cited:—*Great N. R. Co.* v. *Witham* (1); Leake on Contract, p. 30, and *Offord* v. *Davies* (2).

JUDGMENT.

JENKINS, C.J.—This suit is brought by Mr. Homee N. A. Wadia, who carries on business in Bombay under the name of Homee Wadia and

(1) (1873) L.R. 9 C.P. 16.

(2) (1862) 12 C. B. 41.

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Co., against the Bengal Coal Company, Limited, who, as their name indicates, carry on business in Bengal. [102] The suit is one to recover damages for breach of an alleged contract dated the 19th August, 1897.

This document is in writing, and is as follows :—(His Lordship read the document and continued :—)

Mr. Justice Candy considered that this document constituted a binding contract between the parties, and he held that under it the Bengal Coal Company was bound to deliver to the plaintiffs within the year a total quantity of coal not exceeding 4,200 tons ; and he was further of opinion that reasonable notice to deliver the coal within the meaning of the memorandum of the 19th August had been given by the plaintiffs. On those findings he assessed the damages and passed a decree in favour of the plaintiffs.

From that decree the present appeal is preferred, and it has been contended before us that the learned Judge was wrong in holding that there was a contract at all, and that even if he was right in holding that there was a contract he was wrong in holding that reasonable notice to deliver had been given. I think the appellants are right in both these contentions.

I am of opinion that the memorandum of the 19th August, 1897, is not a contract, but simply a continuing offer made by the defendants to the plaintiffs, and that each successive order given by the plaintiffs under it while it remained in force was an acceptance of the offer as to the quantity ordered, and that thus the offer of the defendants and each successive order of the plaintiffs together constituted a series of contracts.

It is an invariable principle of the law of contracts that an offer by one person made to another imposes no obligation on the former until it is accepted by the latter according to the terms in which the offer is made. That is a principle very clearly laid down in *Offord* v. *Davies* (1) and *Great N.R. Co.* v. *Witham* (2), and I think having regard to that principle and to those authorities, it is clear that the memorandum of the 19th August, 1897, was (until orders under it were given) nothing more than a continuing offer, which the defendants might revoke. They could not, of [103] course, revoke it as to orders actually given, but except as to them, they had full power of revocation.

If that is so, then the plaintiffs' case must fail. For the failure to perform alleged in this case, and for which the plaintiffs claim damages, was a failure to comply with orders which were given after the defendants' offer was cancelled and withdrawn. That was done on the 18th July at the interview of that date, and the plaintiffs' order for the balance of the 4,200 tons was given afterwards. When that order was given, there was no offer in existence upon which it could operate as an acceptance.

On this ground, therefore, in my opinion the plaintiffs' claim must be rejected, but there is another point upon which, I think, the lower Court has erred in construing the writing of the 19th August. The second clause of that document is as follows :—"Sellers to supply them with Bengal Coal Company's Deshurghur from time to time as required by purchasers ; reasonable notice to be given of such requirements. The total quantity indented for during the year shall not exceed without seller's consent the maximum average of 350 tons per month."

I think the word "average" there must be read as meaning "quantity." It was probably written by mistake in the hurry of business. The two words "maximum" and "average" are inconsistent, and one

(1) (1862) 12 C. B. 41.

(2) (1873) L. R. 9 C.P. 16.

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or the other must go out or be modified. The expression "maximum quantity" probably more correctly expresses the intention of the writer. That appears to have been the limit which the defendants' offer imposed on the amount of coal to be ordered by the plaintiffs in each month. I cannot agree with the learned Judge of the Court below that the plaintiff was entitled under this writing to order at any time the whole quantity of 4,200 tons. That was the total amount to be supplied within the year if ordered by the plaintiffs. It was the outside limit, but the coal was to be supplied by the defendants in monthly instalments, and the plaintiffs were not entitled to obtain more than 350 tons in any month without the defendants' consent.

Further, I do not think that the notice given by the plaintiffs on the 22nd day of July, 1898, to supply 2,648 tons was a reasonable [104] notice within the meaning of the memorandum of the 19th August. Perhaps it might have been physically possible for the defendants to carry out such an order, but it would clearly have required an effort which the plaintiffs had no right to demand. I do not think that a notice involving such an effort from business-men with innumerable other matters to attend to can be held to be such a reasonable notice as was intended by both parties when this document was given. It has been argued that because 4,200 tons were liable to be indented for in the course of a year, the defendants were bound to have set apart a sufficient quantity of coal to answer the orders if given. But it is clear that it was just to prevent the necessity of having to do this, that the parties inserted in the memorandum a clause requiring that reasonable notice should be given.

For these reasons I think that this appeal should be allowed with costs here and in the Court below.

RUSSELL, J.—I concur.

Attorneys for plaintiffs:—Messrs. *Bicknell, Merwanji and Motilal.*

Attorneys for defendants:—Messrs. *Crawford, Brown and Co.*

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24 B. 104=1 Bom. L. R. 466.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice and Mr. Justice Candy.

DHONDO RAMCHANDRA AND OTHERS (*Original Defendants*), *Appellants* v. VASUDEO SAKHARAM SOMAN AND OTHERS (*Original Plaintiffs*), *Respondents.** [19th June, 1899.]

Limitation—Khoti—Adverse possession—Limitation Act (XV of 1877), s. 18, and Art. 144, sch. II—Survey Settlement Act (Bombay Act I of 1865).

A mixed khoti village, consisting of khoti and dhara lands, belonged to two co-sharers, Parashram and Dhondo. Each of them passed kabulayats to Government in alternate years till 1862-63, when a Parashram on account of his advanced age allowed Dhondo to pass the kabulayat every year. In the year 1867 the survey settlement having been introduced under Bombay Act I of 1865, Dhondo refused to pass the annual kabulayat. Government thereupon put the village under attachment, which was, however, removed in the year 1878 on his passing the [105] required kabulayat. The management of the village was restored to him and certain surplus profits were handed over to him by Government. In the year 1881 Parashram sold his share in the khoti to Sakharam, who brought a suit against Dhondo and his brother to recover a half share of the above-mentioned

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* Second Appeal No. 544 of 1898.

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profits. Dhondo resisted the claim, denying that either Parashram or his assignee had any right to the khoti or to share in the khoti profits. The suit was dismissed on a technical ground. Subsequently in the years 1881 and 1884, Dhondo got decrees against the actual tenants declaring that the lands, the subject-matter of the present suit, were his dhara lands, and in accordance with those decrees the Revenue authorities made corresponding entries in the revenue records. In the year 1888-89 Sakharam passed a kabulayat as a half sharer in the khoti and enjoyed the khoti profits for one year. Afterwards plaintiff No. 1, one of Sakharam's sons who died in the meanwhile, having passed the annual kabulayat in 1892-93 and again in 1894-95 and having failed during both the years to recover khoti profits from the lands in dispute, he filed the present suit in August, 1895, for a declaration that the lands were khoti and that the defendants had fraudulently got them entered in the revenue records as dhara. The plaintiff stated that they learnt of the defendant's fraud in the year 1895, and sought to recover a share of the khoti profits for 1892-93 and 1894-95. The defendants contended (*inter alia*) that the claim was time-barred.

Both the lower Courts allowed the claim for a declaration, holding that it was not time-barred, the first Court holding that the cause of action accrued to the plaintiffs in 1888-89, when Sakharam first entered on the management, and the appeal Court holding that the cause of action accrued in 1881 and 1884, when the dhara entries were made in the revenue records, and that but for s. 18 of the Limitation Act (XV of 1877) the plaintiff's suit would have been time-barred even under Art. 144, Sch. II of the Act. On appeal to the High Court,

Held, (reversing the decree) that the claim was barred by limitation. The plaintiffs' cause of action arose in the year 1881 at the date of Sakharam's purchase. Neither Sakharam nor his sons (the present plaintiffs) having ever been in possession of any share of the profits of the lands in dispute, not even in the year when Sakharam passed the kabulayat and managed the village, and their right to such possession being throughout denied by Dhondo, the claim was beyond time.

Held, further, that the provisions of s. 18 of the Limitation Act (XV of 1877) did not apply.

SECOND appeal from the decision of Rao Bahadur A. G. Bhave, First Class Subordinate Judge of Ratnagiri.

The village of Kolthare in the Ratnagiri District comprised both khoti and dhara lands.

The khoti of the village was owned in equal shares by two brothers, *viz.*, Parashram and Ramchandra, the latter of whom had [106] two sons, *viz.*, Dhondo and Vishnu. After Ramchandra's death, Parashram and Dhondo (Ramchandra's son) passed kabulayats to Government in alternate years and thus managed the khoti till the year 1862-63. In that year it was Parashram's turn to pass the kabulayat, but when called upon to do so and to take up the management, he excused himself on the ground of his advancing age and feeble health, and asked the Revenue authorities to accept Dhondo's kabulayat on his behalf. A kabulayat was accordingly taken from Dhondo, whose management continued till the year 1867. In 1865 the survey settlement under Bombay Act I of 1865 was made. In 1867 Dhondo refused to pass the necessary annual kabulayat, and the village was attached by Government. The attachment lasted till the year 1878, when, Dhondo having passed the kabulayat, it was raised, and the management of the village was restored to him together with certain surplus profits which were in the hands of Government.

In the year 1881 Parashram assigned his share in the khoti to one Sakharam, who brought a suit (No. 492 of 1881) against Dhondo and his brother Vishnu to recover a half share of the surplus profits which had been handed over by Government to Dhondo. Dhondo in his defence denied that either Sakharam or his vendor Parashram had any

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share in the khoti. The claim was rejected on the ground that it was barred under s. 43 of the Civil Procedure Code (Act XIV of 1882).

In the years 1881 and 1884 Dhondo filed suits against the tenants of the lands which formed the subject-matter of the present suit and obtained decrees declaring that these lands were dhara and not khoti. Owing to these decrees the revenue authorities altered the entry in the revenue records and therein stated the tenure to be not khoti but dhara.

Sakharam had, in the meanwhile, applied to the revenue authorities to accept from him a kabulayat on account of his share in the khoti, and they accepted one from him in the year 1888-89. Under this kabulayat he enjoyed for one year the profits of the khoti lands. Afterwards Sakharam having died, his son, the present plaintiff No. 1 passed two kabulayats to Government, one in the year 1892-93 and the other in the year 1894-95, but having failed during those years to recover the khoti profits, he along with **[107]** his two brothers filed this action on the 31st August, 1895, against Dhondo and his brother for a declaration that the lands were khoti, alleging that the defendants had fraudulently got them entered in the revenue register as dhara and that they (the plaintiffs) had come to know of the defendant's fraud in March, 1895. The plaintiffs further claimed a half-share of the rents and profits of the lands and sought to recover Rs. 70, being their half-share of rents and profits recovered by the defendants for the two years.

The defendants contended (*inter alia*) that the lands were their dhara and not khoti, that the plaintiffs were not entitled to any share of the profits, and that the claim was barred by limitation.

The Subordinate Judge found that some of the lands mentioned in the plaint were khoti and that they had been fraudulently entered as defendant's dhara. He held that the claim was governed by twelve years' limitation under art. 144, sch. II of the Limitation Act (XV of 1877), and that the cause of action accrued to the plaintiffs in 1888-89, when Sakharam first entered on the management. He, therefore, passed a declaratory decree in plaintiffs' favour with respect to those lands which he found to be khoti, and dismissed the claim for rents and profits as unproved.

On appeal the Judge confirmed the decree on the ground that though the cause of action accrued to the plaintiffs in 1881 and 1884 when Dhondo got decrees declaring the lands to be dhara, and that though the plaintiffs' claim would thus have been time-barred, still owing to the defendants' fraud in getting the tenure altered from khoti to dhara, the bar of limitation was saved under s. 18 of the Limitation Act (XV of 1877).

The defendants preferred a second appeal.

Daji A. Khare, for the appellants (defendants).—The present suit being one for a declaration and not for possession, the view taken by both the lower Courts of the law of limitation is incorrect. We contend that the claim is governed by six years' limitation under art. 120 of the Limitation Act, and the period ought to be counted from the time the lands were entered as dhara in the survey records. Supposing, however, that the limitation of twelve years is applicable, still the suit **[108]** would be barred. Dhondo's adverse possession commenced from the time of Sakharam's purchase, or at least from the time Dhondo filed his written statement in the suit of 1881. Therein he distinctly denied the right of either Parasharam or his vendee Sakharam to the khoti. Dhondo's adverse possession having thus commenced in the year 1881, the present suit, which was filed in 1895, is clearly barred. Since 1881

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at least it cannot be said that Dhondo's possession was on behalf of Parasharam or his vendee Sakharam in alternate years. Since that time he asserted his exclusive ownership. Even when Sakharam passed the kabulayat in the year 1888-89 he did not get the khoti profits of the lands in dispute, and neither he nor his representatives ever got them. The plaintiffs' cause of action arose as early as 1881. The view of the first Court as to the date of the cause of action is clearly erroneous.

The Judge, in appeal, was wrong in giving to the plaintiffs the benefit of s. 18 of the Limitation Act. Fraud is inferred and not proved. The law requires that fraud must be clearly and specifically proved. We have not done anything in secret.

The plaintiffs were aware that we had denied their father's right to the khoti by our written statement in the suit of 1881. Further, the decrees which we obtained against the tenants in 1881 and 1884 were not passed in secret. They were available to the plaintiffs. Section 18 of the Limitation Act has, therefore, no application.

Vasudeo G. Bhandarkar, for respondents (plaintiffs).—Though this is a suit apparently for a declaration, virtually it is one for possession, and, therefore, it is governed by twelve years' limitation—*Umrunnissa* v. *Muhammad YarKhan* (1).

The Judge was right in applying s. 18 of the Limitation Act. The decrees obtained by Dhondo against the tenants were passed without our knowledge. We are khoti sharers and we ought to have been made parties to those suits, and the omission to do so was clearly a fraud practised upon us.

JUDGMENT.

CANDY, J.—The question is whether, on the facts found by the lower Courts, the claim is barred by limitation.

[109] The subject-matter of the suit is certain fields in the village of Koithare in the Ratnagiri District, which is now a mixed khoti village, that is, besides the khoti lands there are certain dhara holdings. The khoti was owned half and half by Parashram and Dhondo. The custom of the village was for each sharer to pass the usual kabulayat in alternate years and to manage the village. But from 1862-63 Parashram, being old, allowed Dhondo to pass the kabulayat every year. In 1867 the survey settlement was introduced under the old Act, Bombay Act I of 1865. As so often happened in those days, Dhondo, the khot, refused to pass the ordinary annual kabulayat, and the village was attached by Government. In 1878 Dhondo signed the annual kabulayat, and the management of the village was restored, certain surplus profits being handed over by Government to Dhondo. In 1881 Parashram assigned his share in the khoti to Sakharam, the father of the present plaintiffs. Sakharam then sued (Suit No. 492 of 1881) the present defendants (Dhondo and his brother) to recover his half share of the above-mentioned profits, which had been handed over to Dhondo by Government when the attachment had been removed in 1878 and the village restored to Dhondo. Sakharam failed in his suit on a technical ground. The point to be now noticed is that Dhondo denied that Parashram, or Sakharam, who stood in Parashram's shoes, had any share in the khoti. Of course, if Parashram could validly assign his share in the khoti to Sakharam, then from 1881, the date of that assignment, Sakharam's right to a share in the management, and to participate in the profits of all khoti lands, accrued.

(1) 3 A. 24.

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In 1888 Sakharam succeeded in persuading the revenue authorities that as a half sharer in the khoti he was entitled to take his turn in passing the annual kabulayat and in managing the village. For 1888-89 or 1889-90 (there is a discrepancy on the record as to the actual year, but it was apparently 1888-89) he did pass the kabulayat, and enjoy the profits of the khoti. But there is nothing to show that he enjoyed the profits of the lands now in suit. On the contrary his son (plaintiff No. 1) deposed in the present suit that he had no reason for saying that his father might have received the profits of these lands. *Prima facie*, Sakharam did not receive them, for prior to 1888 (between [110] 1881 and 1884) Dhondo had brought suits against the actual cultivators of the lands (or most of them), and had obtained decrees declaring that the lands in question were his (Dhondo's) dhara and in accordance with those decrees the revenue authorities had made corresponding entries in the village records. Sakharam and his sons not having been parties to those decrees are not bound by them, but in the face of the entries made according to the decrees it is obvious that, *prima facie*, Sakharam did not recover profits from these lands as khoti lands. All he did recover as managing khot was the Government assessment from the registered dharekari, *viz.*, Dhondo.

Sakharam having died, his eldest son, plaintiff No. 1, passed the annual kabulayat in 1892-93 and again in 1894-95. In both years he failed to recover any khoti profits from the lands in question. He and his brothers, therefore, filed the present suit on 31st August, 1895, stating that they had recently come to know of Dhondo's fraud in having caused the lands in question to be entered as his dhara, and they sued for a declaration that the said lands are khoti and not dhara, and to recover Rs. 70 on account of the khoti profits for 1892-93 and 1894-95.

Both the lower Courts held that the period of limitation to be applied was twelve years, the first Court holding that the cause of action accrued in 1888-89, when Sakharam first entered upon the management of the village; the lower appellate Court holding that the cause of action accrued when Dhondo in 1881 and 1884 caused the lands to be entered as dhara, and thus prevented Sakharam or Parashram from participating in the rents of those lands as khoti, and that, "but for the provisions of s. 18 of the Limitation Act, the plaintiffs' suit would be time-barred even under art. 144."

Now, assuming that in such a suit as the present the period of limitation which is applicable, is twelve and not six years, it is obvious that the suit is time-barred. For when did Sakharam's right, as purchaser of Parashram's share in the khoti, to participate in the khoti profits of these lands arise? Obviously at the date of his purchase in 1881. Even assuming that Parashram received his share of these profits up till 1881, which is not found as a fact, and which is most improbable, as Dhondo was then denying that Parashram [111] was a sharer at all in the village, clearly Sakharam's right to take the half-share of the profits of those lands accrued in 1881. To this day he has not received any such share. But directly he purchased Parashram's share, he was entitled either to receive from the kabulayatdar khot the half-share in the profits of all the khoti lands including the lands in suit, or to pass the kabulayat in alternate years and himself recover the profits from the cultivators of those lands. Whatever may have been the reason, he and his sons have never been in possession of any share of the profits of these lands, not even in the years when the

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eldest son passed the kabulayat and managed the village, and their right to such possession had throughout been denied by Dhondo. *Prima facie*, therefore, the claim is clearly time-barred.

The lower appellate Court relied on s. 18 of the Limitation Act as avoiding the bar. That section provides that when any person having a right to institute a suit has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, the time limited for instituting a suit shall be computed from the time when the fraud first became known to the person injuriously affected thereby. These provisions do not apply to the facts of the present case. For Sakharam's right to institute a suit arose in 1881. That right could not have been kept from his knowledge by Dhondo's conduct in 1881 and 1884. On the contrary, according to the Subordinate Judge, A. P., the lands in question stood in the village records of 1881 as khoti. Whatever evil motives may be attributed to Dhondo, his conduct in publicly bringing suits in 1881 and 1884 against the cultivators of those lands, asserting that they were his dhara, cannot, because he did not make Sakharam a party, be termed a fraud by means of which Sakharam's right to institute a suit (which had accrued in 1881) was kept from Sakharam's knowledge.

It is unnecessary to allude to various other points discussed by the Subordinate Judge. On the above facts we must hold that the decree of the lower Court must be reversed and the suit dismissed with costs on plaintiffs throughout.

Decree reversed.

Note.—An application for review of judgment in this case was made, but the Court on 23rd November, 1899, rejected the same.

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[112] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

MEHERJAN BEGAM (*Original Applicant*), *Appellant v.* SHAJADI BEGAM AND ANOTHER (*Original Opponents*), *Respondents** AND NAWAB MIR NURUDIN (*Defendant Opponent*), *Appellant v.* AMTULNISSA (*deceased*) BY HER HEIRS, HER DAUGHTER MEHERJAN BEGAM AND OTHERS (*Plaintiffs, &c.*), *Respondents.** [8th August, 1899.]

Mahomedan law—Inheritance—Residuary—Sister a residuary with daughters.

A Mahomedan lady died, leaving a husband, two daughters, a sister, and the son of her father's paternal uncle.

Held, that the sister was entitled, in preference to the paternal kinsman, to the residue of the deceased's estate after the husband and daughters had taken their shares.

APPEAL from the decision of Rao Bahadur K. B. Marathe, First Class Subordinate Judge of Surat.

In 1896 one Waliunnissa Begam and others obtained a decree for partition of certain joint property against Nawab Mir Nurudin Husein Khan.

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* Joint Appeals Nos. 20 and 44 of 1899.

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On the 11th June, 1898, during the course of the execution proceedings, Waliunnissa Begam died, leaving a husband, two minor daughters, and a sister Meherjan Begam.

Thereupon a dispute arose as to who were the heirs and legal representatives of the deceased according to Mahomedan law.

Meherjan Begam applied to the Court to place her name on the record as the residuary heir of the deceased.

This application was opposed by Nawab Mir Nurudin, who urged that he was the paternal cousin of the deceased's father, and as such was a residuary of the first class, entitled to succeed in preference to the sister.

The Subordinate Judge held that the sister was no heir, being excluded by the daughters of the deceased, and that the paternal kinsman was a very remote and not a recognised residuary. He, therefore, passed an order declaring that the daughters and the husband were alone the heirs of the deceased both as sharers and residuaries by return. Their names were accordingly entered on the record in place of the deceased.

[113] Against this order both Meherjan Begam and Nawab Mir Nurudin preferred separate appeals to the High Court.

Gokaldas Kahandas Parek, for Meherjan Begam.

Ganpat Sadashiv Rao for Nawab Mir Nurudin.

JUDGMENT.

PARSONS, J.—The Subordinate Judge says that "the applicant as sister of the deceased is no heir, because she is excluded by the daughters of the deceased, who are first class heirs." This is not correct. Daughters as sharers take a specific portion of the estate, but they do not take the whole.

In this case Waliunnissa died leaving a husband, two daughters and a sister. As sharers the husband takes $\frac{1}{4}$th of her estate and the daughters take $\frac{2}{3}$rds. Whether they take $\frac{2}{3}$rds of her estate or $\frac{2}{3}$rds of the remainder has not been argued before us, and it is not necessary for us to decide this point. In either case a residue is left, and the only question at issue in this appeal is to whom this residue goes. The applicant claims it as being the sister of the deceased; the opponent claims it as the son of the uncle of the father of Waliunnissa. It appears to us to be quite clear, on the authorities, that the sister is entitled to it in preference to the patrneal kinsman. Macnaghten in his Principles and Precedents of Mahomedan Law in para. 25 at p. 5 says: "Where there are daughters or son's daughters and no brothers, the sisters take what remains after the daughters or son's daughters have realized their shares." In Wilson's Digest in para. 233 it is said: "If there be no residuaries of the first or second class and no brothers, but daughters or son's daughters whose existence will prevent sisters (full or consanguine) from taking, as sharers, such sisters or sister will take the residue, if any." The residuaries of the first and second class are described in para. 224 to be: "Class I.—Sons and son's sons, daughters and son's daughters when not sharers. Class II.—Father (and true grand-father)."

Paternal uncles, great-uncles and their male descendants in the male line are entered as coming within Class IV. Syed Amir Ali in his Work on Mahomedan Law, second edition, though he classes sisters with daughters as residuaries *together with others*, says at p 59 that "when a person dies leaving behind him several relations who may be classed as residuaries of the different kinds indicated, preference is given to propinquity to **[114]** the deceased, so that the residuary with another, when nearer to

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the deceased than the residuary in himself, is the first," and he gives this illustration: "Thus when a man has died leaving a daughter, a full sister, and the son of a half-brother by the father,—one-half of the inheritance is given to the daughter and the other half to the sister, who is a residuary *with* the daughter and nearer to the deceased than the brother's son. So, also, when there is with the brother's son a paternal uncle, the uncle has no interest in the inheritance."

We must, therefore, amend the order of the Subordinate Judge and direct that the name of the applicant be entered on the record as the person entitled to the residue of the estate of Waliunnissa. Costs to be costs in the proceedings.

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APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

SUNDARABAI (*Original Defendant* No. 3), *Appellant v.* JAYAVANT BHIKAJI NADGOWDA (*Original Plaintiff*), *Respondent.** [9th August, 1899.]

Damdupat—*Mortgage—Redemption—Mortgage with possession—Mortgagee to take rent in part payment of interest—Remaining interest to be paid by mortgagor every year.*

The *damdupat* rule applies in all cases as between Hindu debtors and creditors both in respect of simple as also of mortgage debts. (2) It does not, however, apply where the mortgagee has been placed in possession, and is accountable for profits received by him as against the interest due. (3) But where these profits are by terms of the bond received for only a portion of the interest on the mortgage debt, the general rule of *damdupat* will govern such mortgage accounts.

[R., 35 B. 199 (203)=12 Bom. L.R. 992=8 Ind. Cas. 649.]

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum, confirming the decree of Rao Bahadur L. G. Limaye, First Class Subordinate Judge.

Suit for redemption and possession of certain land.

The plaintiff had purchased the land from the defendants Nos. 1 and 2. It had been mortgaged on 24th June, 1864, by their ancestor to defendant No. 3 for Rs. 250. The plaintiff now sought to redeem this mortgage on payment of such sum as might be found due.

The following was the material part of the mortgage deed:—

[115] "We (mortgagors), having received Ankushi Rs. 250 (in letters two hundred and fifty) as debt from you (mortgagee), have agreed to pay interest on the said sum at the rate of $2\frac{1}{4}$ per cent. per mensem. As security for the said sum we mortgage with you a field at Halkarni, No. 134, 2 acres, 18 gunthas, assessment Rs. 6, and have given you possession this day of the same. The rent of the said land is Rs. 25 per year. You should cultivate the field and every year in the month of 'Magha,' after taking an account of the interest due to you, you should deduct the said sum of Rs. 25 from the total sum of interest, and the remaining sum of interest we will pay every year."

The Subordinate Judge was of opinion that the principle of *damdupat* applied, and he accordingly directed redemption on payment by the plaintiff to defendant No. 3 (the mortgagee) of Rs. 500.

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* Second Appeal No. 167 of 1899.

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On appeal (by the mortgagee) the Assistant Judge was of opinion that the rule of *damdupat* did not apply to this case, and he remanded the suit in order that accounts might be taken, and, on taking accounts, a sum of Rs. 1,704-15-8 was found due to the mortgagee (defendant No. 3).

The plaintiff appealed, and the Judge being of opinion that the accounts had been taken on a wrong principle again remanded the case. On accounts being again taken, a sum of Rs. 589-3-0 was found due to the mortgagee. The Judge accepted this finding and passed a decree for redemption on payment of this amount.

The mortgagee (defendant No. 3) appealed, and the plaintiff filed cross objections under s. 561 of the Civil Procedure Code.

The question on appeal was whether the rule of *damdupat* applied.

Scott (Acting Advocate General) with *G. S. Mulgaonkar* and *S. S. Mulgaonkar*, for the appellant (the mortgagee).

Branson (with *V. G. Bhandarkar*), for the respondent (plaintiff).

The following authorities were cited :—*Narayan* v. *Satvaji* (1) ; *Ali Saheb* v. *Shabji* (2) ; *Gopal* v. *Gangaram* (3) ; *Dhondshet* v *Ravji* (4) ; *Krishnaji* v. *Balaji* (5).

JUDGMENT.

[116] PARSONS, J.—The disposal of this case has been greatly protracted by the irregular procedure in the District Court. The suit was filed in 1894 and decided on the 30th January, 1896, by the Court of first instance, which, applying the rule of *damdupat*, awarded Rs. 500 to the mortgagee (the appellant in this Court). In appeal the Assistant Judge thought that the rule of *damdupat* had no application and that an account ought to be taken of principal, interest and rent as provided for by the mortgage deed, but instead of remanding an issue, or taking the account himself as should have been done, he, on the 4th March, 1897, reversed the decree and remanded the case in order that an account be taken on the footing he had prescribed and a new decree passed.

On the 28th July, 1897, a new decree was passed, awarding Rs. 1,704-15-8 to the appellant. On appeal against this decree, the District Judge dissented from the mode in which the Assistant Judge had ordered the account to be taken, and ordered it to be taken again in a fresh manner, namely, by an account being taken of the actual profits received by the appellant, and he remanded an issue for that purpose on the 18th January, 1898. The case was returned without any finding on that issue (not because the Subordinate Judge was on leave, but because no evidence was adduced by the parties, see the entry in the roznama under date the 24th March, 1898), and the District Judge again remanded it on the 2nd June, 1898. A finding was then returned to the effect that Rs. 589-3 were due on the mortgage and this was accepted by the District Judge, and a decree for redemption on payment of that amount passed on the 31st October, 1898. This appeal is filed against that decree, and the point for us to determine is how much is due on the mortgage.

The decision depends upon whether the rule of *damdupat* applies to the case or not. The material part of the deed of mortgage, (for we have nothing to do with the payment of nazarana), runs as follows :—

" We, having received Ankushi Rs. 250 (in letters two hundred and fifty) as debt from you, have agreed to pay interest on the said sum at the

(1) 9 B.H.C.R. 83.
(2) 21 B. 85.
(3) 20 B. 721.
(4) 22 B. 86.
(5) P.J. (1896), p. 415.

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rate of 2¼ per cent. per mensem. As security for the said sum we mortgage with you a field at Halkarni, No. 134, 2 acres, 18 gunthas, assessment Rs. 6, and have given you possession this day of the same. The rent of the said land is Rs. 25 per [117] year. You should cultivate the field, and every year in the month of 'Magha' after taking an account of the interest due to you, you should deduct the said sum of Rs. 25 from the total sum of interest, and the remaining sum of interest we will pay every year."

The case is thus precisely similar to that of *Narayan* v. *Satvaji* (1). The mortgagee was to hold the land without liability to account for rents and profits, and in consideration for that the mortgagor, instead of having to pay the sum of Rs. 67-8, the full interest, was to pay only Rs. 42-8 as interest. There could not, therefore, be any account taken of rents and profits. That the rule of *damdupat* applies to such a case has repeatedly been held by this Court; (we may almost say that it has never been questioned, certainly not in late years); and it is affirmed in the case just quoted. In the case of *Gopal* v. *Gangaram* (2), Candy, J., says (p. 725): "It is unnecessary to quote at length the many decisions in which it is shown that the rule of *damdupat* does apply to all cases in which the mortgagee has had no possession of the mortgaged property, or in which being in possession he takes the rents and profits in lieu of the whole or part of the interest. In such cases no account is taken on both sides, and, therefore, the rule of *damdupat* applies." In *Ali Saheb* v. *Shabji* (3), the facts were similar to those in the present case and the rule was applied to the Hindu mortgagor.

This being so, the first decision of the Court of first instance was undoubtedly right, and no more than double the principal ought to have been awarded to the mortgagee for the debt due under the mortgage. The amount of nazarana to be repaid is not disputed. We amend the decree by substituting Rs. 539 for Rs. 589-3. The amount still remaining unpaid is to be paid within six months of this date or the respondent will be foreclosed. We make no order as to costs in this Court.

RANADE, J.—The only point of law involved in this case is whether the *damdupat* rule was applicable to the mortgage account in this redemption suit. The Court of first instance held that the *damdupat* rule applied, and it accordingly passed a decree for Rs. 500, to be paid by the respondent plaintiff to [118] the mortgagee-appellant, defendant No. 3. In appeal Mr. Lord, the Assistant Judge, was of opinion that the *damdupat* rule did not apply as there was a running mortgage account, and he accordingly remanded the case with directions to make up a fresh account. The Court of first instance thereupon, setting aside the *damdupat* rule, found that the balance due was Rs. 1,704-15-8. Mr. Beaman, the District Judge, was not satisfied with this account, and remanded the case back again for a fresh account. In this second remand, the Court of first instance reduced the balance of the mortgage account to Rs. 589-3-0. The District Judge, Mr. Beaman, adopted this finding, and confirmed the decree, but at the same time he expressed an opinion that the *damdupat* rule ought to be made universally applicable to all mortgage accounts, or abrogated altogether. In the appeal before us, the mortgagee-appellant has raised the contention that the *damdupat* rule did not apply to the mortgage account in the present case.

(1) 9 B. H. C. R. 83. (2) 20 B. 721. (3) 21 B. 85.

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It may be remarked at the outset that the remand made in this case under s. 562 by Mr. Lord was irrregular, and that the proper order should have been to send an issue under s. 566 for determining the balance due.

As regards the principal point of law, it may be noted that the Court of first instance relied chiefly on the authority of the decision in *Shri Ganesh Dharnidhar* v. *Keshavrav* (1) in coming to the conclusion that the *damdupat* rule was applicable here. It was held in this last case that in a mortgage account, if after appropriation of rents and profits, the amount of interest payable exceeds the amount of the principal, this excess should not be allowed. The correctness of this last ruling was questioned in *Gopal Ramchandra* v. *Gangaram* (2), where it was held that the operation of the rule of *damdupat* must be excluded in all mortgages, the terms of which necessitate the existence of an account current between mortgagor and mortgagee, whatever the state of the account may be. It was on the strength of this ruling, supported by *Dhondshet* v. *Ravji* (3) and *Krishnaji* v. *Balaji* (4) that the Assistant Judge, Mr. Lord, came to the conclusion that the *damdupat* rule did not apply to the present case, inasmuch as **[119]** there was an account of profits and interest to be taken in this suit.

As the bond provided that the mortgagee should take the profits, which were estimated at Rs. 25, in lieu of a portion of the interest, and the mortgagor should pay the balance of interest himself, the present case must be distinguished from those noticed above, as also from the ruling in *Rango* v. *Balaji* (5). In these cases, the accounts had to be taken generally of the interest on one side, and of profits on the other. A different class of cases has to be considered where, as in the present case, the rents and profits of the land are fixed at a particular amount which falls far short of the interest due. In such cases the principle would justify the application of the rule of *damdupat* in making up the final account. Accordingly it was held in *Shankara Bawa* v. *Babaji* (6) that where there is an express stipulation that rents and profits are to be taken in lieu of a fixed portion of the mortgage-debt, the ordinary rule which governs cases of running mortgage accounts would not hold good. Similarly where the mortgagee has to receive the profits and rent without any liability to account, being responsible only for the payment of assessment, the *damdupat* rule has been held to apply—*Vasudeo* v. *Bhagvan* (7) and *Daji Gopal* v. *Daji Hari* (8). There are two decisions in the earlier reports—*Vithal* v. *Daud* (9) and *Narayan* v. *Satvaji* (10)—which expressly cover the present case. In *Vithal* v. *Daud* the profits were by agreement to be received in lieu of past interest, and as no account had to be taken, the rule of *damdupat* was held to apply. This was also the view adopted in *Narayan* v. *Satvaji*. This intermediate class of cases must, therefore, be treated apart from the general rule which regulates running mortgage accounts.

To sum up, (1) the *damdupat* rule applies in all cases as between Hindu debtors and creditors, both in respect of simple as also of mortgage debts. (2) It does not, however, apply where the mortgagee has been placed in possession, and is accountable for profits received by him as against the interest due. (3) But **[120]** where these profits are by the terms of the bond received for only a portion of the interest on the mortgage-debt, the general rule of *damdupat* will govern such mortgage

(1) 15 B. 625. (2) 20 B. 721 (728). (3) P. J. (1896), p. 202.
(4) P.J. (1896), p. 415. (5) P.J. (1886), p. 76. (6) P.J. (1881) p. 291.
(7) P.J. (1873), p. 32. (8) P.J. (1873), p. 74. (9) 6 B. H.C R. A.C.J. 90.
(10) 9 B.H.C.R. 83.

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accounts. The inconvenience, to which Mr. Beaman in his judgment refers at some length, is thus obviated, and all equities are provided for.

I would, therefore, vary the decree, and hold that only Rs. 500 plus Rs. 39 for nazarana charges are due to the appellant. As he has received this sum, only Rs. 39 remain due. Each party to bear his own costs in this appeal.

Decree varied.

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24 B. 120 = 1 Bom. L. R. 645.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice and Mr. Justice Candy.

VINAYAK NARAYAN (*Applicant*).—DATTATRAYA KRISHNA DATAR, (*Applicant*).* [11th September, 1899.]

Civil Procedure Code (Act XIV of 1882), s. 316—Execution—Sale—Sale absolute—Purchaser—Certificate of sale granted to the representative of deceased purchaser.

When a sale in execution has become absolute, the Court can, under s. 316 of the Civil Procedure Code (Act XIV of 1882), grant the certificate prescribed therein to the representatives of a deceased purchaser.

[R., 13 C.L.J. 625 = 6 Ind. Cas. 392.]

REFERENCE by Rao Saheb Govind Vasudev Kanitkar, Subordinate Judge of Alibag, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was made in the following terms :—

"There are two applications (one in darkhast No. 818 of 1898, and another in darkhast No. 827 of 1897) for sale certificates, made apparently under s. 316 of the Civil Procedure Code. The sales in both the cases have been formally confirmed and become absolute under s. 314 of the Code.

"The applicants are the heirs (son in one case and grandson in the other) of the purchasers who died after the sale, and the question for decision is whether the heirs or legal representatives have a right to apply for and obtain a sale certificate under s. 316, or, in other words, whether under the said section a Court is **[121]** under an obligation to grant a sale certificate to any one who asks for it?"

On the said question the opinion of the Subordinate Judge was in the negative. He observed :—

"My opinion is that the words of the said section do not include the heirs or legal representatives of the purchasers, nor does it appear that the Legislature had in view any applicant other than the purchaser himself. The section says that Court shall grant a certificate, but it does not say to whom. The marginal heading of that section is 'certificate to purchaser of immoveable property.' If the Legislature had intended the grant of a certificate, not only to the purchaser but also to his heirs, legal representatives or assignees or any other persons who may choose to ask for it, it would have said so expressly. It has been held that an application for certificate is not required to be in writing (I. L. R. 13 Bom. 670)."

* * * * *

"The ruling of the High Court in the case of *Assur Purushottam* v. *Ruttonbai* (I. L. R., 16 Bom. 152) appears to support the view that the

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* Civil Reference No. 8 of 1899.

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heirs or representatives of a deceased person are required to be expressly mentioned when the Legislature intends to include them."

Balkrishna N. Bhajekar (*amicus curiæ*) in support of the reference.—Section 316 of the Civil Procedure Code does not apply to the representatives of a deceased purchaser at an auction sale. The section does not expressly exclude them, but they cannot come under the term "purchaser." The marginal note to the section also uses the word "purchaser." Now by the latter part of the section also it would appear that the purchaser alone is meant. Section 318 also only mentions the purchaser. If the Legislature had intended that the legal representatives of a deceased auction-purchaser should be entitled to get a certificate, a provision to that effect would have been made in the Code.

Ganpatrao S. Mulgaonkar (*amicus curiæ*), for the applicants.—The term "purchaser" includes the purchaser's legal representatives—*Bala Kadar* v. *Gulam Mohidin* (1); *Ajudhia Prasad* v. *Nandlal* (2). Title passes by confirmation of the sale, and the certificate is merely evidence of the sale. It has nothing to do with the title, and it is not necessary to produce it to show title—*Khushal Panachand* v. *Bhimabai* (3); *Tara Prasad* v. *Nandkishore* (4). A certificate bears the date of the confirmation of sale. **[122]** Hence the right to a certificate vests in the purchaser after confirmation, and passes to his legal representatives after him.

JUDGMENT.

JENKINS, C. J.—The question submitted for our opinion is whether when a sale in execution has become absolute, the Court can, under s. 316 of the Civil Procedure Code, grant the certificate prescribed therein to the representatives of a deceased purchaser.

The section indicates the required contents of the certificate whose precise form is given in the 4th schedule to the Act. It was urged in argument that the provision dictating that the title to the property shall vest in the purchaser from the date of the certificate and not before, is inconsistent with a grant of the certificate after the purchaser's death. This, however, overlooks the earlier provision by which the certificate shall bear the date of the confirmation. Here apparently at the confirmation the purchaser was alive, so that there would be no incongruity in declaring, that from that date the title to the property should vest in him, for he it is in whom it would have vested.

Apart from this the section itself creates no difficulty; it is, so far as we can see, callous as to whether the purchaser is alive or dead; it wants him neither as applicant nor recipient. But we have been invited to read and be guided by the marginal note, for no other purpose that we can see than to create the difficulty which otherwise would not exist. The Subordinate Judge apparently has yielded to this invitation, but we would decline to follow him, not merely because it seems to us unprofitable in interpreting this Code to raise a needless difficulty, but also because the law as expounded forbids us to rely on the suggestive exposition of a marginal note.

Reading, then, the section in its strictest sense, we find in it nothing to forbid or to prevent the grant of a certificate under the circumstances of this case, and we would answer accordingly the question propounded in the reference.

Order accordingly.

(1) 7 B. 424. (2) 15 A. 318. (3) 12 B. 589. (4) 9 C. 842.

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APPELLATE CIVIL.

24 B. 123 = 1 Bom. L.R. 556.

24 B. 123 = 1 Bom. L.R. 556.

[123] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

GURUSHANTAPPA (*Original Plaintiff*), *Appellant v.* CHANMALLAPPA (*Original Defendant*), *Respondent.** [14th August, 1899.]

Hindu law—Joint family—Bond in favour of one co-sharer—Payment of such bond made to another co-sharer when a discharge—Right to sue.

Where a debt due to one member of a joint family has been paid by the debtor to another member of the family, the question whether such payment operates as a discharge depends on the circumstances under which it was made.

A and B were members of a joint Hindu family. Both managed the joint property for the common benefit. Each used to recover debts due on bonds taken in the other's name. In 1890 defendant passed a bond to A. In 1892 he passed a mortgage bond to B, the consideration for which was stated to be the balance due on the former bond. Subsequently A sued defendant on the bond of 1890.

Held, that under the circumstances the mortgage bond passed to B operated as a valid discharge of A's claim under the previous bond.

[F., 12 Bom. L.R. 801 (809) = 7 Ind. Cas. 986.]

SECOND appeal from the decision of T. Walker, District Judge of Dharwar.

The plaintiff Gurushantappa and his brother Kallyanappa were members of a joint Hindu family. They both managed their family property, and each used to recover debts on bonds taken in the other's name.

On the 22nd June, 1890, the defendant passed a bond for Rs. 400 to Gurushantappa.

On the 23rd September, 1892, defendant executed in favour of Kallyanappa a mortgage bond, the consideration for which was therein stated to be the balance due on the bond for Rs. 400 of the 22nd June, 1890.

In 1896 Gurushantappa filed this suit to recover Rs. 800, the balance due on account of principal and interest on the bond of the 22nd June, 1890.

Defendant pleaded the mortgage bond as a discharge.

The Subordinate Judge held that the mortgage to Kallyanappa could not be pleaded as a valid discharge to the plaintiff's claim in his bond. He, therefore, decreed the plaintiff's claim.

[124] This decision was reversed, on appeal, by the District Judge, who was of opinion that under the circumstances of the case the mortgage given to Kallyanappa absolved defendant from payment to plaintiff. He, therefore, reversed the decree and rejected the plaintiff's claim.

His reasons were as follows :—

"The dispute in this case is not really between plaintiff and defendant at all. It is between plaintiff and his co-sharer, Kallyanappa. These two are members of a joint family, and until about eight or nine years ago they lived together and managed their joint property for the common benefit. Thus in 1888 a mortgage bond was taken by Kallyanappa from one Sheshobhat, and plaintiff signed the receipt, and returned the bond when the debt was paid off. Plaintiff states in his deposition that 'up to the last eight or nine years Kallyanappa used to receive debts due on bonds taken in my name, and I used to recover debts due on

* Second Appeal No. 45 of 1899.

bonds taken in Kallyanappa's name.' About eight or nine years ago they quarrelled, and Kallyanappa started a branch of the family business at Byadgi, where he now lives, plaintiff continuing to reside at Katenhalli. No partition, however, has yet taken place, neither of them apparently liking to start legal proceedings, but they are apparently trying to get what they can out of the family debts, each for himself."

* * * *

"After some hesitation, I have come to the finding that the two united relatives were in precisely the same position as regards this family debt, and the document passed to plaintiff is discharged by Ex. 38 passed to Kallyanappa."

Against this decision plaintiff preferred a second appeal to the High Court.

Shamrao Vithal, for appellant.

There was no appearance for respondent.

JUDGMENT.

PARSONS, J.—We take the law as settled that a member of a joint family can sue on a contract which he has taken in his own name, especially when it does not purport to have been obtained by him on behalf of any others but himself (see *Hari* v. *Mahadu*(1)). Whether, however, payment to any member of the family would be binding on the member who took the contract in his own name, seems to depend upon the facts of each particular case. In *Adaikkalam* v. *Marimuthu*(2) it is pointed out that the promisee under the contract would be, as regards the [125] promisor, the only person entitled to payment, and that the contention, that payment to any member of the family was by itself necessarily binding on the promisee, could not be supported, and that, therefore, it lay on the promisor to show that his payment to a third party was binding on the promisee. These are propositions that seem to us to be sound in principle, and we apply them to the present case.

The plaintiff and one Kallyanappa were members of a joint family and lived together and managed their joint property for the common benefit. Each used to recover debts due on bonds taken in the other's name. The defendant in 1890 passed a bond to the plaintiff. In 1892 he passed a mortgage bond to Kallyanappa wherein the debt under that bond was included and discharged.

In the ordinary course of dealings the plaintiff would have admitted the discharge, and the only reason he gives for disputing it is, that he says that he and Kallyanappa quarrelled some eight or nine years ago (that is, in 1889 or 1890), and that Kallyanappa started a branch business at Byadgi. He admits, however, that no partition took place and no notice of any kind was given to the defendant. We find, moreover, that in 1894 the plaintiff received a debt due under a mortgage bond passed to Kallyanappa in 1888. We think, therefore, that the payment by the defendant to Kallyanappa must be held to be good as against the plaintiff, and accordingly we dismiss the appeal.

(1) 20 B. 435.

(2) 22 M. 326.

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CRIMINAL REVISION.

24 B. 125 = 1 Bom. L.R. 518.

24 B. 125 = 1 Bom. L.R. 518.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

In re MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY *v.* HARI DWARKOJI. HARI DWARKOJI (*Applicant*).*

[23rd August, 1899.]

Bombay City Municipl Act (Bom. Act III of 1888), s. 381—Low ground—Low-lying ground—Notice by Municipal Commissioner requiring owner of low-lying ground to fill it with sweet earth up to a certain level.

Under s. 381 of the Bombay Municipal Act (Bom. Act III of 1888) the Municipal Commissioner for the City of Bombay issued a notice to the appellant [126] as owner of certain low-lying ground. The notice stated that in the opinion of the Commissioner the ground accumulated water in the monsoon and caused nuisance to the tenants of two chawls situated on the premises. The owner was, therefore, required by the notice "to fill in the low-lying ground with sweet earth to the level of the road and slope it towards the new drain on the road side."

As the owner refused to comply with the notice, he was convicted and sentenced to pay a fine of Rs. 15 by the Presidency Magistrate under s. 471 of the Municipal Act (Bom. Act III of 1888).

Held, reversing the conviction and sentence, that the notice was illegal. The words used in s. 381 are "low ground," which is not the same as low-lying ground. And though the section gives power to the Commissioner to require the owner of low ground to cleanse and fill up the same, it does not permit him to issue an order that an indefinite extent of low-lying ground shall be filled up, much less that it shall be filled up to some particular level, or filled up with sweet earth, or that it shall be sloped in a particular direction.

APPLICATION under s. 435 of the Code of Criminal Procedure (Act V of 1898).

The applicant was owner of a large area of low-lying ground at Dadar Road in Bombay.

On 8th February, 1899, the Municipal Commissioner of Bombay issued to the applicant a notice under s. 381 (1) of the City of Bombay Municipal Act (Bom. Act III of 1888).

The notice was in the following terms :—

"Whereas in my opinion the ground accumulates water in the monsoon and causes nuisance to the two chawls situated in your premises, now pursuant to the provisions of s. 381 of the City of Bombay Municipal Act, 1888, I do hereby with the approval of the Standing Committee require you within one month from the service hereof *to fill in with sweet earth the low-lying ground to the level of the road and slope it towards the new drain on the road side.* And if you fail to comply with this requisition, you will be liable to the penalty prescribed by s. 471 of the said Act."

The applicant was prosecuted for not complying with this notice. He pleaded that he was fazendar of the land, and had leased it to one Manekji Edulji for a term of 999 years at an annual [127] rent of Rs. 275, and that the lessee ought to have been called upon to fill in the ground.

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* Criminal Revision No. 151 of 1899.

(1) Section 381 of Bombay Act III of 1888 provides as follows :—If, in the opinion of the Commissioner, any pool, ditch, tank, pond, well, quarry-hole, *low ground* or stagnant water is or is likely to become a nuisance, the Commissioner may, with the approval of the Standing Committee by notice in writing, require the owner thereof to cleanse, fill up, drain off or remove the same or take such other order therewith as the Commissioner shall deem necessary.

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24 B. 125=
1 Bom. L.R.
518.

This contention was overruled, and the applicant was convicted and sentenced to pay a fine of Rs. 15 under s. 471 of the Municipal Act (Bom. Act III of 1888) by W. R. Hamilton, Second Presidency Magistrate.

The accused moved the High Court under its Revisional Jurisdiction to set aside the conviction and sentence.

H. C. Coyaji, for applicant.

L. Crawford, for the Municipality.

JUDGMENT.

PARSONS, J.—We have no materials before us upon which we can decide whether the applicant is or is not the owner of the ground in question. It is said that he has leased it to a third party for a term of 999 years renewable at the option of the latter for a further term of 999 years. There is, however, no proof of this lease, as no evidence was taken on this point by the Magistrate. If the lease is proved, no doubt a question arises whether he is the "owner" within the meaning of s. 381 of the City of Bombay Municipal Act, 1888; but it cannot arise until that point is proved. In the present case it is unnecessary for us to order further enquiry, because we are of opinion that the notice is not a legal one under the section. It is addressed to Hari Dwarkoji, "owner of the low-lying ground at Dadar Road," and after reciting that the ground accumulates water in the monsoon and causes nuisance to the tenants of the two chawls situated in his above mentioned premises, requires him within one month "to fill in with sweet earth the said low-lying ground to the level of the road and slope it towards the new drain on the road side."

The words used in s. 381 are "low ground," which is not the same as low-lying ground, and though the section gives power to the Commissioner to require the owner of low ground to cleanse and fill up the same, it does not permit him to issue an order that an indefinite quantity of low-lying ground shall be filled up, much less that it shall be filled up to some particular level, or filled with sweet earth, or that it shall be sloped in a particular direction.

[128] For this reason we reverse the conviction and sentence and acquit the applicant, and direct the fine if paid to be refunded. This will leave the Commissioner free to take such further steps, if any, as he may be advised in the matter and as may be legal.

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APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

SHIVMURTEPPA (*Original Defendant No. 2*), *Appellant v.* VIRAPPA AND OTHERS (*Original Plaintiffs and Defendants*), *Respondents.**

[15th August, 1899.]

Hindu law—Partition—Suit by a purchaser of a co-sharer's interest for partition of a specific part of joint property—Right of defendant co sharers to require a general partition—Rules as to partition, general and partial.

Where a co-parcener or a purchaser of the rights of a co-parcener sues for partition, the partition must be general: a suit for a partial partition of a single property will not lie.

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* Second Appeal No. 164 of 1898.

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[F., 23 M. 608 = 10 M.L.J. 141 (143) ; 15 C.P.L.R. 156 (159) ; 4 Ind. Cas. 812 = U.B. R. II Qr. (1909), C.P.C., O. II, rr. 1 and 2, p. 21 ; 15 M.C.C.R. 308 (309) ; 32 P.R. 1908 = 151 P.L.R. 1908. = 75 P.W R. 1908 ; R., 31 B. 271 = 8 Bom. L.R. 758 (759) ; 4 Ind. Cas. 236 = 5 N.L.R. 152 (157) ; Expl., 14 Ind. Cas. 524 = 23 M. L.J. 64 = 11 M.L.T. 395.]

SECOND appeal from the decision of L. Crump, Assistant Judge of Dharwar.

Suit for partition. Plaintiffs sued for partition of a certain warehouse in which they claimed a half share. They alleged that it was the joint ancestral property of the first and second defendants ; that the right, title and interest therein of the first defendant had been sold in execution of a decree and purchased by their (the plaintiffs') ancestor in 1880, and that they (the plaintiffs) were now in joint possession with defendant No. 2.

Defendant No. 2, who alone defended the suit, pleaded (*inter alia*) that, besides the warehouse, there was other family property belonging jointly to himself and defendant No. 1 which ought to be included in the present partition suit ; that a general partition ought to be made of the whole of the joint property ; and he prayed that his share thereof should be ascertained and allotted to him.

The Subordinate Judge awarded the plaintiff a half share of the warehouse, without ordering a general partition of the joint property as prayed by the second defendant.

[129] This decision was upheld, on appeal, by the Assistant Judge. His reasons were as follows :—

" *Prima facie* the share of defendant No. 1 may be more or less than one-half, but I see no reason why a general partition need be decreed in order to ascertain it. In the present suit defendant No. 2, who is the only appellant, has admitted through his pleader that he has no objection to half of the property in suit being awarded to plaintiff.

" Further, it may be pointed out that the bulk of the ancestral property is admittedly in the possession of strangers, and is not available for partition, and could not, therefore, be brought into the hotchpot, even if a general partition were ordered.

" It appears to me that the Subordinate Judge has laid down a correct principle in dealing with this case. He says, ' the equities are to be ascertained by taking evidence, and then giving to the purchaser what equitably can be given consistently with an imaginary general partition.' This principle appears to me to be laid down in *Haribharthi* v. *Vithal* (1) and *Gadadhar* v. *Balvant* (2). In the present case I fail to see that it has been improperly applied, as it is clear that defendant No. 2 does not dispute the fact that a half share of the warehouse in suit would fall to defendant No. 1, if a general partition were made."

Against this decision defendant No. 2 preferred a second appeal to the High Court.

Shamrao Vithal, for appellant.

N. G. Chandavarkar and *V. G. Bhandarkar*, for respondents.

JUDGMENT.

PARSONS, J.—For the purposes of this suit it will be sufficient to state the following facts. The defendants Nos. 1 and 2 are undivided brothers. The plaintiffs bought at a Court sale the right, title and interest of the defendant No. 1 in a warehouse and they brought this suit

(1) P. J. (1882), p. 148.

(2) P. J. (1883), p. 250.

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to obtain a half-share of it partitioned off and given to them. On the objection of the defendant No. 2 that the whole of the joint property should have been brought into suit, and the persons in possession thereof made parties, twelve persons were joined as co-defendants and a list was filed showing the joint property which consisted of 4 houses valued at Rs. 5,650 and 10 fields assessed at Rs. 199-6-0 (Ex. 11). Any defect, therefore, that may have existed in the suit as originally filed was thus cured.

The defendant No. 2 further claimed that there should be a general partition made of all the joint property and that his own [130] share in it should be ascertained and given to him. The Judges of both the lower Courts refused him this relief. They were of opinion that there was no necessity for a general partition, as it was clear that a half-share of the warehouse in suit would fall to the defendant No. 1, if a general partition were made.

The Judge of the appellate Court thus puts the case :—

"It appears to me that the Subordinate Judge has laid down a correct principle in dealing with this suit. He says 'the equities are to be ascertained by taking evidence * * * and then giving to the purchaser what equitably can be given consistently with an imaginary general partition." This principle appears to me to be laid down in *Haribharthi* v. *Vithal* (1) and *Gadadhar* v. *Balwant* (2). In the present suit I fail to see that it has been improperly applied, as it is clear that defendant No. 2 does not dispute the fact that a half-share of the warehouse in suit would fall to defendant No. 1 if a general partition were made."

It appears to us that that might be a correct mode of disposing of a case where no one of the co-parceners except the purchaser wished a partition, but that the principle cannot be applied where, as here, a general partition is desired and asked for. The general rule is that a suit for partial partition will not lie. See *Haribharthi* v. *Vithal*(1). This was found in practice to work very hardly upon the purchaser and upon the members of the joint family, and the evident desire of the Courts here was to give a purchaser his rights without creating a disruption of the joint family, and its property against the wishes of the latter. For this purpose they introduced the principle of an imaginary general partition as in *Gadadhar* v. *Balvant* (2), and doubtless that principle can be applied in suitable cases. Where, however, the members of the family themselves desire a general partition, we do not see how that prayer can be refused. It is the right of every defendant in a partition suit to ask to have his own share divided off and given to him, and the fact that the partition suit has been brought by a purchaser cannot alter or annul that right. The objection raised by the Subordinate Judge that the defendant will get his share without any costs to him in Court fees, is not sound. A defendant claiming a share on partition [131] is, *qua* that claim, in the position of a plaintiff and could be called on to pay court fees on the value of his claim. We have dealt with the points involved in this appeal very recently (see *Murarrao Sitaram* (3), *Abdul Kadar* v. *Bapubhai* (4), and we have nothing to add to what we then said.

We think that in the present case the appellant (defendant No. 2) is clearly entitled to have his own share ascertained and partitioned, and we, therefore, reverse the decrees of the lower Courts and remand the

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(1) P.J. (1882), p. 148. (2) P.J. (1883), p. 250. (3) 23 B. 184. (4) 23 B. 188.

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case to the Court of first instance for retrial. All costs incurred to be costs in the cause.

RANADE, J.—In this case, one Chanappa, the ancestor of the respondents (plaintiffs Nos. 1—12) purchased the right, title and interest of respondent No. 13 (original defendant No. 1) in a certain warehouse, and obtained possession of the same through Court. The appellant (original defendant No. 2) was brother of respondent No. 13, and on his application he was placed in joint possession of the warehouse along with the auction-purchaser Chanappa. The respondents Nos. 1—12 sought in this partition suit to recover respondent No. 13's half-share in the warehouse, and the plaint stated that, besides the warehouse in dispute, the original defendants Nos. 1, 2 owned other joint property.

Appellant (defendant No. 2) did not object to the division of the warehouse, but he insisted that, besides the warehouse and the properties stated in the plaint, he and his brother (defendant No. 1) had other properties, which had been mortgaged and sold by the latter to strangers, and these properties should be included in the suit, and the persons in possession joined as parties to the suit, and a general partition made of the whole property including the warehouse. The necessary parties were added, and the plaint amended so as to include all the properties alleged to be jointly owned by the two brothers. The Court of first instance held that, though these other properties so included had to be considered along with the warehouse in dispute, for the purpose of fixing the judgment-debtor's proper share in the property purchased by the plaintiffs, no general partition of the entire property could be ordered in this suit at the instance of the appellant, and that the division should be confined to the warehouse only, in respect of which it was ordered that respondents, plaintiffs Nos. 1—12, should recover a half-share as belonging to the judgment-debtor. [132]

This view was upheld by the District Court in the appeal brought by the only appellant who objected to the decree. The same appellant in the present second appeal before us contended that he had a right, under the circumstances, to require the Courts below to order a general partition such as he demanded, as all the necessary parties had been joined in the suit, and the whole of the joint property had been included in the amended plaint, and was thus available for division among all parties.

It appears to me that, under the circumstances of this case, the appellant's contention is well founded, and the appeal must be allowed. The Courts below have obviously made a mistake in holding that the appellant did not object to the division of the warehouse in dispute. His admission appears to have been made with the qualification that the division of the warehouse should be accompanied a general partition of the whole of the joint property. The appellant's contention seems to have been all along that as his brother, the judgment-debtor, had mortgaged and sold the joint property on his own responsibility, his share in the particular warehouse in dispute could not be determined without considering all the equities arising between the claims of the appellant and his brother. The Court of first instance appears to have at first acted upon this view when it allowed the plaint to be amended, and new parties to be added. In finally disposing of the case, however, it appears to have changed its first view, and it came to the conclusion that a general partition could not be claimed in this case by the appellant, and that the actual division must be confined to the particular warehouse in dispute. This was clearly based on a mistaken view of the law of partition.

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Leaving aside for the present the subsequently added properties, which were not in the possession of the appellant and his brother, the appellant had clearly a right to insist on an actual partition of the properties first mentioned in the plaint, which [133] were admittedly in the possession of his brother. Supposing that the judgment-debtor, whose rights had been purchased by Chanappa, had himself sought to recover possession of an equal half-share of the warehouse, he could only have done so by bringing a suit for general partition, including therein all the properties in the possession of both the brothers. A suit will not lie for the division of any single property, and the only remedy is by general partition— *Nanabhai* v. *Nathabhai* (1); *Trimbak* v. *Narayan* (2); *Venkatesh* v. *Ganpaya* (3); *Gopal* v. *Narnapa* (4); *Haridas* v. *Pran Nath* (5). The only exception recognised to this general rule is where any portion of the joint property is not in the possession of any of the co-parceners by reason of its being in mortgage with third parties, in which case such mortgaged property, if not available for immediate partition, may be excluded from the partition suit—*Balkrishna* v. *Hari Shankar*(6); *Narayan* v. *Pandurang*(7). With this exception, as also where any property is within the jurisdiction of a foreign Court, a member of an undivided family, suing his co-parceners for partition, must bring together into hotchpot the whole of the property in his possession —*Hari* v. *Ganpatrav*(8). The whole property and all the parties must be represented in a partition suit—*Chhotibibi* v. *Pachhabi* (9). Similarly, when a co-parcener brought a suit to recover his moiety of a particular property which another co-parcener had mortgaged to a third party, it was held that no such suit would lie for a defined moiety, as, on an equitable adjustment of the right of the sharers, the whole of the property in dispute might be left in the hands of the mortgagee by assigning it to the share of the mortgaging co-parcener—*Daji* v. *Aba*(10). Of course a co-parcener is free to abandon any portion of the property to which he has a claim, but he cannot be permitted to do so if by such action he throws a disproportionate burden on the portion of the estate alienated or mortgaged by him—*Wamnaji* v. *Atmaram* (11).

[134] Such being the state of the law as between co-parceners and those who derive rights under them, the same principle must hold good in suits where an execution purchaser sues for a division of a particular property purchased by him from one of the co-parceners. In *Venkatarama* v. *Meera Labai*(12) where a purchaser of a joint co-parcener share in a specific portion of the property sued to obtain a division of that property, it was held that such a suit did not lie. The purchaser of a co-parcener's share can take no higher right than his vendor possesses and that is not a right to a certain share in each particular property, but a joint right with other co-parceners to the ownership of the whole with an incidental right to obtain a partition. This view was given effect to in a later decision of the same Court—*Palani Konan* v. *Masakonan* (13) *Venkayyaya* v. *Lakshmayya* (14). In a decision of this Court in *Udaram* v. *Ranu* (15) the rule was laid down that the purchase of an undivided co-parcener cannot, before a partition is made, insist upon the possession of any particular portion of the undivided estate. Westropp, C. J., laid down

(1) 7 B.H.C.R.A.C.J. 46. (2) 11 B.H.C.R. 69. (3) P.J. (1876), p. 110.
(4) P.J. (1883), p. 3. (5) 12 C. 566. (6) 8 B. H.C.R.A.C.J. 64.
(7) 12 B. H.C.R. 148. (8) 7 B. 272. (9) P.J.(1892), p. 112.
(10) P. J. (1892), p. 290. (11) P. J. (1883), p. 337. (12) 13 M. 275.
(13) 20 M. 243. (14) 16 M. 98. (15) 11 B. H. C. R. 76.

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that in such cases, partition must be of the whole of the family property, and it must be made in a regularly constituted suit to which all the co-parceners must be made parties. The Calcutta High Court has also held that there can be no partial division of family property—*Radha Churn* v. *Kripa Sindhu* (1). This decision was questioned on another point in *Upendra Narain* v. *Gopee Nath* (2), but that point has no bearing on the present dispute.

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These rulings leave no doubt that both when a co-parcener himself, or the purchaser who obtains his rights, brings the suit, no suit for a partial partition of any single property can lie, and that the partition must be general. Both the Courts below rely chiefly on the decision of Mr. Justice West in *Gadadhur* v. *Balvant* (3). It was, however, not a case of partition, either partial or general, but a contest between two purchasers about four fields which one of them had bought from two brothers, and the other **[135]** had bought the same four fields before from a third brother, and an account had to be taken to ascertain each brother's particular share in the four fields.

It is clear from a review of the authorities noted above that the appellant was entitled to require the Court to proceed with the partition inquiry, and fix the appellant's share in the family property. As the property not in the possession of the brothers has been included in the plaint, and the necessary parties have been joined, there is no particular reason, if the appellant pays the additional Court-fees, why the whole claim should not be dealt with as in a regular partition suit, and appellant's share in the whole family property determined.

I would reverse the decrees of the Courts below, and remand the case for passing a regular partition decree after due inquiry.

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24 B. 135 = 1 Bom. L. R. 627.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice and Mr. Justice Candy.

DEVJI (*Original Defendant*), *Appellant v.* SAMBHU AND ANOTHER (*Original Plaintiffs*), *Respondents.** [31st August, 1899.]

Hindu law—Joint family—Father's debt—Liability of family property—Decree against widow for husband's debt—Execution sale—Minor sons bound though not parties to suit.

One Ghanu died leaving him surviving a widow and two minor sons. The widow mortgaged some lands and a house to pay off a debt due by her husband. Subsequently a money decree was passed against her for another debt due by her husband, and the greater part of the mortgaged property was sold in execution, and the equity of redemption thereof was purchased by the mortgagee (the defendant). The sons were not parties to the suit in execution proceedings.

The sons afterwards brought this suit claiming that not having been parties to the suit their interests were not affected by the sale and praying for redemption. The lower Courts allowed the claim and passed a decree for the plaintiffs. On second appeal,

Held (reversing the decree and remanding the case) that the Courts in determining the effect of an execution sale must look to the substance of the transaction. The question was whether the debt for which the property was sold was a joint family debt, and whether it was the equity of redemption in the **[136]** entirety of the mortgaged property that was offered for sale, bargained for, and

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* Second Appeal No. 700 of 1898.

(1) 5 C. 474. (2) 9 C. 817. (3) P. J. (1883), p. 250.

intended to be bought. It was obvious that, if the sons had been parties to the suit in which the decree had been passed, they would have appeared by their mother and guardian, and there was no reason to suppose that anything would have been differently done in the suit if she had been described as their guardian instead of being treated as the representative of the estate. Under these circumstances the sons were substantially represented in the suit, and the sale and proceedings therein should be treated as valid, unless the sons were able to show either that their father's debt, which was the foundation of the decree, was of such a nature that no liability arising from it could attach to the family property, or, if they failed in that, they might show that the entirety of the family property was, in fact, not sold.

[F., 2 S.L.R. 55 (59) ; 2 S.L.R. 76 (79) ; Appl., 34 M. 188 = 8 Ind. Cas. 1072 = 21 M.L.J. 320 = 9 M.L.T. 235 (246) = 1910 M.W.N. 799 ; R., 28 C. 517 = 5 C.W.N. 640 (648) ; 25 Ind. Cas. 84 = 20 C.L.J. 23 (29) = 19 C.W.N. 313.]

SECOND Appeal from the decision of W. H. Crowe, District Judge of Poona, confirming the decree of Rao Saheb N. G. Patbak, Subordinate Judge of Khed.

Suit for redemption. The plaintiffs were the sons and heirs of one Ghanu, who died in debt. On the 4th October, 1872, Ghanu's widow mortgaged the property in question, consisting of three pieces of land and a house, to the defendant Devji for Rs. 400. In December, 1872, a suit (No. 940 of 1872) was brought against her to recover a debt due by Ghanu, and a money decree was passed. The present plaintiffs, who were then minors, were not parties to that suit.

In execution of the money decree the greater part of the mortgaged property was sold and was bought by the defendant.

In 1897 the plaintiffs filed this suit, contending that they were the heirs of Ghanu ; that Ghanu's widow had no interest in the property, and that as they (the plaintiffs) were not parties to the suit in which the money decree was passed, their interests were not affected by the sale in execution of that decree. They prayed to be allowed to redeem the property from the mortgage of 1872.

The defendant pleaded (*inter alia*) that the property had been sold in execution of a decree against the plaintiff's father ; that he (the defendant) purchased it at the Court sale, and had become its full owner ; that the plaintiffs had no right now to redeem and that their claim was time-barred.

The Subordinate Judge found that only the right, title and interest of the plaintiffs' father Ghanu in the property was sold [137] and purchased by the defendant ; that the plaintiffs were entitled to redeem the whole of the property, it being open to the defendant to bring a suit for partition to recover the father's share ; that partial redemption could not be allowed ; that the claim was not time-barred, and that the plaintiffs should be allowed to redeem the property on payment of Rs. 400 to the defendant.

The defendant appealed and plaintiffs presented cross-objections under s. 561 of the Civil Procedure Code (Act XIV of 1882). The Judge confirmed the decree.

The defendant preferred a second appeal.

Ghanasham N. Nadkarni, for the appellant (defendant).—We contend that by our purchase we have become full owner. It was not necessary to make the plaintiffs, who were then minors, parties to the suit in which the money decree was passed, because their mother was their natural guardian and she was the defendant—*Achut Ramchandra Pai* v. *Manjunath* (1).

(1) 21 B. 539.

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The lower Courts have found our purchase to be of no avail to us, because the property was already mortgaged to us. We say that we purchased the property, not as mortgagee but as a stranger. We purchased the whole of the equity of redemption and not merely the father's interest. The plaintiffs were sufficiently represented in the suit by their mother, their natural guardian.

Daji A Khare, for the respondents (plaintiffs).—The certificate of sale obtained by the defendant clearly shows that what he purchased was only the right, title and interest of Ghanu, who was a co-sharer in the property with us as his sons. We are, therefore, entitled to redeem at least a two-thirds share of the property if not the whole of it. But we say that the order directing redemption of the whole of the property is correct. The mortgage is still subsisting and we are entitled to redeem the whole of the mortgaged-property. The ruling in *Akoba Dada* v. *Sakharam* (1) is on all fours with the present case. Though we were the legal heirs of our deceased father we were ignored in the suit for money, and our mother was sued as the representative of our father, which she was not. Therefore the decree in that suit cannot bind us, it being merely a money decree against our **[138]** mother in her capacity as a widow—*Jatha Naik* v. *Venktapa* (2) referred to in *Akoba Dada* v. *Sakharam* (1).

At this stage the case was adjourned for the production of the records of Suit No. 940 of 1872 and execution proceedings to ascertain definitely the frame of the suit. The District Judge of Poona, who was asked to send the records, reported that the records were burnt in the conflagration of the Bodhvar Wada in 1879.

JUDGMENT.

JENKINS, C. J.—This is a suit to redeem property mortgaged to the defendant, and the claim is resisted on the ground that the equity of redemption is vested, not in the plaintiffs, but in the defendant, who alleges that he purchased it at an execution sale. The suit was in the first instance heard by the Second Class Subordinate Judge at Khed, who granted a decree in favour of the plaintiffs. This was affirmed, on appeal, by the District Judge at Poona, and it is from this decision that the case now comes before us by way of second appeal.

The plaintiffs are the sons and heirs of one Ghanu, who died in debt. On the 4th of October, 1872, Ghanu's widow—not Ghanu himself as the judgments of the lower Courts assume and assert—mortgaged the property in suit to the defendant to secure a sum of Rs. 400, which was in fact a debt of Ghanu's.

In December, 1872, a suit (No. 940 of 1872) was brought against the widow to recover another debt of Ghanu's; in 1873 a money decree was passed, and in execution of that decree the equity of redemption of the greater part of the mortgage property was sold. The defendant was the purchaser, and it is in this way that he claims to be entitled to the equity of redemption.

The plaintiffs contend that they were Ghanu's heirs; that their mother, the widow, who alone was sued, had no interest; and that, therefore, their interests are in no way bound by the execution proceedings.

In both the lower Courts this contention has prevailed, and they have held that the defendant has not made out a title to the equity of redemption. Attention, however, does not seem to have been drawn to certain

(1) 9 B. 429. (2) 5 B. 14.

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decisions which call for consideration in connection with circumstances such as arise in this case. [139] But before dealing with the authorities, we should point out that, at the time of the mortgage by their mother and of the decree and execution sale in suit No. 940 of 1872, the present plaintiffs were both minors and their mother was their natural guardian.

Now the cases make it clear that the Courts in determining the effect of an execution sale look to the substance of the whole matter and have declined to hold themselves fettered by any incorrect description or by any informality in procedure which can have had no practical influence on the result. And so it has constantly happened that where justice and equity require such a determination, it has been held that a greater or other interest in the property has passed than would be warranted by a strict adherence to the words of the sale notification or certificate in execution proceedings. Similarly, the whole estate of a deceased debtor has been held to be bound by proceedings in execution of a money decree though the actual heirs were not in so many words bound by the decree, but were substantially represented in the suit. And one can well understand how the Courts, and more particularly the Privy Council, have declined to apply the more rigid test of English practice to proceedings in this country.

We now propose to examine the cases with a view to ascertaining the limits within which the Courts have acted in disregard of mere formal defects. The first case to which we would refer is *Ishan Chunder Mitter* v. *Baksh Ali Soudagur* (1), which has since met with the unqualified approval of the Privy Council. The facts that gave rise to that suit have by now become familiar to most of us. A man died leaving a widow and two minor sons. He was at his death indebted in a sum of money, to recover which a suit was brought against his widow alone. Judgment was recovered and in the consequent execution proceedings property forming part of the deceased husband's estate was attached. In one part of the sale advertisement it was stated that the property to be sold was the mother's and in another column it stated that the rights and interests of the debtor were the property to be sold. The sale took place. Then a suit was brought by one [140] of the sums to recover the property on the ground that it had descended to him from his father, but it was dismissed. The *ratio decidendi* was that the deceased husband was really the debtor and the widow was sued merely in a representative character, and that inasmuch as the widow's rights and interests were *nil*, it was impossible to suppose that they were the subject-matter of the sale. That decision was pronounced on the 17th of July, 1863.

The next case in order of date is that of *The General Manager of the Raj Durbhunga, under the Court of Wards* v. *Maharajah Coomar Ramaput Sing* (2), decided by the Privy Council in March, 1872. It is unnecessary to refer to all the proceedings in question in that suit: it will suffice to state that one of them was a suit brought against a widow for rent accrued due in the time of her deceased husband. She was not the husband's heiress, but her minor son was, and she was sued as the mother and guardian of her minor son. In the words of Sir James Colvile, who pronounced the opinion of the Board, "it was a suit brought against those who were supposed to be the representatives of the debtor Gourpershad. In that suit the case set up by the defendants was that the infant was not the heir of his father; that he had been adopted into another family, and

(1) (1863) Marshall, 614.

(2) 14 M.I.A. 605.

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that consequently the widow was the sole heiress and representative. The decree was against the widow in that capacity. It declared that the son was not liable, and ended with a declaration, which clearly pointed to the realization of the demand out of the estates of the deceased Gourpershad, and showed that the decree was made against the person supposed to be the heir and representative of Gourpershad." In a later proceeding it was affirmed that Hurpersad was the heir of the deceased Gourpershad. In the end the estates were sold in execution of the decree against the widow. It was held that this sale was good. Sir James Colvile in reference to this point says: "The whole proceeding, if fairly looked at, amounts to this,—that the estate of Gourpershad was sold under the decree in execution of his debt, and that the interest of his widow, the registered proprietor and ostensible owner, of the estate and also the interest of his son, if he had any interest, [141] was bound by that decree." Then towards the close of the judgment there is this passage: "Their lordships also desire to add that they are unable to see any distinction between this case and that of *Ishan Chunder Mitter* v. *Buksh Ali Soudagar*. They entirely agree in the principles expressed by Chief Justice Peacock in that case and think that they govern the present case."

The principle to be deduced from those two cases is clear and we cannot do better than quote the words in which it has been expressed by the Privy Council itself. In *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Sing* (1) decided in July, 1879, the judgment of the Board was delivered by Sir Robert Collier, who states the effect of the two cases thus: "in execution proceedings the Court will look at the substance of the transaction and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right." The decision itself is an illustration of the limits within which the principle can be properly applied.

This brings us to those cases which appear to have been regarded as qualifying the rule thus laid down by the Privy Council: we need hardly say that if they are inconsistent with that rule there can be no question that it is our duty to disregard them and to loyally carry out to its just conclusion the principle enunciated by the Privy Council decisions and at the same time it will be right to consider whether this alleged departure is any thing more than a determination that the particular facts of the case do not attract the principle.

The cases which have been referred to as evidencing this departure have all arisen in this Presidency, and we will refer to them in their order of date. The earliest is *Jatha Naik* v. *Venkatapa* (2) decided in August, 1880. It was a suit to recover land, and the defence (so far as it is necessary to consider it for the present purpose) was that the plaintiff's father Govinda had mortgaged it to the defendant Jatha, that the property had been brought to sale under a decree obtained in a suit for realization of the security, and that at that sale the defendant Jatha had bought. To this it was urged on the part of the plaintiff that he had not been made a party to the suit and was not bound by it. [142] What had happened with regard to the parties was this; the suit in the first instance was brought against Govinda, but he died before decree, and thereupon his widow, Venktapa's mother, was substituted in his stead and an *ex parte* decree was passed. Then the widow died and an application was made by one Manji to have the decree set aside for deficient service. The application succeeded and Manji

(1) 6 I.A. 233.

(2) 5 B. 14.

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was substituted as a defendant. Now it is important to observe who Manji was: she was Govinda's sister, that is to say, Venktapa's paternal aunt. The suit then proceeded against Manji with the result that there was a decree, and it was as a purchaser in execution of that decree that Jatha claimed. It is only necessary to add that Manji was not Venktapa's guardian in any sense. On these facts it was held by Sir M. Westropp that the inheritance was wholly unrepresented, and as a result that the plaintiff was not bound by the decree. He did not, however, grant the plaintiff the relief he sought, but granted a decree for redemption framed so as to adjust the equities consequent on the sale.

Now, on this case, the following points should be remarked. Though the Privy Council decisions affirming the principle of *Ishan Chunder Mitter* v. *Buksh Ali Soudagar* were not even alluded to in the course of the arguments or the judgment, we do not read Sir M. Westropp's as indicating any intention on his part to qualify the rule laid down by Sir Barnes Peacock: he merely held, on the facts of that case, that there was not substantial representation. Next, it must be borne in mind that the decree, in execution of which the property was sold, was not against the widow, who would have been Venktapa's guardian, but against Venktapa's aunt, who was not his guardian: it was in law as though a complete stranger had been selected as defendant. And, lastly, it is to be noted that the decree worked substantial justice. Jatha, the mortgagee, had purchased the property for less than the amount of the mortgage-money, and under the decree the plaintiff could only redeem on payment of the full amount of the mortgage and interest as provided in the decree.

The next case is *Akoba Dado* v. *Sakharam* (1) decided in 1885 which undoubtedly in its circumstances bears a close [143] resemblance to the present. There the plaintiff's father mortgaged the property in suit and died leaving a widow and the plaintiff his minor son. A suit, having nothing to do with the mortgage, was brought against the widow alone, but as representing her deceased husband. A decree was passed; a sale was held in execution, and the defendant claimed that at that sale he became the purchaser of the equity of redemption. Sir Charles Sargent held this contention to be ill-founded and that the sale had not operated to pass from the plaintiff the equity of redemption. The cases in Marshall and in 14 Moore's are dealt with in the judgment, and their result is stated in these words: "These cases doubtless establish that when the minor son is substantially before the Court, and the proceedings show a clear intention on the part of the Court making the decree to bind the entire estate which is subject to the debt, no mere technical or formal objection will be allowed to prevail against giving full effect to the decree. But they do not go the length of saying that a widow represents the estate so as to bind the son, when the existence of the minor son is, from whatever cause, altogether ignored, and there is nothing on the face of the proceedings to show that she is sued as representing the minor son." Then the judgment proceeds to vouch in its support the decision of Sir M. Westropp with which we have already dealt, and in the result it is held, on the facts of that case, that there was no substantial representation. Unfortunately neither the report nor the judgment give us any clue as to the form or character of the decree, the order for sale, the notification or the sale certificate, but from the absence of any reference to

(1) 9 B. 429.

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them we should assume that "these proceedings did not" (to quote from the judgment) "show a clear intention on the part of the Court making the decree to bind the entire estate." It is to be noticed that no reference is made to *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (1), and the point of this will become apparent later.

The next case to which we would refer is *Jairam Bajabashet* v. *Joma Kondia* (2) decided in 1886 by Sir Charles Sargent and Mr. Justice Nanabhai Haridas. There one Kondia after mortgaging property to secure debt died leaving four sons, of whom one **[144]** only, Raghu, was of age. The mortgagee to realize his security brought a suit against "Kondia, deceased, by his heir Raghu." The minors were not parties, nor was Raghu expressed to be sued as representing the family, but simply as the heir of Kondia. There was a decree and in execution of it the joint family property was sold. A suit was then brought by the three minor sons for possession of this same property. In the lower Courts the claim was allowed with costs, but on appeal this decree was reversed. Now, in this case, *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* was brought to the notice of the Court and governed its conclusion, for it was held in deference to that case that the entirety of the estate was represented by the elder brother though the younger brothers were not parties and the elder brother was not named as their representative or guardian, nor, so far as the report discloses, was the fact of their existence referred to. The result was that the decree of the lower appellate Court was reversed and the case was sent back for a fresh decision after a finding had been recorded on the following issue:—"Was the debt incurred for an immoral and improper purpose"? The *onus* of proof arising on this issue was declared to lie on the plaintiff. This case seems to mark a change in the swing of the pendulum so far as this Presidency is concerned, for a tendency in the same direction is to be found in the decision of the same learned Judges in the case of *Khurshetbibi* v. *Keso Vinayek* (3), where the doctrine of representation was extended to a Mahomedan family one of whom had been omitted from the suit and proceedings in execution, her existence having been throughout ignored.

We now come to the case of *Erava* v. *Sidramappa*(4) heard in the first instance by Sir Charles Farran and Mr. Justice Parsons, who disagreed, with the result that it ultimately came for decision before a Full Bench composed of Mr. Justice Jardine, Mr. Justice Candy and Mr. Justice Ranade, who delivered their judgments on the 19th December, 1895. The facts on which that suit was brought were as follows. Nagappa mortgaged to the defendant Sidram on the 28th March, 1877. On the 27th June Hanmant obtained a money-decree in respect **[145]** of another debt against Nagappa, who, however, died before execution. Thereupon Hanmant applied for execution against the deceased by his nephew Ramlinga, who appeared pursuant to notice and informed the Court that not he but his cousins the deceased debtor's daughters were the heirs. No consequent amendment was made, but a sale was held under which Sidram claimed to have purchased the equity of redemption. The daughters and true heirs thereupon sued to redeem, and the defendant pleaded his purchase. It is difficult to treat this case as any authority on the point with which we are now concerned, seeing that at no stage of it was any reference made to that catena of cases with which we have already dealt, nor would it be

(1) 6 I.A. 233. (2) 11 B. 361. (3) 12 B. 101. (4) 21 B. 424.

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necessary to refer to it were it not that in the lower Court it was supposed to be a governing authority, and that in the judgment of Mr. Justice Ranade there are to be found certain remarks which divorced from the context might be supposed to have some bearing on the question now before us. But the truth is that those remarks must be read with the context, and we think it may be confidently said that Mr. Justice Ranade never intended to lay down a proposition in conflict with repeated rulings of the Privy Council, of this Court and of the Calcutta High Court.

The last case to which we will refer is *Achut Ramchandra Pai* v. *Manjunath Venkatnarnappa* (1) decided on the 20th of January, 1896, by Sir Charles Farran and Mr. Justice Parsons, where they held, in reliance on the case in Marshall and others, that in execution proceedings the widow sufficiently represented the estate of her deceased husband though there were minor sons living, and that the sons' only right was to show that the decree was not binding on the estate in their hands by reason of the debt not being one for which that estate was liable.

In tracing the origin and growth of this doctrine, it will be noticed that it had its first beginnings in Bengal, and it may perhaps be assumed that the cases out of which it grew were governed by the Bengal School of Law, so that we at one time felt some doubt whether that was a differentiating circumstance which rendered them inapplicable to cases governed by the [146] Mitakshara. We cannot find, however, that any point of this sort was made in the cases which have come under consideration in this Court, nor on reflection do we think that there is any solid foundation for the doubt. The matters for consideration as it seems to us are, 1st, what property could have been brought to sale in a properly constituted suit; 2ndly, what property was it actually intended to sell and buy; and 3rdly, has there been such an error in the constitution of the suit or the conduct of the proceedings that effect cannot be properly given to the intention, or, to state conversely, has there been a substantial representation of those interested in the property intended to be sold and bought?

The position of sons under the Mitakshara is succinctly stated by Lord Hobhouse in *Mussamut Nanomi Babuasin* v. *Modun Mohun* (2), where he says: "If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's co-parcenary interest alone (and in *Deendyal's* case there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale, if the sons had been brought in to oppose the legal proceedings." Nor does it make any difference as to what property can be brought to sale that the suit is brought against them after their father's death: the freedom of the son from the obligation to discharge his father's debt has reference to the nature of the debt and not to the nature of the

(1) 21 B. 539.

(2) 13 I.A. 1 (18).

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estate. As, then, the whole equity of redemption could have been sold, it has to be determined whether, if [147] all other circumstances had been favourable, the suit was so constituted that the proceedings in it could have had no operation against the present plaintiffs. By the other circumstances being favourable, we mean that the debt for which the decree was passed was a joint family debt and that it was the equity of redemption in the entirety that was offered for sale, bargained for and intended to be bought. Assuming for the moment all this in the affirmative, can it be said that the defect relied on was fatal?

In approaching the consideration of this part of the case, we feel in some difficulty by reason of our not having the records of the Suit No. 940 of 1872 or of the execution proceedings. This is a misfortune for which the parties before us are not to blame; for those records were destroyed by fire. The only record we have is the sale certificate, and from that we infer that though the widow was the defendant, she was not so in her personal capacity, and further that the decree was made against her as the representative of the entire estate. True, in strictness, she was not the real representative, for that estate was vested in her two infant sons, but it is obvious that if those boys had been made the defendants, it is through their mother and guardian that they would have appeared and acted, and there is no reason to suppose that one single thing would have been differently done in the suit had she been described as the guardian of the boys instead of being treated as representative of the estate in which they were interested. In our opinion it is impossible on the facts of this case to come to any other conclusion than that no plea was left unurged which might have been advanced had the infants' names appeared on the record, and that there was a substantial representation within the principle involved in the cases.

If then this be so, what consequence should be attached to the decree and execution proceedings? We do not think that they should be treated as absolutely void, but that they should be accepted as valid unless the present plaintiffs are able to show that they are not bound thereby, either on the ground that their father's debt, the foundation of the decree, was of such a nature that no liability arising from it could attach to the family [148] property, or, if they fail in that, they may show that the entirety of the family property was in fact not sold.

For the determination of these points two issues will be appropriate:

1. Was the debt, on which the decree in suit No. 940 of 1872 was founded, incurred for an immoral or improper purpose? On this issue it will lie on the plaintiffs to establish the affirmative.

2. Did the entire interest in the property pass under the sale in execution of that decree? This no doubt is to a large extent a question of law depending, as it does, in a great measure on the true construction of the only remaining record left to us, and had it rested solely on that, it would have been proper for us to have disposed of it. There may, however, be facts which would have a material bearing on the determination of this question, and by way of illustration we may point to the fact that the price may have been such as to afford an inference what it was intended to buy. As to this issue, the *onus* will be on the defendant, but the Court, if nothing else appears, may, under the circumstances of this case, well consider it discharged by the terms of the certificate.

The case must be remanded for decision on issues which we have formulated, and also on the following issues which will be necessary for the complete determination of the case:—

1. What at the date of the mortgage were the relative values (*a*) of the house and its site and (*b*) of the mortgaged lands ?

2. Was the second house built on land included in the sale certificate Ex. 12 or not ?

The *onus* of this last issue will be on the defendant-mortgagee.

The findings to be certified to this Court within two months.

Issues sent down.

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[149] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

UTTAMRAM AND OTHERS (*Original Applicants*), *Appellants v.* KISHORDAS AND ANOTHER (*Original Opponents*), *Respondents.** [4th September, 1899.]

Decree—Construction—Suit for land—Mesne profits—Decree for mesne profits—Decree silent as to the time down to which mesne profits were given—Construction of such decree—Civil Procedure Code (Act X of 1877), s. 211—Limitation—Limitation Act (XV of 1877), arts. 178, 179.

A decree, dated 3rd July, 1878, awarded possession of certain land with mesne profits to be ascertained in execution, but specified no time down to which the mesne profits were to be computed.

Held, that under s. 211 of the Code of Civil Procedure (Act X of 1877) the decree could not be construed as giving mesne profits for a period longer than three years from the date of the decree.

[F., 35 C. 1017 (1020); R., 24 Ind. Cas. 484.]

APPEAL from the decision of Rao Bahadur K. B. Marathe, First Class Subordinate Judge of Surat.

On the 3rd July, 1878, one Uttamram Jamyatmal obtained a decree in the High Court, which directed that he should recover certain land specified therein, and further declared him to be entitled to mesne profits (to be ascertained in execution by the Subordinate Judge) of all of the said lands sued for in the plaint, such mesne profits to be computed from the date of possession being given to the defendants.

The decree was silent as to the date down to which the mesne profits were awarded.

On 24th April, 1881, the decree-holder applied for execution of the decree, and asked for possession of the lands awarded to him, and for mesne profits from 1870 (the date at which the defendants had obtained wrongful possession) down to the date of his application, and for further mesne profits from the date of the application until delivery of possession.

The Subordinate Judge ordered possession to be given to him and awarded him mesne profits from 1870 down to the date of the [150] application, but made no order as to further mesne profits. This decision was upheld, on appeal, by the High Court.

The decree-holder was put into possession on 19th September, 1882 and died in 1883 leaving two minor sons.

In 1897 his sons applied for mesne profits from the 24th April, 1881, (the date of the former application) to 19th September, 1882, on which day their father obtained possession through the Court.

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The Subordinate Judge rejected this application, holding (i) that it was time-barred, and (ii) that the matter was *res judicata*.

The applicants appealed.

Gokaldas K. Parekh, for appellants (applicants).—The present application is not barred by limitation. The decree sought to be executed, leaves the amount of mesne profits to be determined in execution. And until the Court determines this question, no final decree can be said to have been passed, which can be executed. A decree directing mesne profits to be determined in execution is in the nature of an interlocutory order, and there is nothing that can be executed until the actual amount of mesne profits has been determined—*Puran Chand* v. *Roy Radha Kishen* (1). An application to the Court to determine the amount of mesne profits as directed by the original decree is an application not for execution of the decree, but in pursuance of the decree—*Pryag Singh* v. *Raju Singh* (2). Such an application is not governed either by art. 178 or by art. 179 of the Limitation Act. In the present case the amount of profits from the date of the former darkhast to the date of delivery of possession has not been determined, and until that is done no period of limitation applies. The decree does not specify the time up to which the mesne profits are to be calculated. But it must be taken to have awarded profits up to the recovery of possession—*Bijai Bahadur Singh* v. *Bhup Indar Bahadur Singh* (3); *Mon Mohun Sirkar* v. *The Secretary of State for India* (4).

[151] *K. M. Jhaveri*, for respondent No. 1 (opponent).—Section 211(5) of the Code of Civil Procedure (Act X of 1877) restricts the award of mesne profits to three years from the date of decree. In the present case, where the decree is silent as to the time up to which mesne profits are awarded, the Court must be presumed to have awarded profits for three years only. Otherwise the Court would award more than the law allows. Moreover, the decree-holder did ask in his former application for mesne profits for the year 1881-82. Neither the Court of first instance nor the High Court awarded these profits. The question is, therefore, *res judicata*, and cannot be re-opened at this distance of time.

T. R. Kotwal, for respondent No. 2.

JUDGMENT.

PARSONS, J.—The facts are these. The appellants' father obtained in this High Court on the 3rd July, 1878, a decree for the possession of certain land "with mesne profits to be ascertained in execution by the Subordinate Judge of all of the said lands sued for in the plaint, such mesne profits to be computed from the date of possession being given to the defendants." Nothing was said as to the date down to which the mesne profits were awarded.

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(1) 19 C. 132. (2) 25 C. 203. (3) 19 A. 296. (4) 17 C. 968.

(5) Section 211 of Act X of 1877 is in the same words as s. 211 of Act XIV of 1882 and is as follows:—

"When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs) with interest thereupon at such rate as the Court thinks fit.

"*Explanation.*—'Mesne profits' of property mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received, therefrom together with interest on such profits."

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On the 24th April, 1881, the appellants' father presented a darkhast in which he asked for possession and for the sum of Rs. 9,466 which he estimated to be the amount of mesne profits from 1870 to the date of the darkhast and for further mesne profits until possession was obtained. The Court ordered possession to be given to him and awarded him the sum of Rs. 6,573 for mesne profits for the years 1870 to 1881 (inclusive). It said [152] nothing about the further mesne profits, and the prayer for these was not persisted in though there was an appeal to this High Court. The darkhast was finaily disposed of on the 15th July, 1882, and possession was given on the 19th September, 1882.

Now, on the 3rd September, 1897, the appellants applied to the lower Court asking it in execution of the decree to ascertain the amount of mesne profits of the land for the year 1881-82, that is, for the period between the date of the darkhast of 1881 and the date of obtaining possession in 1882. The Subordinate Judge rejected the application, holding that it was both time-barred and *res judicata*.

The bar of time depends upon the application of arts. 178 and 179 of the Limitation Act, 1877, and of s. 230 of the Civil Procedure Code. The bar of *res judicata* is based upon the refusal of the Court to grant the prayer contained in the darkhast of 1881 to compute and award the amount of mesne profits from its date until actual delivery of possession. A Full Bench of the Calcutta High Court has held that "neither art. 178 nor art. 179 of the Limitation Act applies to an application to ascertain the amount of mesne profits awarded by a decree in accordance with the provisions of s. 211 or 212 of the Code of Civil Procedure"—*Puran Chand* v. *Roy Radha Kishen* (1). Section 230 of the Code of Civil Procedure relates only to decrees for the payment of money or delivery of other property, and a Division Bench of the same High Court has held that a decree directing that the plaintiffs should get *vasilat* from the defendants but that the same should be ascertained through the intervention of a Court Amin and in the course of execution proceedings, was an interlocutory decree only so far as *vasilat* was concerned and did not become final until the amount of *vasilat* had been ascertained by the Amin and until his report had been adopted or confirmed by the Court—*Hajon Manick* v. *Bur Sing* (2).

There are numerous decisions to the effect that where a decree is silent as to mesne profits for the period subsequent to institution of a suit, a separate suit for the same will lie—*Bhivrav* v. *Sitaram* (3), even when there was an express prayer for the same—[153] *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (4). There are, therefore, difficulties in the way of our accepting the view taken by the Subordinate Judge and holding the darkhast to be either time-barred or *res judicata*. I do not intend to discuss these difficulties and see whether or not they are unsurmountable, because there is an objection taken here which seems to me to be absolutely fatal to the application. It is that this Court by its decree did not award to the appellants' father the mesne profits now asked for, namely, the profits for the year 1881-82, because it could not award mesne profits for a period longer than three years from the date of the decree under the provisions of s. 211 of the Code of Civil Procedure, 1877, which was then in force. In the Civil Procedure Code of 1859, under which the decision in the case of *Fakharuddin* v. *Official Trustee of*

(1) 19 C. 132. (2) 11 C. 17. (3) P.J. (1894), p. 255. (4) 17 C. 968.

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Bengal (1) was passed, there was no time specified, down to which mesne profits could be awarded, short of that of obtaining possession. Section 211 of the Code of 1877, however, enacts that the Court can provide for the payment of mesne profits, "from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs)." It thus restricts the time for which mesne profits can be allowed in a decree to three years from the date of the decree. In the decree in the present case no period was mentioned, down to which mesne profits were awarded, but we cannot construe it as giving the plaintiffs profits for a period longer than what the law allowed the Court to give. The decree may be supplemented by the law on a point upon which it is silent, but we cannot introduce into it a provision which would be contrary to the law and *ultra vires* on the part of the Court pronouncing it.

For this reason, therefore, namely, that the decree did not award and could not legally have awarded the appellants mesne profits for the year 1881-82, I would confirm the order dismissing the application. The order of this Court now is that the appeal is dismissed with costs.

RANADE, J.—The appellants' father, in Suit No. 449 of 1872, sought to recover possession of certain lands, and obtained a **[154]** decree on 5th July, 1876, which awarded possession of some of the lands, and directed that mesne profits should be determined in execution. There were cross appeals from this decree, and the High Court varied the decree by awarding possession of all the lands with mesne profits, which were to be determined in execution, computing the profits from the date on which possession was made over to the respondent-defendant. The decree was silent as to the date up to which the profits should be calculated. This decree was passed on 3rd July, 1878. A darkhast application was made in April, 1881, for the execution of the High Court's decree, and there was a prayer for the possession of the lands and for mesne profits up to 24th April, 1881, the date of the darkhast, as also for future mesne profits till the possession of the lands was made over to the appellants' father.

The Subordinate Judge made over possession of the lands on 19th September, 1882, and gave a portion of the past mesne profits claimed, but he made no order about the future mesne profits. An appeal was preferred to the High Court by the respondents, but the High Court confirmed the order passed by the Subordinate Judge in December, 1883, and a Review Petition made in 1884 was dismissed later on in 1885. The present darkhast was presented on 4th September, 1897, by the appellants, whose father died in 1883, without making any application for the mesne profits for 1882, and the minor applicant's certificated guardian also made no application till 1897. This application was made for the recovery of the mesne profits from the date of the institution of the darkhast of April, 1881, to the date when the lands were made over into the appellants' father's possession in September, 1882. The Subordinate Judge held that the darkhast of 1897 was time-barred, and the claim was also *res judicata*.

The chief question for consideration is whether both these objections were rightly held to bar the claim. Mr. Gokuldas for the appellants first referred to *Bijai Bahadur Singh* v. *Bhup Indar Bahadur Singh* (2) and *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (3). They have not much bearing on the present dispute. In the first

(1) 8 I.A. 197 = 8 C. 178. (2) 19 A. 296. (3) 17 C. 968.

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of these cases, it was held that when [155] no point of time is fixed up to which profits should be calculated, a decree of the Privy Council was properly construed as awarding profits up to the date of the recovery of possession, while in the second it was held that where a decree is silent on the point, a separate suit will lie. In the present case the decree did fix the time from which mesne profits were to be allowed, and in the previous darkhast the profits were claimed for the period up to 1881, and a claim was made for the future profits also. It was this latter claim which was not specially noticed in the order passed in this darkhast, which only gave mesne profits up to 1881. The contention of the appellants is that as long as the mesne profits for 1882 had not been ascertained, as directed by the High Court decree, no period of limitation governed the claim for the same. The authority of the ruling in *Puran Chand* v. *Roy Radha Kishen* (1), followed in *Prayag Singh* v. *Raju Singh* (2), was cited, but the view taken by the Calcutta High Court on the operation of arts. 178, 179 in such cases was not accepted by the Allahabad High Court, and this Court in *Bhagwan* v. *Ganu* (3) expressed its agreement with the Allahabad High Court's view as opposed to the Calcutta rulings. In this last case the point was considered with reference to the operation of s. 89 of the Transfer of Property Act, and it was held that a decree for redemption was subject to the operation of limitation if no proceedings were taken in time under s. 89 to make the decree absolute. This analogy must govern the present case where the inquiry into mesne profits was delayed till September, 1882.

Lastly, there can be no doubt that under s. 211 of Act X of 1877, which governed the order under the decree, there was a three years' limit from the date of decree within which mesne profits might accrue, if that event took place earlier than the delivery of possession. As the decree was silent, this provision of the law must be held to have been in the intention of the parties. This three years' limitation also bars the present claim for the profits of 1882. For these several reasons, I would confirm the order, and dismiss the appeal with costs.

Order confirmed.

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24 B. 156 (P.C.) = 2 Bom.L.R.518 = 26 I.A. 184 = 7 Sar. P.C.J. 609.

[156] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Davey, Sir Richard Couch, and Sir Edward Fry.

[*On appeal from the High Court at Bombay.*]

SULTAN NAWAZ JUNG (*Plaintiff*) *v.* RUSTOMJI NANABHOY BYRAMJI JIJIBHOY (*Defendant*).

[28th June and 22nd July, 1899.]

Indian Easements Act (V of 1882), s. 15, expl. 1—Access of light and air to windows—Agreement preventing the acquirement of an easement.

A promise was made regarding the access of light and air, by the plaintiff's predecessor in title, to windows placed by him in the upper part of his house,

(1) 19 C. 132. (2) 25 C. 203. (3) P. J. (1899), p. 145.

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which was separated by a narrow space from a building opposite belonging then to the defendant's predecessor. This promise was that the owner of the house would make no objection to the blocking up of the windows in question when the owner of the building opposite should rebuild it and raise it to a higher elevation.

The owner of the windows accepted this promise.

After the lapse of twenty years the defendant, having given notice that he would act on the agreement, proceeded to rebuild; and he raised his building higher than the old one, causing the obstruction of which the plaintiff now complained.

Held, that there having been a continuing agreement between the parties within the meaning of Explanation 1 of the Indian Easements Act, 1882, the acquirement by the plaintiff of an easement by prescription had been prevented.

From the agreement it was apparent that the enjoyment of light and air had not been granted as an easement.

APPEAL from a decree (27th February, 1896) (1) of a Division Bench of the High Court, reversing a decree (15th March, 1895) of the High Court in the original jurisdiction.

The plaintiff-appellant became in 1867 the owner of the house in respect of which he sued to have declared his right to an easement for the access of light and air to windows, complaining that such access had been wrongly obstructed by the defendant's having raised his building, on the opposite side of a narrow space, to a height greater than its former elevation.

[157] The suit was brought on the 12th October, 1894, to obtain a decree declaring the plaintiff entitled to an easement for light and air to the windows in the upper part of his house with an aspect on to the defendant's building without any more obstruction to the access of such light and air than that which had been caused by that building before the alterations which the defendant made in 1893 by re-building and raising the structure.

The defendant's written answer was that by arrangement made in 1865 between his predecessor and that of the plaintiff in title, confirmed in 1868 by the plaintiff, he, the defendant, had the right when rebuilding upon the site of his former building to raise his new building higher without regard to its affecting the access of light and air to the plaintiff's house opposite.

The material issue, which also was the question in this appeal, was whether the defendant was within his right, in thus raising his building, to a greater height than the old one had occupied, without regard to the effect upon the plaintiff's right.

The evidence of the agreement of 1865, on which the defendant's right to raise his building was mainly founded, was documentary, and the letters that passed between the owners, both previous and present, of the house and of the building alleged to be servient, appear at full length in the report of this case, when on appeal to the High Court and decided in 1896, in I. L. R., 20 Bom. 704. There is also a full statement of the facts and of the correspondence between the parties, given in their Lordships' judgment on this appeal.

Both the Courts below held concurrently that the access of light and air to the plaintiff's house had been so interfered with as to entitle him to a decree for damages on account of the obstruction, provided that he had acquired a prescriptive right to the access of light and air, the right which was in question. The questions on which the Courts differed

(1) 20 B. 704.

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were as to the pecuniary value or amount of such damage, and as to whether there had or had not been a continuing agreement or arrangement which should be held to have prevented the plaintiff from acquiring the easement which he claimed, or which justified the defendant in obstructing the free access of air and light to the windows of the [158] opposite house. The Courts concurred in finding that an agreement had been come to between the parties on the subject, but differed as to whether it had or had not been brought to an end.

The Court of original jurisdiction (Farran, J.) held that the arrangements between the owners respectively, as evidenced by the letters of the 11th May, 1865, and of the 17th March, 1868, were temporary, and that they came to an end when the defendant wrote the letters of the 2nd November, 1871, and of the 17th July, 1872. All these appear in the report in I. L. R., 20 Bom. 705—709. The decision was that, in the interval which had elapsed between the 17th July, 1872, and the filing of the plaint on the 12th October, 1894, the plaintiff had acquired the prescriptive right to light and air which he claimed as an easement over the defendant's property. It was also decided that in accordance with the law laid down in *Dhanjibhoy Cowasji Umrigar* v. *Lisboa* (1), followed by *Ghanasham Nilkant* v. *Moroba Ramchandra* (2), the plaintiff was not entitled to an injunction, but was entitled to damages which the Court assessed at Rs. 4,500.

The plaintiff appealed to the High Court, contending that he was entitled to an injunction, and that if it should be held that his only remedy was in damages, then the damages assessed by the original Court were inadequate and should be increased.

The defendant filed cross-objections to the decree. His objections mainly were that the plaintiff was neither entitled to damages nor to an injunction. No such easement existed as had been held to be the ground of damages. The southern windows in the upper floor of the plaintiff's house had been opened and permitted to exist, not as of right, but under the agreement made in 1865 between the predecessors; and confirmed afterwards between the plaintiff and himself.

The High Court (Parsons and Strachey, JJ.) agreed with the first Court that the case would have been one for damages, and not one for an injunction. But on the question whether the plaintiff had been shown to have gained by prescription a right to sue for the infringement of an easement, their opinion was that he had not [159] established his claim to have done so. Their decree was, therefore, in favour of the defendant. Their judgment is given at length in I.L.R., 20 Bom. pp. 710 to 718.

Mr. *R. B. Haldane*, Q. C., and Mr. *J. H. A. Branson*, for the appellant, argued that the High Court ought to have held and declared that he had acquired by prescription on the expiration of the period of more than twenty years between 1872 and 1893 the right which he claimed, and that the access of light and air should not be obstructed. They relied on the law enacted in the Indian Easements Act, 1882, s. 15. The English law should be referred to on the subject as explanatory. *Shelfer* v. *City of London Electric Lighting Company* (3) was referred to. Also *Bewley* v. *Atkinson*(4).

The High Court should have held that the access of light and air was an easement, and had not, at all events since the 17th July, 1872,

(1) 13 B. 252.
(2) 18 B. 474.
(3) (1895) 1 Ch. 287.
(4) (1879) 13 Ch. D. 283.

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been enjoyed by the permission and sufferance of the respondent in virtue of an agreement. Since that date the obtaining the light and air to the windows had been an act adverse to the defendant, and the exercise of the right claimed by the appellant in this respect had given to him, after the lapse of twenty years, a prescriptive right to such light and air. On the other hand, the right asserted by the defendant, to exclude from the plaintiff's windows the full amount of air and light, could not rest upon what had passed between the predecessors of the parties in 1865 and 1868. There had been no evidence to show how the letters to or from his predecessor written in 1865 were sufficient to bind the plaintiff as a purchaser, who had not been shown to have had communication made to him of their contents. The principal question in the case was how the rights of the parties had been affected by the correspondence, and on this point the termination of the agreement, if, indeed, one could be said to have been established as existing at any time by the unsubstantial evidence of what took place in 1865, had not been sufficiently considered by the High Court. The Court of original jurisdiction had rightly held that any agreement on the subject was at an end in 1872. As a promise was not binding until its [160] acceptance was shown, there was no actual agreement. But even if at one time there was an agreement, and if that agreement would have had effect, had it lasted, to prevent the plaintiff from acquiring a prescriptive right, still any such effect was negatived when the letters of 1871 and 1872 were written by the defendant.

Mr. *G. Farwell*, Q. C., Mr. *Swinfen Eady*, Q. C., and Mr. *A. R. Ingpen*, for the respondent, argued that the appellant had failed to establish that he had gained a right to the access of light and air by prescription. This was the foundation of his suit, and this, if he could have established it, would have come under s. 15 of the Easements Act of 1882. But they contended that no case had been made out within that section. On the contrary it had been established that the plaintiff had enjoyed the access of light and air in question in pursuance of an agreement in writing, contained in the letters of 11th May, 1865, 17th March, 1868, and 28th July, 1883, and falling within the meaning of Explanation 1 of the same section. On the true construction of those letters it was clear that it was not as an easement that the right had subsisted for the access of, and use by him of the light and air entering his upper windows, but the right was enjoyed under actual agreement. This agreement contained a condition which on fulfilment brought the agreement to an end, *viz.*, the defendant's re-building. They referred to the letter of the 17th March, 1868, from the former agent of the plaintiff to the defendant containing the expression "You have a right to shut up the said windows and weather-board, and whenever you may build your house I am not to raise any objection whatever to your shutting up the same."

Mr. *Haldane*, Q. C., replied.

JUDGMENT.

On the 22nd July, 1899, their Lordships' judgment was delivered by

SIR RICHARD COUCH.—In 1867 the trustees of Rustomji Jamsetj Jijibhoy conveyed to the appellant a house and premises in Hornby Row, Bombay, consisting of a ground floor and four upper stories, in the south and west walls whereof there are a number of windows. Upon the south side of this house there stood until 1893 a house belonging to the respondent which was [161] separated from the appellant's house by a narrow

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space and extended in height to a point below the level of the appellant's third storey windows. On the 6th of May, 1893, the respondent's solicitors by letter informed the appellant that his windows were opened and suffered to exist under a special arrangement made between their predecessors in title, and that such arrangement was confirmed and ratified by the appellant by an instrument in writing dated the 28th July, 1883; that as their client intended to build a house upon his premises up to or possibly higher than the appellant's existing house, the requisite notice to close up his windows and remove the projections would be served in due course. In reply to this letter the appellant's solicitors wrote on the 17th July, 1893, that their client was not aware of the alleged arrangements or of the writing of the 28th July, 1883, and that the windows existing in the south wall of his house and opening on the premises of the respondent were ancient, and that full light and air had been enjoyed by the occupiers of the appellant's house without any obstruction or interruption for a number of years. The respondent having commenced foundations for his intended house, the appellant after some further correspondence between the solicitors on the 12th October, 1894, filed a plaint in the High Court at Bombay praying that it might be declared that he is entitled to free and uninterrupted access of light and air to and for the windows on the south and west sides of his house save so far as the same was obstructed by the respondent's old house. On the same day, on an affidavit verifying the plaint and saying that the respondent was rapidly proceeding with the erection of his new house, a rule *nisi* for an *interim* injunction was granted by the Court.

The suit came on for hearing on the 14th March, 1895, when the learned Judge who heard it held that the arrangements evidenced by letters of the 11th May, 1865, and 17th March, 1868, were temporary arrangements, and came to an end when the respondent wrote the letters of the 2nd November, 1871, and 17th July, 1872, and dissolved the injunction and made a decree for Rs. 4,500 damages with costs. Both parties appealed, the now respondent on the ground that the now appellant had not acquired an easement as claimed, and the appellant on the ground **[162]** that the learned Judge should have granted an injunction and not have awarded damages only. The Appeal Court was of opinion that the letter of the 11th May, 1865, was a contract or agreement by which the appellant's predecessor in title is allowed to enjoy the access of light and air through the windows on the south side of his house in return for which he promises that he will not raise any objection to those windows being blocked when the respondent should rebuild and raise his house. And being also of opinion that so long as that promise remained in force the appellant could acquire no easement in respect of those windows, and that it had not been put an end to, the Appeal Court reversed the decree of the lower Court and dismissed the suit.

Their Lordships have come to the same conclusion. The letter of the 11th May, 1865, is from Rustomji Jamsetji Jijibhoy to Byramji Jijibhoy, the grandfather of the respondent, under whose will he acquired his house and is as follows:—

"Upon the house of Bhai Pestanji Merwanji Tabak adjoining your (house) in Hornby Row purchased from the heirs of Rustomji Mancherji Bengali which I have purchased from Bhai Saheb Kharsedji Furdunji I have now raised a fourth storey and have placed windows on the south side thereof. As to those windows at the time when you shall build the neighbouring house higher (than mine) I shall not raise any objection in

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respect of the abovementioned windows on the south side which may be shut up, and should I raise any the whole is to be considered null and void. This is the sole request."

On the 17th May, 1865, Byramji Jijibhoy wrote to Rustomji Jamsetji Jijibhoy as follows :—

"I have received from you, sir, the note dated the 11th of May, 1865, in respect of Bhai Pestanji Tabak's house. And as regards what you have communicated in writing about the additional building which you, sir, have erected thereon there is a slight difference therein. And on your coming to Bombay or on my coming to Poona when you, sir, will be at Poona I shall give an explanation in respect thereof. And if you should deem it meet do you be good enough to make some alterations in what has [163] now been written and amend the same because I do not think it advisable to raise any dispute whatever with a gentleman like you. I have therefore by writing this given you a little trouble. This is the sole representation."

In this letter the writer appears to be willing to accept the promise in the previous letter, but to wish for some alterations, leaving it, however, to Rustomji Jamsetji Jijibhoy to do as he deemed meet. It does not appear that there was any further correspondence until the 4th September, 1867, when Byramji Jijibhoy wrote to Haji Ismail Haji Hubib as "Agent to the Jamadar of Hyderabad" (a title of the appellant) as follows :—

"Learning that you have purchased for the Jamadar the house No. 7 in Hornby Row from the trustees of the estate of Mr. Rustomji Jamsetji Jijibhoy I take this opportunity of drawing your attention to the correspondence that has passed between myself and Mr. R. J. Jijibhoy respecting the windows and projected conframes opening on the north of my property No. 6, Hornby Row, wherein the said Mr. R. J. Jijibhoy has agreed to throw no obstacle or hindrances of any kind whenever I require the said windows and their projections to be blocked up ; that writing (being) insufficient I asked him in my letter, dated 17th May, 1865, to send me a more particularised paper to the above effect, but owing to different circumstances and the late difficulties of that gentleman's affairs the matter rests still incomplete.

"But as you are now the agent for the present proprietor of the said house I shall thank you to pass me a fresh agreement or writing binding the proprietor, his heirs, executors, administrators and assigns to block up the said windows and the projected conframes at any time I or my heirs, executors, administrators and assigns shall demand and require the same to be done without hindrance or delay on your part. In the absence of such an agreement or writing to the above effect forthcoming from you within a reasonable time I shall be compelled to have these windows blocked up and the conframes removed at once. Although I have not the slightest intention of adopting this course I should like to have the business done in a regular and straightforward manner, preventing thereby any unpleasantness hereafter."

[164] Then followed two letters from the respondent's solicitors about preparing an agreement in accordance with the latter part of the letter of the 4th September, and on the 28th February, 1868, the solicitors for Haji Ismaii wrote them that he had no power to execute any such agreement, but he would, if they wished it, give the respondent a Gujarati note in the form the respondent had obtained from Rustomji

Jamsetji Jijibhoy until the return of the Jamadar Awad, when the arrangement the respondent wished would probably be carried out. Accordingly a Gujarati letter, dated 17th March, 1868, to the respondent was written and sent by Haji Ismail. It is as follows :—

"As to your one house bearing No. 6 situate in Hornby Row which has been purchased from Parsi Dadabhai Rustomji Nowroji Bengali on the east side thereof there is Jamadar Awad bin Umar's house which said house the said party had purchased from Set Rustomji Jamsetji Jijibhoy. And the windows and the kanframe (weather-board) of the said house open towards your side. You have a right to shut up the said windows and kanframe (weather-board). And whenever you may build your house I am not to raise any objection whatever to your shutting up the same."

No other agreement was executed.

The Indian Easements Act, 1882, s. 15, enacts that "where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for 20 years ..... the right to such access and use.....shall be absolute," and Expl. I says "nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement." It was contended for the appellant that the matter here rested in negotiations and there was no agreement. Their Lordships do not agree to this; they think the fair inference from the letter of the 17th May, 1865 is that the respondent accepted the promise in the letter of the 11th May, 1865, but wished for some alterations in the form of it which he left to the option of Rustomji **[165]** Jamsetji Jijibhoy. This is confirmed by the letter of 4th September, 1867, in which he refers to the correspondence and says that Rustomji Jamsetji Jijibhoy had agreed to throw no obstacle or hindrances of any kind whenever he required the windows to be blocked up. (This is not accurate, as the promise only related to the respondent building his house higher, but it is probably what was meant.) Then he says that in his letter of the 17th May, 1865, he asked for a more particularised paper to the above effect. This shows he considered that he had accepted the promise in substance, but wanted it to be in a different form. He then asked for an agreement or writing binding the appellant himself to block up the windows. This would be a different action from what is mentioned in the letter of 11th May, but having the same result. If this had been agreed to, it might have been contended that it was to be substituted for the other agreement, but it was not agreed to. The Appeal Court has found that there was an agreement in pursuance of which the appellant is allowed to enjoy the access of light and air through the windows on the south side of his house in return for which he promises that he will not raise any objection to those windows being blocked when the respondent should rebuild and raise his house, and the Judges say they were informed that the learned Judge at the trial in his oral judgment treated the letter of the 11th May as an agreement between the parties. Their Lordships are of this opinion, and they see no reason for holding that the respondent when he asked for the other agreement waived the performance of the promise in the letter of the 11th May, 1865, or intended to abandon that agreement. Such negotiation as there was, related to the other proposed agreement. It appears to their Lordships that there was an agreement between the parties which prevented the enjoyment by the appellant of the access of

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light and air through the windows under s. 15 of the Easements Act, giving a right to an easement, and they will humbly advise Her Majesty to affirm the decree of the High Court in the appeal to it, and to dismiss this appeal. The appellant will pay the costs of it.

Solicitors for the appellant:—Messrs. *Payne and Lattey.*

Solicitors for the respondent:—Messrs. *Turner, Son and Foley.*

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24 B. 166 = 1 Bom. L.R. 646.

[166] APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice and Mr. Justice Candy.

SHET MANIBHAI PREMABHAI (*Original Plaintiff*), *Appellant v.* BAI RUPALIBA (*Original Defendant*), *Respondent.** [6th September, 1899.]

Warranty—Breach of warranty—Suit on warranty—Principal and agent—Guardian—Minor—Loan obtained by guardian as such—Liability for such loan—Warranty by guardian of authority to borrow—Misrepresentation on a point of law—Contract Act (IX of 1872), s. 235—Guardian's liability.

Plaintiff, having lent a sum of money to one Rupaliba as guardian of her minor son Ranmalsangji, brought a suit against the minor, represented by his guardian, to recover it. In that suit a consent decree was passed, which directed the amount due to him to be recovered out of the minor's estate. On Ranmalsangji's coming of age he got the consent decree set aside, and the plaintiff had to refund the sum which he had recovered under it. Thereupon the plaintiff sued Rupaliba to recover the amount as damages for breach of warranty, alleging that she had represented to him that she had authority to incur the debt on behalf of the minor and to bind his estate, whereas she had really no such authority.

Held, that the plaintiff could not recover, there having been no such misrepresentation as would support an action for a breach of warranty.

Assuming that there was a representation, the only possible representation, if the case be treated as coming within s. 235 of the Contract Act (IX of 1872), was that the defendant represented that she was the agent of her son. But as the plaintiff knew that the son was an infant, he must have been aware that any representation that defendant was her infant son's duly authorized agent was incorrect, for an infant cannot appoint an agent, and consequently no warranty, such as would support a suit, could arise out of such a representation.

Even if it were conceded that there was a representation by Rupaliba, as to her power to bind the minor's estate, it was one on a point of law, and as such, it was incapable of supporting the suit.

Beattie v. *Ebury* (1) followed.

APPEAL from the decision of Rao Bahadur Lalubhai P. Parikh, Additional First Class Subordinate Judge of Ahmedabad.

Bhagvatsangji, the Thakor of Koth and Sanad, died in 1869, leaving a widow Rupaliba and a posthumous son Ranmalsangji.

On 24th July, 1872, Rupaliba was appointed, under Act XX of 1864, to act as guardian of the person and property of her minor son Ranmalsangji.

[167] In 1888 plaintiff lent a sum of Rs. 20,103-13-6 to Rupaliba as guardian of the minor. The money was borrowed to defray the expenses of the minor's marriage.

In 1889 plaintiff filed a suit against the minor, represented by his guardian Rupaliba, to recover the above sum.

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* Appeal No. 51 of 1899.

(1) (1872) L.R. 7 Ch. 777; 7 H.L. 102.

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That suit was compromised, and on the 24th January, 1890, a consent decree was passed in plaintiff's favour for Rs. 24,006-0-5. This sum was made payable by two instalments, and it was provided that, in default of payment of the instalments on the due date, plaintiff should recover the amount out of the minor's estate.

The first instalment was duly paid into Court on 22nd March, 1890. The second instalment was recovered by executing the decree against the minor's estate.

On the 15th January, 1891, the minor Ranmalsangji attained majority, and on the 14th April, 1891, he filed a suit against the present plaintiff to set aside the consent decree of the 24th January, 1890, on the ground that it had been obtained by fraud and collusion.

The Court held that the guardian Rupaliba had no authority to contract the debt on the minor's behalf without the sanction of the District Court; that the minor's estate was, therefore, not liable for the debt; and that the consent decree was, therefore, not binding on the minor. That decree was accordingly set aside. This decision was upheld by the High Court, in appeal, on 16th June, 1897.

Thereupon Ranmalsangji applied to recover the amount paid to the plaintiff under the consent decree, which had been set aside. The Court granted this application and the plaintiff had to refund Rs. 20,113-8-9 on 1st April, 1898.

On 22nd April, 1898, plaintiff filed the present suit to recover from Rupaliba personally the sum which he had been obliged to refund, together with the costs of his litigation with Ranmalsangji, amounting in all to Rs. 23,000. He sought to hold Rupaliba personally liable for this amount on the ground that there was a breach of warranty on her part, in that she falsely [168] represented to the plaintiff that she had authority to incur the debt on the minor's behalf and to bind his estate, when, as a matter of fact, she had none.

The Subordinate Judge dismissed the suit, holding that there was no express or implied warranty as to the guardian's authority to obtain the aforesaid loan on the minor's behalf; that the debt had not been contracted under misrepresentation; and that Rupaliba could not be held liable either under s. 65 or s. 235 of the Indian Contract Act.

The plaintiff appealed to the High Court.

Scott, Acting Advocate-General (with him *Branson*, *Macpherson*, *Manekshah Jehangirshah* and Messrs. *Jamaitram and Mathubai*), for appellant.—This is a suit for breach of warranty. Defendant, as guardian of her minor son, borrowed from the plaintiff a sum of money on the occasion of her son's marriage, and represented to the plaintiff that she was appointed, under her husband's will, to act as guardian and manager of the minor's property, and had authority to contract the debt so as to bind the minor's estate. On the faith of this representation the plaintiff lent the money to defendant as guardian of the minor. The minor has now repudiated this transaction as one which his guardian had no authority to enter into on his behalf. The case falls within the principle laid down in s. 235 of the Contract Act (IX of 1872). A person who professes to act as agent of another impliedly warrants that the authority he professes to have, does in point of fact exist. And he is liable to be sued on his warranty—*Collen* v. *Wright* (1); *Firbank's Executors* v. *Humphreys* (2).

(1) (1857) 7 E. & B. 301.

(2) (1886) 18 Q.B.D. 54.

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[JENKINS, C.J.—Those cases apply where the misrepresentation relates to a matter of fact and not of law. What is the misrepresentation here?]

We say that defendant falsely represented to the plaintiff that she had authority to bind the minor's estate both as his natural guardian and as manager appointed under her husband's will.

[169] [JENKINS, C. J.—Assuming that to be the case, the misrepresentation is one on a point of law, and as such, cannot support the action. See *Beattie* v. *Ebury* (1).]

Ganpat Sadashiv Rao, for respondent, was not called upon.

JUDGMENT.

JENKINS, C. J.—The plaintiff is a money-lender and he has brought this suit to recover from the defendant a sum of Rs. 23,000. The material facts are practically not in dispute; they are very fully stated in the careful judgment of the First Class Subordinate Judge, and we need now do no more than refer briefly to the more salient of them. [His Lordship stated the facts and proceeded:—] From these facts it is manifest that, if the plaintiff were to sue the defendant on the original loan, his suit would be barred. Accordingly he has formulated his claim as one for damages arising out of a breach of warranty. To support it, reliance has been placed on the principles enunciated, in *Collen* v. *Wright* (2) and *Firbank's Executors* v. *Humphreys* (3), where it has been laid down that an agent impliedly warrants his authority and is liable to be sued on his warranty.

In this country provision is made for such a case by s. 235 of the Contract Act, under which "a person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so doing." The first question, then, to be asked is, whose agent did the defendant represent herself to be? and for this purpose we will for the moment assume that there was a representation. A person can only be the agent of another person, and the only possible representation, if the case be treated as coming within the express words of s. 235, would be that the defendant represented that she was the agent of her infant son. But there is no question that the plaintiff knew the son was an infant, so that he must have been aware that any representation that the defendant was her infant son's duly authorized agent was incorrect, for an infant cannot appoint **[170]** an agent, and consequently no warranty such as would support a suit could arise out of such a representation—*Beattie* v. *Ebury* (1). Then it has been argued that the representation really was that she had power to bind the estate, so that we will pass to consider whether looked at from this point of view the plaintiff's case is bettered. In our opinion it is not. If the case be so regarded, we have to seek a solution elsewhere than in the words of s. 235, and the Advocate-General in effect has argued that he relies on the principle on which s. 235 is based and of which, he claims, it is only a particular illustration. But still it seems to us that by this way the plaintiff gets no further; for even if it be conceded that there was a representation as to her power to bind the estate, it was one on a

(1) (1872) L.R. 7 Ch. 777 = 7 H. L. 102. (2) (1857) 7 E. & B. 301.
(3) (1886) 18 Q.B.D. 54.

point of law and thus on the authority of the case we have named incapable of supporting a suit. We have so far assumed a representation, but we have little doubt that in truth the plaintiff never relied on any representation at all, but was content to take the risk on the facts which were within his knowledge. We, therefore, think the appeal must be dismissed with costs.

Appeal dismissed.

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24 B. 166 = 1 Bom. L.R. 646.

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24 B. 170 = 1 Bom. L.R. 649.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

KAZI HASSAN AND OTHERS (*Original Plaintiffs*), *Appellants v.* SAGUN BALKRISHNA AND OTHERS (*Original Defendants*), *Respondents.**

[11th September, 1899.]

Mahomedan law—Wakf—Mutawalli—Alienation of wakf property—Suit to set aside such alienation—Right to sue—Civil Procedure Code (Act XIV of 1882), s. 539.

Plaintiffs sued to recover possession of certain lands, alleging that they had been granted in wakf to their ancestor and his lineal descendants to defray the expenses for, or connected with, the services of a certain mosque; that their father (defendant No. 3) and cousins (defendants Nos. 4 and 5), who were mutawallis in charge of the said property, had illegally alienated some of these lands, and had also ceased to render any service to the mosque, whereupon they **[171]** (the plaintiffs) had been acting as mutawallis in their stead. They, therefore, claimed to be entitled, as such, to the management and enjoyment of the lands in dispute. It was contended (*inter alia*) that the plaintiffs could not sue in the lifetime of their father (defendant No. 3), he not having transferred his rights to them.

Held, that the plaintiffs were entitled to sue to have the alienation made by their father and cousins set aside and the wakf property restored to the service of the mosque. They were not merely beneficiaries, but members of the family of the mutawallis, and were the persons on whom, on the death of the existing mutawallis, the office of mutawalli would fall by descent, if, indeed, it had not already fallen upon them, as alleged in the plaint, by abandonment and resignation.

Wakf property cannot be alienated, and any person interested in the endowment can sue to have alienations set aside and the property restored to the trust.

Per RANADE, J.—As a suit for possession, the suit was defective in form and could not be maintained. It was a suit for partition of a moiety of the lands, and the owner of the other moiety was not a party.

The suit was, however, really a suit for a declaration that the lands were the inam property of the mosque, and, as such, were not liable to alienation for the private debts of defendants Nos. 3, 4 and 5. The plaintiffs were entitled to sue for such a declaration, although they could not obtain actual possession. They were beneficiaries and had a right to sue under s. 42 of the Specific Relief Act (I of 1877).

When a suit is brought to set aside an alienation made to a stranger, such a suit by the worshipper at a mosque or temple can be maintained and does not fall within s. 539 of the Civil Procedure Code (Act XIV of 1882). That section is only applicable where there is an alleged breach of trust created for a public, charitable, or religious purpose, and the direction of the Court is necessary for the administration of the trust. As against strangers, s. 539 does not apply.

[F., 33 A. 660 = 8 A.L.J. 710 (714) = 11 Ind. Cas. 36; 36 B. 29 = 13 Bom. L.R. 989 = 12 Ind. Cas. 577; 33 C. 789 (805) = 10 C.W.N. 581; 2 C.L.J. 431 (437, 439); 10 Ind. Cas. 712 = 14 O.C. 65 (67); R., 27 B. 500 (510) = 5 Bom. L.R. 303; 35 B.

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* Second Appeal No. 22 of 1899.

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APPEL-LATE CIVIL.

24 B 170 = 1 Bom. L.R. 649.

470=13 Bom. L.R. 690 (693)=12 Ind. Cas. 30; 6 O.C. 355 (358); 30 P.R. 1908 (F.B.)=102 P.L.R. 1903=35 P.W.R. 1903; 5 S.L.R. 103; 24 Ind. Cas. 369=26 M.L.J. 537=(1914) M.W.N. 581.]

SECOND appeal from the decision of Rao Bahadur A. G. Bhave, First Class Subordinate Judge, A. P., at Ratnagiri.

Suit for possession and management of certain lands alleged to have been granted in wakf.

The plaintiffs were the sons of defendant No. 3 and the cousins of defendants Nos. 4 and 5. The lands in question had formerly been in the possession of defendants Nos. 3, 4 and 5, but had been alienated by them to defendants Nos. 1 and 2, who now held them.

The plaintiffs alleged that these lands were a portion of certain lands which had been granted in inam to the Kazi family, to [172] which they and defendants Nos. 3, 4 and 5 belonged, for the purpose of defraying the expenses connected with the service of a certain mosque. A moiety of the lands so granted was now in the possession of one Kazi Abdul Razak, who was not a party to the suit, and the other moiety had belonged to defendants Nos. 3, 4 and 5, who performed service at the mosque. These defendants, however, in 1891 had ceased to perform their services, and the plaintiffs consequently had been performing them. The plaintiffs further alleged that defendants Nos. 3, 4 and 5 had mortgaged their moiety of the said inam lands to the defendants Nos. 1 and 2, and that the share therein of defendant No. 3 (the father of the plaintiffs) had been subsequently sold and purchased by the said mortgagees (defendants Nos. 1 and 2). The plaintiffs contended that these lands had been improperly alienated, and that they were entitled to recover them on the ground that they were performing the services at the mosque for the purposes of which these lands had been granted.

The suit was contested only by defendants Nos. 1 and 2. They alleged that the lands had been the private property of defendants Nos. 3, 4 and 5, who had mortgaged and sold them. They further denied that the plaintiffs had a right to sue in the lifetime of their father (defendant No. 3).

The Court of first instance dismissed the suit on the ground that the plaintiffs' father was still alive and had not transferred his rights to them, and that, therefore, they could not sue.

On appeal the Court confirmed the decree, holding that the suit was not properly framed, and that the proper course to follow was to have the defendants Nos. 3, 4 and 5 removed from being trustees of the mosque. The Subordinate Judge, A.P., stated his reasons as follows:—

"The sanad itself provides for the devolution of the right of management of the property by inheritance to the heirs of the grantee. The plaintiffs, therefore, cannot claim the right of management during the lifetime of their father. The plaintiffs rest their right to the management of the property chiefly on the ground that since their separation from their father in 1891 they have rendered 'service' to the mosque, as the defendants Nos. 3, 4 and 5 neglected to do it. The plaintiffs, however, do not state what service they have been doing. It is true that one of the objects of the grant was to secure the services of a public [173] preacher. But the plaintiffs do not say in the plaint that they have been acting as preachers in the mosque. Moreover, if they did, they must be treated as the usurpers of the office. Having forcibly got into it they now seek by this suit to recover possession of the property appertaining to it, charging their father and other co-sharers with breach of trust,

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mismanagement, &c. But if they desire to remove the present trustees from their office and to get themselves appointed to it, they must bring a properly constituted suit (1) for that purpose on the ground of their father's alleged misconduct or incapacity (which is referred to, not in the plaint, but in the evidence). The hidden object of this suit appears to me to get the father's alienations set aside, and I strongly suspect that it has been brought in collusion with him. But it is enough for the disposal of this suit to say that the suit not being properly constituted, the plaintiffs cannot claim to be put into possession of the property which belongs to the office which they do not legally fill. The property must go with the office, and unless the plaintiffs establish their right to the latter, they cannot claim possession of the former."

Against this decision the plaintiffs preferred a second appeal to the High Court.

Nasrulla Khan (with him *R. R. Desai*), for appellants.

Manekshah Jehangirshah, for respondents.

The following authorities were referred to in argument :—*Zafaryab Ali* v. *Bakhtawar Singh* (2); *Jawahra* v. *Akbar Husain* (3); *Lakshmandas* v. *Ganpatrav* (4); *Jan Ali* v. *Ram Nath* (5); *Thakersey Dewraj* v. *Hurbhum* (6); *Shri Dhundiraj* v. *Ganesh* (7); *Miya Vali* v. *Sayed Bava* (8); *Sayad Mahomad* v. *Venkaji*(9); *Sitaram* v. *Lakhmidosji* (10); *Balkrishna* v. *Balkrishnabhat* (11); Tagore Law Lectures, 1884, Vol. I, 2nd Ed., pp 367, 450, 454.

JUDGMENT.

PARSONS, J.—The suit was dismissed by the lower Courts on the ground that the plaintiffs could not claim the right of management during the lifetime of their father, and, therefore, had no right to sue for the present possession of the lands in suit. The following are the material allegations on which the suit was brought :—

[174] "The lands in suit were granted in wakf 'for the illumination of the mosque and for the stipend of the priestship' to the sons of the late Kazi Mahamad and after them to their successors or to any person of their lineage. The defendants Nos. 3 to 5 and one Kazi Mahamad Alli are the persons to whom the right of enjoying the lands belongs, and the last of these persons is in enjoyment of the moiety of it. Since 1891 the defendants Nos. 3 to 5 have not been rendering service to the mosque, and these defendants have also improperly and illegally sold some and mortgaged other of their moiety of the lands to the defendants Nos. 1 and 2. The plaintiffs, who are the sons of the defendant No. 3 and the cousins of the defendants Nos. 4 and 5, have been rendering the service of the mosque and performing the duties of the wakf in their stead and have the right to the enjoyment of their moiety of the lands."

The defendants Nos. 1 and 2 only appeared to contest the suit, and their chief plea was that the lands, which they and their ancestors had obtained by purchase and mortgage from defendant No. 3 and the father of defendants Nos. 4 and 5, were not the subject of any wakf. An issue was raised on this plea but was never decided, the suit having been dismissed, as I have above said, on the ground that the plaintiffs had no right to sue. No doubt they would not have the right to bring the suit if it be regarded as one to remove the defendants Nos. 3, 4 and 5 from

(1) 11 C. 33 ; 16 B. 626 ; 14 M. 186 ; 20 C. 397.
(2) 5 A. 497.
(3) 7 A. 178.
(4) 8 B. 365.
(5) 8 C. 32.
(6) 8 B. 432.
(7) 18 B. 721.
(8) 22 B. 496.
(9) P. J. (1885), p. 75.
(10) P. J. (1892), p. 142.
(11) P. J. (1898), p. 316.

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the office of mutawalli which they hold by right of inheritance, to appoint the plaintiffs mutawallis in their stead, and to restore the wakf property to the latter as such. It would seem that the Subordinate Judge, A. P., thought that the suit ought to have been one of this nature and that no other kind of suit would lie, for he says :—

"The sanad provides for the devolution of the right of management of the property by inheritance to the heirs of the grantee. The plaintiffs, therefore, cannot claim the right of management during the lifetime of their father. The plaintiffs rest their right to the management of the property chiefly on the ground that since their separation from their father in 1891 they have rendered 'service' to the mosque, as the defendants Nos. 3, 4 and 5 neglected to do it. The plaintiffs, however, do not state what service they have been doing. It is true that one of the objects of the grant was to secure the services of a public preacher. But the plaintiffs do not say in the plaint that they have [175] been acting as preachers in the mosque. Moreover, if they did, they must be treated as the usurpers of the office. Having forcibly got into it they now seek by this suit to recover possession of the property appertaining to it, charging their father and other co-sharers with breach of trust, mismanagement, &c. But if they desire to remove the present trustees from their office and to get themselves appointed to it, they must bring a properly constituted suit for that purpose on the ground of their father's alleged misconduct or incapacity (which is referred to 'not in the plaint' but in the evidence). The hidden object of this suit appears to me to get the father's alienations set aside, and I strongly suspect that it has been brought in collusion with him. But it is enough for the disposal of this suit to say that the suit not being properly constituted, the plaintiffs cannot claim to be put into possession of the property which belongs to the office which they do not legally fill. The property must go with the office, and unless the plaintiffs establish their right to the latter, they cannot claim possession of the former."

That view does not commend itself to us. For the purpose of argument, the hidden object of the suit may be taken to be its real object, and it may be regarded as one to recover trust property which has been improperly alienated away from the trust.

The first and most material point, therefore, to be determined is whether the property in suit is wakf or not. If it is not, then the suit fails, but if it is, then the further question arises whether the plaintiffs can bring the suit. The sanad (Ex. 95) settled certain property in wakf on the sons of the late Kazi Mahamad and directed that after them the land should be handed down to their successors or to persons of their lineage, and should not be given to any other man who bears no relation to this family. If the property in suit be a portion of that wakf, there is no doubt that it cannot be alienated, and it would seem that any person interested in the endowment could sue to have the alienations set aside and the property restored to the trust. That is the decision of the Allahabad High Court in *Zafaryab Ali* v. *Bakhtawar Singh* (1) and *Jawahra* v. *Akbar Husain* (2). The following passages out of the works of Sayad Amir Alli on Mahomedan Law were cited to us during the argument (Tagore Law Lectures, 1884, Vol. I (2nd Ed., 1892)) :—

"An attempt to sell or alienate the allowance or to create a charge upon it has been regarded as misconduct sufficient to pass the vazifa or

(1) 5 A. 497.

(2) 7 A. 178.

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allowance, if [176] hereditary, to the children of the vazifadar (p. 367). The judgment of the Allahabad High Court in *Jawahra* v. *Akbar Husain* seems to be in conformity with the provisions of the Mahomedan law. As has been clearly pointed out from the *Radd-ul-Muhtar* and the *Fatawa-i-kazi Khan*, every Mahomedan who derives any benefit from an admitted wakf, is entitled to maintain an action against the mutawalli to establish his title thereto, or against a trespasser to recover any portion of the wakf property which has been misappropriated, without joining any other person who may participate with him in the benefit (p. 450). When the mutawalli has in breach of his trust conveyed the property to another, the beneficiaries are entitled to sue the mutawalli or to sue him in conjunction with the assignee to recover the property (p. 454)."

The decision of the Calcutta High Court in *Jan Ali* v. *Ram Nath* (1) was cited on the other side. The decisions of this Court in *Lakshmandas* v. *Ganpatrav* (2), *Thackersey* v. *Hurbhum* (3), *Shri Dhundiraj* v. *Ganesh* (4), *Miya Vali Ulla* v. *Sayed Bava* (5), *Sayad Mahamad* v. *Venkaji* (6), *Sitaram* v. *Lakhmidasji* (7), *Balkrishna Babaji* v. *Balkrishnabhat* (8), were also alluded to. The result of the authorities seems satisfactorily to establish the right of the plaintiffs to bring a suit to have the alienations made by their father and cousins set aside and the wakf property restored to the service of the mosque. They are not merely beneficiaries, but are members of the family of the mutawallis and the persons on whom on the death of the present mutawallis the office of mutawalli would fall by descent, if indeed it has not already fallen as alleged in the plaint by abandonment and resignation. This, however, has not been inquired into. It will be necessary to do so in order to ascertain to what relief the plaintiffs are actually entitled. At present this much only can be said about the suit. The plaintiffs, as beneficiaries and members of the family and next heirs, are entitled to sue the mutawallis and their assignees to have the alienations set aside and the wakf property restored to the wakf. If they are also the holders of the office of mutawalli, they can obtain the possession of the wakf property themselves to be by them applied to the purposes of the wakf.

[177] We reverse the decree of the lower Courts and remand the suit to the Court of first instance for trial on the merits in reference to the above remarks. We make all costs costs in the cause.

RANADE, J.—In this case, the question at issue relates to a point of Mahomedan law involving the proper procedure to be followed in a suit about a wakf endowment. The appellants-plaintiffs brought the original suit against their father (defendant No. 3) and cousins (defendants Nos. 4, 5), and their mortgagees and purchasers (defendants Nos. 1, 2), as also the tenants of the latter (defendants Nos. 6, 7), to recover possession of certain lands at Masure. The plaintiffs' case was that these lands were granted in inam to the Kazi family to which the plaintiffs and defendants Nos. 3, 4, 5 belonged, and that the inam was granted to defray the expenses connected with the service of a certain mosque. An eight annas share of the land belonged to one Kazi Abdul Rajak, who was not a party to the suit, and the other half was in the enjoyment of the defendants Nos. 3, 4, 5, who used to perform service at the mosque. These Kazi defendants latterly ceased to perform service at the mosque, which

(1) 8 C. 32. (2) 8 B. 365. (3) 8 B. 433.
(4) 18 B. 721. (5) 22 B. 496. (6) P.J. (1885), p. 75.
(7) P. J. (1892), p. 142. (8) P.J. (1896), p.316.

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service since 1891 was performed by the appellants. The lands belonging to the eight annas share had been mortgaged by the defendants Nos. 3, 4, 5 with their creditors (defendants Nos. 1, 2), and defendant No. 3's interest was subsequently sold and purchased by the said mortgagees. These mortgagees and purchasers ceased to make any payments for the service of the mosque, and they had let the lands to defendants Nos. 6, 7. The appellants claim that as the lands were granted in inam for mosque service, and as the service was not performed by defendants Nos. 3, 4, 5, they (the appellants who performed the service) were entitled to recover possession of this land, and they accordingly brought the suit to recover the eight annas share of the lands from the defendants.

The principal defendants (Nos. 1, 2) contended that the lands were not held for mosque service, and their income was not enjoyed as such. The defendants Nos. 3, 4, 5 held the lands as private property, and the lands had come into the possession of defendants Nos. 1, 2, by assignment under mortgage and purchase. It was further objected that the appellants had no right [178] to bring the suit while their father was alive, or to recover possession of the lands which had come into the hands of defendants Nos. 1 and 2 as mortgagees and purchasers from the owners thereof.

The Court of first instance laid down seven issues, but it did not decide the principal points raised by the pleadings. It did not decide the first issue as to the point whether the land was service inam granted to the mosque, or whether it was the private property of the defendants Nos. 3, 4, 5. It also did not decide the question whether defendants Nos. 1, 2 had or had not obtained a valid title to the lands in dispute as mortgagees or purchasers. The question of limitation was also not formally disposed of. The claim of the plaintiffs-appellants was held not maintainable on the ground that their father was still alive, and had not transferred his rights to his sons, the plaintiffs. It was held that, as long as defendants Nos. 3, 4, 5 had not been removed from their office in the mosque, appellants were not entitled to claim possession in the suit as now framed. The Subordinate Judge was of opinion that the proper course to follow was that laid down by s. 539 of the Civil Procedure Code.

The lower appellate Court took the same view as regards the procedure, though as regards the tenure of the lands it was of opinion that the lands in dispute were partly an endowment of the mosque, though the lands were not absolutely dedicated to it, and defendants Nos. 3, 4, 5 had a beneficial interest in the same. It dismissed the suit on the ground that the suit was not properly framed, and that the proper course to follow was to secure the removal of the misconducting trustees, defendants Nos. 3, 4, 5.

The chief point for consideration in second appeal is whether the present suit was maintainable, in whole or in part, under the Mahomedan law of wakf, and whether the appellants were prevented from bringing the suit by reason of their father being alive. It appears to me that, if the suit is treated solely as one for the possession of the lands, it is defective, and not properly maintainable in its present form. As a suit for the partition of a half share in the lands, such a suit could not be maintained, as [179] the owner of the eight annas share is admittedly not a party to it, and even in respect of the other eight annas share, only four annas really belong to the appellants and their father, while the other four annas belong to defendants Nos. 4, 5. The lower appellate Court has found that the

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lands are only partly endowed property, and that the Kazi defendants Nos. 3, 4, 5 have also beneficial interest therein. To the extent of this beneficial interest, alienation might be permissible—*Futtoo Bibee* v. *Bhurrut Lall* (1). If the present suit is considered in this light, it is obvious that it was improperly framed and defective in its character. Point 10 in the memorandum of appeal shows clearly that the appellants are themselves conscious of this defect in the form of the suit, and they suggested that they should be allowed to amend the plaint.

Reading the plaint and pleadings carefully, it appears to me that the principal object of the suit was really to secure a declaration that the lands were the inam property of the mosque, and as such not liable to alienation for the private debts of the mutawalli defendants Nos. 3, 4, 5. This is the principal ground of action and the main object of the suit. The defendants Nos. 3, 4, 5 have in fact not even been made respondents in this appeal. The only parties to it are the defendants Nos. 1, 2, who are Hindu creditors of the Kazi defendants, and their tenants. These same Kazi defendants did not also contest the claim in the original Court.

The dispute is thus really confined to the mortgagees and purchasers and their tenants, who are all outsiders, and not members of the appellants' family. The plaint expressly recites that defendants Nos. 1, 2 had no right to retain possession of the property, or recover the income thereof. If this declaration can be claimed by the appellants, their inability to seek the other reliefs would not defeat the main object of the suit. Section 539 will not come in the way of such a declaration.

The question for consideration is thus limited to the inquiry whether the appellants-plaintiffs can bring the suit to secure **[180]** such a declaration. I am of opinion that such a suit is maintainable. In *Reasut Ali* v. *Abbott* (2), where the son of a deceased mutawalli sued to recover possession of endowed property, and the defence was that the property was all along shared among the heirs of the grantee, such a suit was held maintainable for the determination of the question really at issue between the parties. The *peeruttur* in that case closely resembles the wakf in the present suit, and it was held that even if all the profits were not devoted to the *peer*, the land was none the less a wakf. The next case is still more in point—*Syud Asheerooddeen* v. *Sreemutty Drobo Moyee* (3). In that case the mutawalli whose endowment land had been sold in execution of a decree against himself, brought the suit to set aside the sale, and his suit was held maintainable on the ground that the trust was not altered by the misconduct of any particular mutawalli. In these cases no objection was raised on the ground of s. 539, as that section did not apply where outsiders obtain possession, and the claim is made to oust them from their possession. In a leading Allahabad case—*Zafaryab Ali* v. *Bakhatwar Singh* (4)—the right of Mahomedan worshippers to set aside a mortgage and sale of certain lands attached to a mosque was upheld, and s. 539 was held not to apply even when the Mahomedans based their right solely on the ground that they frequented the mosque, and used the buildings. This same view was upheld in a latter case, *Jawahara* v. *Akbar Husain* (5), and the Allahabad Judges dissented from the opinion expressed in a Calcutta case—*Jan Ali* v. *Ram Nath* (6) where it was held that s. 539 governed such a suit. In this Presidency, in *Lakshmandas* v. *Ganpatrav* (7) a Hindu donor gave a land in gift to a

(1) 10 W.R. 299. (2) 12 W.R. 132. (3) 25 W.R. 557. (4) 5 A. 497.
(5) 7 A. 178. (6) 8 C. 32. (7) 8 B. 365.

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Mahomedan darga, which was managed by a Mahomedan servant of the darga. The land was sold in execution of a decree against the manager, and the original grantor brought the suit to have the sale set aside. The suit was held to be maintainable, and one which did not fall under s. 539, as the object of the suit was to recover property from outsiders.*

[181] It will be seen from these cases that when the object is to set aside an alienation made to a stranger, a suit by the worshippers of a mosque or temple can be maintained, and it does not fall within the provisions of s. 539, Civil Procedure Code. This section is applicable only when there is an alleged breach of trust created for a public, charitable or religious purpose, and the direction of the Court is necessary for the administration of the trust—*Miya Vali Ulla* v. *Sayed Bava* (1). As against strangers, like defendants Nos. 1, 2 in the present case, s. 539 does not apply—*Shri Dhundiraj* v. *Ganesh* (2); *Strinivasa Ayyangar* v. *Strinivasa Swami* (3); *Vishvanath* v. *Rambhat*(4); *Radhabai* v. *Chimnaji* (5). Of course a person to be entitled to bring a suit in respect of a wakf property must have a beneficiary interest. As the wakf in this case was given partly for service and partly for maintenance, in which latter right the appellants have an interest along with the defendants Nos. 3, 4, 5, they are beneficiaries, and are not such utter strangers as those noticed in *Vajid Ali Shah* v. *Dianat-ul-lah Beg* (6). The appellants have thus a legal character, and are entitled to sue under s. 42 of the Specific Relief Act. As far as the appellants seek a declaration against strangers, they are entitled to sue, and s. 539 does not come in their way. I would, therefore, hold that the suit is maintainable for the declaratory relief which is their principal cause of action, and which is included in the relief prayed for. The relief about possession might also be claimed under certain circumstances if it is proved that they have succeeded to the office of the mutawalli and were rendering service at the mosque.

I would, therefore, reverse the decree and remand the case for decision on the merits after amending the plaint, if necessary, on the lines laid down above.

Decree reversed and case remanded.

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24 B. 182=1 Bom. L.R. 777.

[182] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

LAKSHMAN DARKU (*Original Plaintiff*), *Appellant v.* NARAYAN LAKSHMAN (*Original Defendant*), *Respondent.** [13th September, 1899.]

Hindu law—Partition—Decree for partition—Decree awarding plaintiff's share, but postponing possession thereof till plaintiff attained majority—Effect of such decree.

On the 21st February 1894, a decree in a partition suit provided as follows:—"Plaintiff is a minor twelve years old; until he attains twenty-one years, Narayan (defendant) should for the next nine years annually deliver to him twenty maunds of paddy, and for this year ten maunds; after that plaintiff

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* Second Appeal No. 460 of 1899.

(1) 22 B. 496. (2) 18 B. 721. (3) 16 M. 31.
(4) 15 B. 148. (5) 3 B. 27. (6) 8 A. 31.

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should be given one-sixth of the family lands; until then defendant is not to alienate the lands.

The minor died and in 1897 his widow, Sundri, as his heir, applied for execution of the decree, claiming seventy maunds of paddy, being the amount due at the rate specified in the decree. It was objected that she was not entitled to execute, inasmuch as the decree had not effected a partition and that the property at his death still remained joint family property, which passed to the male survivors of the family, and that she was only entitled to maintenance.

Held, that the effect of the decree was to make the applicant's husband a divided member of his family. It awarded him a one-sixth share of the family estate and assigned to him a separate allowance. The mere fact that it postponed the actual possesseion of the share until he had attained the age of twenty-one years made no difference. The share vested in him from the date of the decree and descended to his heirs.

Held, also, that in execution of the decree she was only entitled to recover the arrears of the allowance up to the date of her husband's death. When he died he was still a minor, and the allowance ceased, and the share went to his heirs by right of inheritance, and was recoverable only by a separate suit and not in execution.

SECOND appeal from the decision of M. B. Tyabji, District Judge of Thana.

One Lakshman Darku, a minor, sued by his next friend for partition of certain joint ancestral property and for possession of his one-sixth share. This suit was compromised and a decree was passed in terms of the compromise, which provided (*inter alia*) as follows :--

[183]" Plaintiff is a minor twelve years old; until he attainstwenty-one years Narayan (defendant) should for the next nine years annually deliver to him twenty maunds of paddy and for this year ten maunds; after that plaintiff should be given one-sixth of the family lands; until then the defendant is not to alienate the lands."

This decree was passed on 21st February, 1894.

The minor plaintiff died shortly afterwards, leaving a childless widow named Sundri.

In 1897 Sundri, as his heir, applied for execution of the decree to recover seventy maunds of paddy, being the amount due for three and a half years at the rate awarded by the decree.

The opponent resisted the application and contended that Sundri was not the minor's heir and was not entitled to execute the decree: that no partition had been effected by the decree, and that, consequently, the property still remained joint family property, which, at the minor's death, passed to the surviving members of his family, his widow Sundri being only entitled to maintenance.

The Court of first instance overruled the objection and granted the application, and ordered that the decree should be executed.

On appeal the District Judge reversed the order, holding that the decree had not effected partition, and that, therefore, the widow was not entitled to the execution prayed for. His judgment was as follows :—

" If (the decree) merely contained an expression of intention on the part of the members of the family to divide their estate at a future date, it was not more than an inchoate partition. It did not define the portion of property which appellant's husband was to hold as a separated member of a previously joint family, and it could not, therefore, be executed as a decree directing partition. This view of the decree is supported by the ruling in I. L. R., 4 Bom., 157. The arrangement made by the decree is one of those special arrangements for enjoyment of joint family property referred to in s. 273 of Mayne's Hindu Law and Usage, by which a

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member may hold a portion of the property separately without altering his status as member of an undivided family. Respondent can, therefore, claim maintenance only and cannot claim anything under the decree in question.

Against this decision a second appeal was preferred to the High Court.

[184] *G. S. Mulgaokar*, for appellant.

N. M. Samarth and *M. B Chaubal*, for respondent.

JUDGMENT.

PARSONS, J. —Lakshman Darku, a minor, sued the members of his family for a partition and the possession of his one-sixth share. A decree based on a compromise was passed on the 21st February, 1894, by which it was provided as follows :—

"Plaintiff is a minor twelve years old; until he attains twenty-one years, Narayan, defendant, should for the next nine years annually deliver to him twenty maunds of paddy and for this year ten maunds; after that plaintiff should be given one-sixth of the family lands; until then defendant is not to alienate the land."

Lakshman died after the decree, and his widow seeks in execution to recover seventy maunds of paddy, being the amount deliverable under the decree from its date to the date of application.

The District Judge rejected the application, holding that the decree had not converted the family into a divided one. He cited the case of *Babaji* v. *Kashibai*(1) in support of his view. We are unable to agree with him.

The effect of the decree was clearly to make Lakshman a divided member of the family. It awarded to him a one-sixth share of the family estate and it assigned to him a separate allowance, presumably the income arising from that share. The mere fact that it postponed the actual possession of the share until he had attained the age of twenty-one years, can make no real difference. In the case of *Joy Narain Giri* v. *Girish Chunder Myti*(2), their Lordships of the Privy Council say: "The decree which has been read is, in effect, to give to Shibpershad Giri a separate share of the property of the grandfather. It gives him, in terms, possession of the eight annas which he claimed of the real estate; it gives him mesne profits from the day of the alleged separation,—that is, from the time when he left the house in which he had been living with his cousin, —and it gives him also a half of the personal property. That being so, their Lordships are of opinion that although the suit is not actually, in terms, for partition, yet that the decree does effect a partition, at all events, of rights, [185] which is effectual to destroy the joint estate under the doctrine laid down in the case, which has been quoted, of *Appovier* v. *Rama Subba Aiyan* (3)." So in the earlier case of *Sri Gajapathi Radhika Patta Maha Devi Garu* v. *Sri GajapatiNilamani Patta Maha Devi Garu*(4), where an agreement had been entered into that the sons were to be equally entitled in moieties of an estate, but the division was not to be made until the youngest son was of age, their Lordships held that its effect was to constitute the two brothers a divided family, and that the widows were entitled on the death of their husband each to a moiety of the estate. See also the case of *Tej Protap Singh* v. *Champa Kale Koer*(5). The decision of this Court in *Babaji* v. *Kashibai*(1) is distinguishable, for there it

(1) 4 B. 157. (2) 4 C. 434. (3) 11 M.I.A. 75=8 W.R. (P.C.) 1.
(4) 13 M.I.A. 497=14 W.R. (P.C.) 33 (5) 12 C. 96.

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was found that there was no indication of an intention to presently appropriate and enjoy in a manner inconsistent with the ordinary state of enjoyment of an undivided family. In the present case, there is immediately such an appropriation, for the decree gave the minor a distinctly separate allowance of paddy which he was to enjoy to himself, and it gave him possession of the one-sixth share of the estate when he attained majority. That share became vested in him from the date of the decree and would descend to his heirs.

We do not, however, think that his heirs would be entitled to claim, in execution, either the share or the allowance as awarded in the decree. They could only recover the arrears of the allowance up to the death of the minor, for that is all that the minor himself would be entitled to. When he died, being still a minor, the allowance would cease and the share would go to his heirs by right of inheritance, and would be recoverable only by separate suit. So far, therefore, as the application seeks to recover the arrears of the allowance due at the death of the minor, we think that it ought to have been granted, but that it has been properly rejected as to anything else asked for in it.

We cannot dispose of the case ourselves, as there is nothing on the record to show when Lakshman died. We, therefore, reverse [186] the order of the District Judge, and remand the application for disposal with reference to the above remarks. We make costs costs in the cause.

RANADE, J.—In this case the appellant's minor husband by his guardian obtained a partition decree against the respondent, which directed that the minor should receive during his minority twenty maunds of paddy every year, and when he became major, he should recover a one-sixth share of the land from the respondent, who should not alienate the land till then. This decree was obtained in February 1894. The minor died, and the present darkhast was filed by his minor wife through her guardian to recover seventy maunds of paddy for three and a half years. The respondent objected to the minor appellant's right to execute the decree. This objection was overruled by the Court of first instance, but the District Judge, in appeal, held that, as there had been no partition of the land, the minor widow could not execute the decree for partition, and was entitled only to maintenance. The darkhast was accordingly disallowed.

The chief point for consideration is whether the status of the previously joint property was converted into separate property by reason of the decree. The District Judge has held, chiefly on the authority of *Babaji* v. *Kashibai*(1), that the status of the property was not changed by the decree. The partition was held to be inchoate in that case, and the decree was construed as declaring an intention to divide at a future date, and thus it did not effect a separation of the property. It appears to me that this view of the lower Court was based on a misconception of the real point decided in *Baboji* v. *Kashibai*, and is inconsistent with numerous decisions of this Court and of the Privy Council. The ruling relied upon has no application in the present case, for in that suit, while part of the property was divided, there was a portion left undivided, as it was in mortgage with third parties. The decree only affirmed the right to share this mortgaged property equally when redeemed. One of the sharers subsequently redeemed the whole of the property. The other sharer died, and his heir sought to recover his half share from the brother who [187] had redeemed the whole. It was

(1) 4 B. 157.

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held in second appeal that there was no conversion of the status of the mortgaged property which was subsequently redeemed. This Court held in accordance with the principle laid down in *Appovier* v. *Rama Subba Aiyan* (1) that the proper test to apply is not whether the property is actually divided or not divided, but whether there had been a division of title so as to give to each member a certain and definite share to receive and enjoy in severalty. In the case of *Babaji* v. *Kashibai* (*supra*) there was no such division of title and no conversion of the character of undivided property. In the present case, the decree expressly made this conversion, and effected severance of one-sixth share. This share was adjudged to belong to the minor appellant's husband, though, by reason of his minority, the actual division was postponed, and the respondent was required to pay instead the profits of the one-sixth share, and prohibited from alienating the same.

The leading case on this part of the law is no doubt that of *Chidambaram Chettiar* v. *Gauri Nachiar* (2). In that case there was a partition decree which settled that particular property was partible, and fixed the shares of the parties. A reference was made to the commissioner to effect the division. Before this division could take place, the plaintiff died, and an objection was raised that the partition suit failed. The Privy Council, however, held that on the death of the plaintiff, his own heirs succeeded in preference to the defendants, who were separated coparceners. In *Joy Narain Giri* v. *Girish Chunder Myti* (3) it was held that where the intention of the plaintiff was to obtain a share on separation, and that share was decreed to him, the decree effects a partition of rights, and converts the joint estate into a separate property. Their Lordships of the Privy Council distinguished this ruling from the decision of *Debee Pershad* v. *Phool Koeree* (4) in which last case only a declaration was sought of a right to a share, which declaration was quite consistent with a right to a share in joint estate.

Where, as in the present case, the intention to separate is distinct, and effect is given to it by the decree, the decree converts the [188] character of the estate. Where such an intention is quite distinct, even an agreement to divide extinguishes the right of survivorship. The ruling in *Babaji* v. *Kashibai* noticed above was thus distinguished in *Tej Protap Singh* v. *Champa Kalee Koer* (5) on the ground that the* decree did not contemplate a present separation. An agreement to partition, even when it is not carried out by actual separation, entitles the widow of a deceased brother to succeed to his share in preference to the surviving co-sharer—*Rukhmabai* v. *Joterao*(6), *Suraneni Venkata Gopala Narasimha* v. *Suraneni Lakshmi Venkama* (7); *Sitaram* v. *Ganpat* (8) and *Maharaji Ram Kissen Sing* v. *Rajah Sheonundun Sing* (9). The present case falls under this same category and is clealy distinguished from those other cases where property was advisedly left undivided. In such cases the widow is held to have no claim to divide the same even where a share in the rest of the property has been assigned to her. The ruling in *Babaji* v. *Kashibai* (*supra*), on which the District Judge relied, belongs to this last class of cases—

* [Earlier ED.]

(1) 11 M. I.A. 75 = 8 W. R. 1.
(2) 6 I. A. 177 = 2 M. 83.
(3) 4 C. 434.
(4) 12 W.R. 510.
(5) 12 C. 96.
(6) P J. No. 22, (1872), p. 296.
(7) 3 B.L.R. 41 (P.C.) = 12 W.R. 40 (P.C.).
(8) P.J. (1892), p. 261.
(9) 23 W.R. 412.

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Timmi Reddy v. *Achamma* (1); *Ramabai* v. *Jogan Soarybhan* (2). The appellant plaintiff is, therefore, entitled to prosecute her darkhast. She can, however, only claim to recover arrears due up to the death of her husband. For the period subsequent to that date, she can only bring a suit in her right as heir. I accordingly agree with Mr. Justice Parsons in his final order in the present case.

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24 B. 188=1 Bom.L.R. 658.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice and Mr. Justice Candy.

DESAI BHAOORAI (*Original Plaintiff*) *Appellant* v. DESAI CHUNILAL AND ANOTHER (*Original Defendants*), *Respondents.**

[14th September, 1899.]

Easement—Easements Act (V of 1882)—Right of way—Right of way enjoyed for agricultural purposes—Change of use—Increase of servitude—Injunction.

The defendants had a right of way to their field through an adjoining field of the plaintiff. Until shortly before suit the defendants' field had only been used [189] for agriculture, and the way through the plaintiff's field was used by them for ordinary agricultural purposes. The defendants, however, converted their field into a timber depot and began to use the way across the plaintiff's field for purposes connected with the timber trade. The plaintiff sued for an injunction.

Held, that plaintiff was entitled to an injunction restraining the defendants from using the way otherwise than for agricultural purposes.

[*Cf.*, 1 Bom. L.R. 37—ED.]

SECOND appeal from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge, A. P., of Ahmedabad.

Suit for injunction. The plaintiff sued for an injunction restraining defendants from using a certain way through his (the plaintiff's) field for any other than agricultural purposes.

The plaintiff was the owner of certain fields (Survey Nos. 551, 554 and 555) and the defendants were owners of the adjoining fields (Survey Nos. 552 and 556).

The fields were so situated that one mode of approaching defendants' fields was a way passing through plaintiff's land, Survey No. 554.

This way was used by the defendants for a very long period of time for agricultural purposes only.

In 1896 defendants converted their fields into a timber depot, and began to use the way for carrying carts loaded with timber.

Plaintiff thereupon filed the present suit for an injunction to restrain the defendants from using the way in question for any other than agricultural purposes.

The Court of first instance passed judgment as follows :—

"Plaintiff has established his case to restrain the defendants from taking carts for non-agricultural purposes *in a way so as to injure the hedges of the plaintiff* and the working of the *kos* in the well and not further."

Plaintiff appealed against this decree.

The Subordinate Judge with appellate powers was of opinion that the way in question could be used for agricultural as well as non-agricultural

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* Second Appeal No. 75 of 1899.

(1) 2 M.H. C. R. 325.

(2) P.J. No. 35 (1873), p. 519.

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purposes, and that the defendants could not be restrained from using the way for a non-agricultural purpose so long as they did not impose an additional burden on the land. He was, therefore, of opinion that the first Court's decree should [190] be amended in defendants' favour. But as they had not appealed, nor filed cross-objections, the decree was confirmed.

His reasons were as follows :—

"Timber carts do not require more space than that required for carts loaded with hay and other agricultural produce. Eight feet space is sufficient for both the carts. The easement is attached to the land and not to particular purpose. When the land of defendants was used for agricultural purpose, defendants took their carts for that purpose. Now when the defendants use the land for another lawful purpose, they can take their carts for that purpose. The only thing is that defendants cannot impose an additional burden, and that the purpose must be connected with the enjoyment of defendants' land. If the Revenue authorities allow defendants to enjoy the land for storing timber, and if defendants can pass carts without injuring the bedges of plaintiff, I think that plaintiff cannot stop the carts passing over the *nalia*. Under ss. 21 and 22 of the Easements Act (V of 1882) I think that plaintiffs cannot stop the carts going over the *nalia*."

Against this decision plaintiff preferred a second appeal to the High Court.

Ganpat Sadashiv Rao, for appellant (plaintiff).—The defendants land was originally a field used for agricultural purposes only. To that field they have acquired a prescriptive right of way through plaintiff's land. But the right of way exists for the field in its ordinary use as field. Defendants have no right to turn the field into a timber depot, and then use the way for purposes of the timber trade. If they are allowed to do so, the burden on the servient tenement will be enormously increased. A right of way used for a particular purpose cannot be used for any and all purposes—*Wimbledon, &c., Commons Conservators* v. *Dixon* (1) ; *Bradburn* v. *Morris* (2) ; *Corporation of London* v. *Riggs* (3) ; *Cowling* v. *Higginson* (4).

M. B. Chaubal (with him *R. R. Desai*), for respondents (defendants):—Both the dominant as well as the servient tenements were at one time the joint family property of the parties to this suit. When the property was partitioned, the dominant tenement fell to our share, and with it the way in question as an easement of necessity. In the absence of the partition-deed or other document showing an express grant, the principle of an [191] implied grant upon severance of the tenement should be applied. According to s. 13 of the Easements Act, we are entitled to such an easement as is necessary to the enjoyment of our share of the property. And we have a right to enjoy our share in the manner most profitable and beneficial to us. We may use our land for agricultural purposes, or we may turn it into a timber depot. Whether we use it in one way or the other, that will not affect the easement. As dominant owners we are entitled to use the way for all legitimate purposes. We can alter the mode of enjoying the easement, provided we do not impose an additional burden on the servient heritage—*Jesang* v. *Whittle* (5).

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(1) (1875) 1 Ch. D. 362. (2) (1876) 3 Ch. D. 812. (3) (1880) 13 Ch. D. 798.
(4) (1838) 4 M. & W. 245 (256). (5) 23 B. 595.

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JUDGMENT.

JENKINS, C.J. —This is a suit to restrain the defendants from using a right of way over the plaintiff's land for any other than agricultural purposes. The plaintiff and the defendants are the owners of adjacent fields, and one mode of approaching the defendants' field is by a way that passes through plaintiff's field. Until a recent date the dominant tenement was a field used only for rustic purposes, and the way in question was used for its ordinary agricultural needs. Lately, however, the dominant land has been converted into a timber yard, and the dispute between the parties is whether the dominant owners can claim to use the way for this new purpose.

In the first Court the plaintiff succeeded, and though the second Court did not vary the relief, it made such a pronouncement on the parties' rights that it was necessary to come to this Court. The lower appellate Court thought the user ought not to be limited to agricultural purposes, and had it come to that conclusion on findings of fact, we could not have interfered: it is obvious, however, from the judgment and the circumstances of the case this could not have been so. Accordingly the case has been argued before us on both sides as a point of law, the accepted fact being that the user had throughout been limited, until the acts complained of, to a way for agricultural purposes.

If the easement in question arose by prescription, the user, which establishes it, furnishes the measure of the purposes to which it may be put, and the dominant owner cannot, by merely [192] altering the dominant heritage, substantially increase the easement. The use, as it has been said, must be reasonable use for the purpose of the land in the condition in which it was while the user took place, so that if the user was for a field devoted to agricultural purposes, the right could not be claimed for a timber depot into which the field was converted. But then it has been suggested that the easement arose on partition, though there is nothing from which it could be inferred that there was an express grant of way. In the absence of express grant the right would arise by implication on the severance of heritage, but in that case the easement would be co-extensive with the necessity or user at the time at which it came into existence. Obviously the use to which the dominant owners would now put the way is a most substantial increase of the burden, and the lower Court was in error in deciding otherwise. We must, therefore, vary the decree of the lower Court and restrain the defendants from using the track which runs through Survey No. 554 otherwise than for agricultural purposes. Plaintiff to get his costs here and in the lower appellate Court from the defendants.

Decree varied.

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APPELLATE CIVIL—FULL BENCH.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Parsons, Mr. Justice Candy, Mr. Justice Ranade and Mr. Justice Crowe.

GANDHI MAGANLAL MOTICHAND (*Original Plaintiff*), *Appellant v.* BAI JADAB AND OTHERS (*Original Defendants*), *Respondents.**

[14th September, 1899.]

Hindu law—Inheritance—Paternal grandmother inheriting property from maiden grand-daughter—Estate taken by grandmother—Power to dispose by will.

A paternal grandmother in Gujart, inheriting moveable and immoveable property from her maiden grand-daughter, takes an absolute interest in such [193] property, and on her death the property goes to her heir and not to the heir of the grand-daughter, and the grand-mother can dispose of such property by will.

[R., 31 B. 453=9 Bom.L.R. 834 (837); 32 B. 59=9 Bom.L.R. 1305 (1320).]

APPEAL from the decision of Rao Bahadur Lalshankar Umiyashankar, First Class Subordinate Judge of Ahmedabad.

Suit by an executor to recover possession of his testator's property.

The following table explains the relationship of the parties in the suit :—

Nathubhai m. Jadab
died before 1869.
died

Samalbhai
died

Manibai m. Jadab, deft. 1.
died 4th July 1896.

and

Amrat
died 28th January 1896

Nahalchand m. Shanagar
died 30th January 1883. | died 12th October 1883

Infant daughter
died 15th October 1883.

One Nathubhai Lalbhai had two wives, Jadab and Amrat. By Jadab he had a son Samalbhai, and by Amrat he had a son Nahalchandbhai. In 1869, after the death of Nathubhai, these two sons divided their ancestral joint property, and separated, and each took over and enjoyed his share as absolute owner. On Samalbhai's death his property went to his son Manibhai, who died childless on the 4th July, 1896, and his widow Jadab (defendant No. 1) succeeded to his property. Nahalchandbhai died on the 30th January, 1883, leaving him surviving his mother Amrat and a widow, Bai Shanagar, who was then pregnant. The widow inherited his property. She died shortly afterwards, *viz.*, on the 12th October, 1883, leaving an infant daughter and her mother-in-law Amrat surviving her. The daughter thereupon inherited all Nahalchand's property. This child, however, died three days after its birth, and the property then went to Bai Amrat, mother of Nahalchand. Bai Amrat died on the 28th January, 1896, leaving a will, but on her death, Manibhai, the husband of the first defendant, took possession of Bai Amrat's property. He died on the 4th July, 1896, and his widow then took possession.

The plaintiff was one of the executors appointed by Bai Amrat's will, and he brought this suit to recover the property, [194] Defendants Nos. 2,

* Appeal No. 12 of 1899.

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3 and 4 were his co-executors, but they refused to join with him as plaintiffs, and were accordingly made defendants.

The first defendant (Jadab) pleaded that she was entitled to the property, that Bai Amrat had only a widow's estate, and had no power to dispose of the property by will.

The Subordinate Judge held that the property had been inherited by Nahalchand's infant daughter as her stridhan, and was, therefore, hers absolutely, but that on her death her grandmother Bai Amrat had taken only a widow's estate in it and that she was, therefore, not competent to dispose of it by will, and that it passed to the infant daughter's heir. He, therefore, dismissed the suit.

The plaintiff appealed. The case came before Candy and Crowe, JJ., who on 28th July, 1899, delivered the following judgments referring the case to a Full Bench :—

CANDY, J.—The question arising in this appeal is, does a paternal grandmother in Gujarat, inheriting moveable and immoveable property from her maiden granddaughter, take an absolute interest in all or any of the property, so that on the grandmother's death the property goes to her heir, and not to the person who is then the heir of the granddaughter, and so that the grandmother can dispose of all or any part of the property by will ?

The question arises thus : (His Lordship stated the facts and continued).

It is clear from the above that the estate of Nahalchand, (who had separated from his half-brother Samalbhai), devolved on his death on his widow Shanagar, and on her death was inherited by the nameless daughter, who lived for three days only, and on the baby's death passed to the paternal grandmo her (Nahalchand's mother, Amrat). She enjoyed the property for some years, and on 27th February, 1888, she made a will disposing of the property.

Plaintiff is an executor under that will, and as such he seeks possession of the property, which on Amrat's death was taken possession of by Manibhai, the son of the nameless baby's father's [195] half-brother. Manibhai died six months after Amrat, and Manibhai's widow, first defendant, is now in possession of the property.

The First Class Subordinate Judge rejected plaintiff's claim holding that Amrat had a restricted interest in the property, which on her death passed, not to her own heir, but to the heir of the nameless granddaughter, from whom Amrat had inherited it : Amrat, therefore, could not dispose of any of the property by will. That is the decision which is now attacked in appeal, the main question being, who was heir to the property on Amrat's death, Amrat's heir, or the nameless child's heir ?

We cannot find any authority in this Presidency giving a decisive answer to the above question. There are, no doubt authorities which tend to show that the answer should be in favour of the child's, not the grandmother's heir ; but they do not exactly cover the case now in point, and they do not in our opinion afford an entirely satisfactory solution of the question, which being an important one, we have determined to refer —as set out at the beginning of this judgment—to a Full Bench for disposal. And as the case will come before the Court for a full and further argument, we need only briefly indicate the considerations which have led us to make the reference.

It will be noticed that the property was inherited by Amrat from a maiden granddaughter. The only text upon the succession to a maiden's

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property is one which is variously ascribed to Baudhayana and to Narada, but which cannot be found in the existing works of either writer (Mayne, s. 618). "Of an unmarried woman deceased the brothers of the whole blood shall take the inheritance: on failure of them it shall go to the mother, or if she is not living, to the father." The Mitakshara (II, 11, 30) explains this by including the property which may have been regularly inherited by the maiden. The Mayukha (IV, 10, 34) omits the above explanation, but adds to the text this remark "The *Sampradayikas* (those conversant with usage) declare that this (text) relates to ornaments and the like presented by the mother's father and the like, at the time of gift by speech to a girl (who afterwards) dies before (completion of) marriage"—Mandlik, **[196]** p. 99. There is nothing to show that this was intended by Nilkantha to be an exclusive definition: there is no objection, therefore, to adopt the Mitakshara explanation. The Viramitrodaya further adds (p. 241), in default of parents the property goes to their nearest relations. This would apparently be the case, even if we refuse to graft on to the Mayukha the explanation of the Viramitrodaya. There being no further succession indicated in the original text, the heirs next after the father would naturally be the paternal kismen. Among them the father's mother comes first.

So, too, if we apply the much disputed verse in the Mayukha (IV, 10, 26)—we take Mandlik's translation:—

"As for the text of Yajnavalkya—Let sons divide equally both the effects and the debts after the demise of their parents—it relates to what is acquired by inheritance or spinning and the like excepting the technical stridhan. Therefore, even if there be daughters, the sons or other heirs alone succeed to their mother's property, save the technical stridhan."

Strictly speaking, of course, this cannot apply to a maiden, who cannot have sons or daughters, but even supposing that we can apply it so far as to treat the succession as that which would be as far as possible ordinarily applicable to the property of a male, then clearly the only difference between it and the succession to a maiden given in Mayukha, IV, 10, 34, is that in the latter the brother comes before the parents: failing brother and parents, the grandmother comes in, as the first of the paternal kinsmen. She is specially named in the Mayukha—(IV, 8, 18). In default of the father's mother comes the sister, and in default of the sister comes the father's father. So that Amrat, even had her husband been alive, when she succeeded to the property, would have been preferred to her husband. She does not succeed as representing her husband. In West and Bühler, p. 113, it is said that the place assigned to the paternal grandmother is a special one, due partly to her entrance into the family and moral unity with the grandfather, but partly also to the particular mention of her as an heir by Manu.

Mr. Mayne in the last edition of his work on Hindu Law and Usage says (s. 627) that the order of succession in the case **[197]** of property inherited by a female from a female has not till very lately received any discussion:—"It has been decided that even if such property was *stridhanum* in the hands of the last holder, it would not be *stridhanum* for the purpose of descent in the hands of the next heir." Among the various decisions (none of them late ones) quoted in the note to the above passage the only Bombay one is *Bhaskar Trimbak* v. *Mahadev* (1). No such decision is to be found on p. 18 of the report. On the contrary, in the case in question,

(1) 6 B.H.C.R. O.C.J. 1 (18).

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Sir Joseph Arnould was stating the proposition that on this side of India all property inherited by a woman must be classed as "woman's property," with the exception (based on special texts) of property inherited by a widow from her husband. Then he noticed a Madras case, and remarked (p. 18): "I am at a loss to see how the case (apart from certain *obiter dicta* of the Court) can be cited as an authority for the position that property acquired by a woman by inheritance is not to be classed as *stridhan*. The Bengal authorities, indeed, favour the supposition that *stridhan*, which has once devolved according to the law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of inheritance. This may be sound doctrine, but it does not touch the facts of the case now before us and in course of decision." That case before Sir Joseph Arnould was that one Lakshmi, taking by inheritance from her brother, took his estate as woman's property, and that Hiru, the daughter of Lakshmi, would take as her sole heir in the first instance, and Mahadev Ramji, the son of Hiru's brother, who predeceased Hiru, had in Hiru's lifetime no share in the inheritance, whatever he might have on the death of Hiru, who was a childless widow.

The above decision was apparently governed by the Mitakshara. It would not have been different under the Mayukha. In the present case Amrat must have been heir of the nameless granddaughter, though according to the Mayukha the property both when it was inherited by the child and when it was inherited by Amrat was (because of the *inheritance*) *stridhan* improper, that is, not technical *stridhan*.

[198] Approaching the case from another point of view, and assuming that Amrat inherited the property as if the nameless child had been a *grandson*, we find that Mr. Mayne states (s. 567) that it is admitted by the Courts of all the Presidencies that the mother or grandmother, when inheriting from a son or grandson, takes an estate similar in all respects to that of a widow. The Bombay authorities quoted in the note to the above passage from Mr. Mayne are the following :—

(*a*) *Vinayak* v. *Lakshmibai* (1)—In that case it was decided that in Bombay sisters take as heirs to an unmarried and intestate brother in preference to relations of the father. The question whether a mother takes by inheritance from her son the absolute interest or an estate for life only was purposely left open.

(*b*) *Narsappa* v. *Sakharam* (2)—There Mr. Justice Gibbs said (pp. 217-218) : —"The entire question before the Court turns on whether the son's property, when inherited by the mother, becomes part of her *stridhan* or not. In the case of *Jamiyatram* v. *Bai Jamna* (3), the judgment of Sir Joseph Arnould, Acting C.J., pointed out that the property acquired by inheritance, and which in consequence becomes part of the widow's *stridhan*, can only consist of property inherited by her from *members of her own family*. This view has been questioned by the learned editors of the Digest of Hindu Law, Messrs. West and Bühler; but whether their criticism is correct or not, the decision which has been followed on several occasions is binding upon this Court as a precedent. Were it otherwise, we are of opinion that the very able argument for the respondent and the authorities cited have distinctly shown that the rule under which the widow succeeds to her son's separated property is the same under which she succeeds to her husband's in a divided family."

(1) 1 B.H.C.R. 117. (2) 6 B.H.C.R. A.C.J. 215. (3) 2 B.H.C.R. 11.

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In a note to this passage from the judgment of Mr. Justice Gibbs the authorities quoted are :—Mitakshara, ch. II, s. 1, paras. 1 and 2, and Mayukha, ch. IV, s. 8, paras. 1 and 2.

They do not apparently refer, even by implication, to a mother. The authorities cited by the respondent's pleader before Mr. Justices Gibbs for the proposition that property inherited by a [199] mother from her son can never be *stridhan* (" Manu only acknowledges six forms of stridhan, and there is no mention made among them of property inherited ") are :—Vyavahara Mayukha, ch. IV, s. 6, para. 15; s. 8, paras. 3 and 16-20; s. 10; Mitakshara, ch. II, s. 1, s. 11, paras. 1-5; and several cases, one only of which came from Bombay—*Bechar Bhagvan* v. *Bai Lakshmi* (1). There is no para. 15 in Mayukha IV, 6. The applicability of the other authorities quoted to property inherited by a mother from her son is not apparent. It is certain that the Mayukha does acknowledge inherited property as *stridhan*, though not *stridhan* proper. The case of *Bechar Bhagvan* v. *Bai Lakshmi* (1) deals solely with the case of a widow inheriting from her husband Sir Joseph Arnould's decision, noted above, referred solely to a widow inheriting from her husband. In the present case Amrat as paternal grandmother inherited property in her husband's family.

(*c*) The next case in the note to the passage from Mayne is *Sakharam* v. *Sitabai* (2). The sole question in that case was as to the right of a full sister to succeed in preference to a half-brother. Sir M. Westropp, C. J., added to his judgment a remark (p. 368) that it was also settled law that the mother, on succeeding on the death of her son, took only such a limited estate in it as a Hindu widow takes in the immoveable property of her husband dying without leaving male issue, quoting *Narsappa* v. *Sakharam* just noted above.

(*d*) The next case is *Dhondu* v. *Gangabai* (3) which simply decides that in Western India a sister succeeds to the estate of her deceased brother in preference to a separated and remote male relative of the deceased.

(*e*) The next case quoted is *Bharmangavda* v. *Rudrapgavda* (4). It merely decided that there was no authority for the proposition that the widow of a collateral (one, moreover, who had never been seized of the estate), could will it away. This needs no remark.

[200] (*f*) The last case quoted is *Tuljaram* v. *Mathuradas* (5), which decided that a maternal great-niece inheriting property is in the same position as regards the nature of the estate taken by her as a daughter or a sister. At p. 670 of the Report there is the following *obiter dictum* by Sir M. Westropp, C. J. :—

"A mother, inheriting from her son, is, as to the nature of the estate which she takes in moveable and immoveable property, in the same position as that of a widow inheriting from her husband—*Narsappa* v. *Sakharam* (6). The same rule would seem to be properly applicable to the grandmother inheriting from her grandson, or to the widow of a *sapinda* succeeding under circumstances similar to those under which Mankuvarbai succeeded in the case of *Lallubhai Bapubhai* v. *Mankuvarbai* (7), for they, like the widow and mother, enter by marriage into the family whence the property comes which they inherit."

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(1) 1 B.H.C.R. 56. (2) 3 B. 353. (3) 3 B. 369. (4) 4 B. 181.
(5) 5 B. 662. (6) 6 B.H.C.R.A.C.J. 215.
(7) 2 B. 388; Sub. Nom. *Lallubhai* v. *Cassibai*, 7 I.A. 212=5 B. 110.

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Narsappa's case has been already noticed. *Mankuvarbai's* case simply decided that the Hindu law of inheritance, as it actually prevails in Western India, recognizes and affirms the right of a widow to inherit as a *gotraja sapinda* to members of her husband's family. Here, Amrat did not succeed as a widow. The importance of *Mankuvarbai's* case lies in the weight which the Privy Council attached to positive acceptance and usage. This was pointed out by Mr. Justice West in the Full Bench decision of *Bhagirthibai* v. *Kahnujirav* (1). That was the leading case in which it was decided that under the Hindu law as prevailing in the Presidency of Bombay, a daughter inheriting from a mother or a father takes an absolute estate, which passes on her death to her own heirs, and not to those of the preceding owner. That had been the view hitherto prevalent in the Bombay Presidency; but it was suggested that this view could be enforced only in cases governed by the Mayukha, and that in cases depending on the Mitakshara only the heritage of the daughter must be regarded as a life-interest, the Judicial Committee having distinctly said in *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (2) that the Mitakshara is not to be construed as conferring on any 'woman taking by inheritance from a male a stridhan estate transmissible to her own heirs.' Hence the reference to the Full Bench.

[201] The decision of the Full Bench was given by Mr. Justice West. After remarks on the effect of usage on questions of inheritance, and the comparative weight to be attached in Bombay to the Mitakashara and Mayukha, he showed that there was the authority of the Judicial Committee for holding that "in Bombay, if not in other provinces of India, a female may take by inheritance from a male an absolute as opposed to a life estate, and one excluding any interest of the next heirs, as such, of the *propositus*.' Then he showed that while the general comparative leaning of the Hindu law of Bombay in favour of women's proprietary capacity had been recognized, the restrictions on the widow's full ownership of what she inherits from her husband cannot now be questioned, though imposed against the general opinion of the native lawyers. He proceeded, p. 299 :—"The estate taken by a mother in succession to her son has been assimilated to that taken by a widow in succession to her husband (quoting *Narasappa's* case, and a Madras and a Calcutta case). . . In the case of the succession of a widow as the next *gotraja sapinda* after her own deceased husband, a similar limitation has been enforced. (*Bharmangavda's* case, I. L. R., 4 Bom., 181, already noticed). The females taking by inheritance in these cases, however, are, at any rate, widows; and Katyayana's text may be extended to them by an analogy somewhat less strained than in the cases of daughters or sisters. The principal commentators on the Mitakshara, it is true, make the paternal grandmother inheriting from her grandson take the estate as *stridhan* (Mit. II, 4, 2 note), but that is only a single application of a principle rejected by the Courts. From the mass of decisions Sir M. Westropp deduced the general rule that all widows, inheriting in their family of marriage, take only *durante viduitate* (*Tulijaram's* case, I.L.R., 5 Bom., 662). The logical cogency of the learned Judge's argument cannot be denied, though it leads to a conclusion unrecognized by the Native jurists of the western school."

If this be the general rule, then it would not be applicable to a grandmother who inherits in their own right and not as a widow. As a fact,

(1) 11 B. 285 (291, 293).

(2) 3 M. 290=8 I. A. 99.

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as shown above, Sir M. Westropp did not deduce a general rule from a mass of decisions. All he did was to note, quoting the single case of *Narasappa* v. *Sakharam*, that a [202] mother inheriting from her son is in the same position as a widow inheriting from her husband, and to remark that the same rule *would seem to be* properly applicable to the grandmother inheriting from her grandson, for she, like the widow and mother, enters by marriage into the family whence the property comes which they inherit. With the greatest respect it may be pointed out that there is no trace in the Mayukha of the doctrine that property inherited by a woman cannot stay in the family into which she has married, but must revert to the family in which she was born. Such an idea is absolutely negatived by the admission that in Western India daughters and sisters take an absolute estate in the property which they inherit. They marry and take the property with them. As Mr. Justice West said *Bhagirthibai's* case, p. 310, there is not the slightest indication in the Vyavahara Mayukha of an intention to adopt the Bengal doctrine of reversion; as regards a widow the matter is settled by authority, but Nilakantha distinguishes her case from that of the daughter by his special dissertation on it. And again (West and Buhler, 151) the Mayukha does not give back the heritage after the death of a female successor to the original heir; it makes the female the source of a new line of descent as if she were a male. Such at least is the literal sense of its rule (Mayukha IV, 10, 26): how it is to be worked out in detail, is not laid down. And the late Mr. Justice Telang, though he did not agree with Mr. Justice West in his interpretation of the placitum, Mayukha IV, 10, 26 (a point which does not affect the question now before us) insisted that when once woman's ownership is recognized in the property inherited by her in the way it is recognized by Nilakantha, "it is a matter of course recognizing her as a fresh source of devolution, unless some powerful considerations can be urged on the other side: we can see none such here, but rather the contrary"—(*Manilal* v. *Bai Rewa* (1)).

Mr. Justice Guradass Banerji in his Lectures on the Hindu Law of Marriage and Stridhan (2nd Ed., 1896, p. 330) after noting the rule in Bombay that a woman has been held to possess absolute power of alienation over all property, both moveable and immoveable, inherited from her father or brother, says: [203] "But considering the general spirit of the Hindu law as laid down in the Mitakshara and the Mayukha, and bearing in mind the remarks of Mr. Justice West in *Vijiarangam's* case, 8 Bom. H. C. R. O. C. J., 264, 265, the correctness of the rule, that female heirs have absolute power of alienation over property inherited by them, seems to be open to question. It has, however, been laid down by repeated decisions of the Bombay High Court that females inheriting in their family of birth, such as the daughter and the sister, take absolutely, but those inheriting in their family of marriage, such as the widow and the daughter-in-law, take a limited interest." Then four Bombay cases are quoted, which will be noticed presently. As to the general spirit of the Hindu law as laid down in the Mitakshara and the Mayukha, and Mr. Justice West's remarks in *Vijiarangam's* case, it may be noticed that the learned lecturer in his preceding lecture points out (p. 295) that succession to the widow's estate forms an exception to the general rule that the property of any person descends to the heirs of that person, and not to those of any former owner, "so that

(1) 17 B. 758 (770).

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the decision of the Privy Council which comes under the exception (*Bhugwandeen Doobey* v. *Myna Baee* (1)) that a widow's power of disposition over property inherited from her husband is limited to certain purposes, and that on her death the property passes to the next heir of her husband, can furnish no argument for dispensing with the rule, or for introducing a similar exception with regard to property inherited by a female from any relation other than her husband." If this be so, then property inherited by a grandmother from her grandson must on her death go to her own heirs; and in that case she would be able to dispose of it by will.

It is, therefore, strictly speaking, unnecessary to enquire whether a woman inheriting property from any relation other than her husband can alienate it during her life-time. It may be (idem pp. 327, 328) that, considering the general policy of the Mitakshara law, the restraints on a woman's power of alienation over inherited property under that law are as much binding when such property is inherited from a female relation as when it is inherited from a male, and are as much binding during **[204]** widowhood as they are during coverture. But the "repeated decisions of the Bombay High Court that females inheriting in their family of birth take absolutely, but those inheriting in their family of marriage take a limited interest," do not bear out such an unqualified proposition, at any rate as resting on the Mayukha. Four cases are quoted. The first is *Bhagirthibai's* case (2) already noticed. The next is *Gadadhar Bhat* v. *Chandrabhagabai* (3), which laid down the important proposition that, as moveable property inherited by a widow from her husband devolves by inheritance on the widow's death on her husband's heirs, the widow's power of alienation over the moveables cannot be regarded as including the power of willing them away at her death so as to displace the right of inheritance by her husband's heirs. As pointed out in *Motilal* v. *Ratilal* (4), the above decision deals with parties subject to the Mitakshara law, not the Mayukha; and the two decisions of the Judicial Committee, on which it is chiefly based, contain express words of reservation: moveable property inherited by a widow from her husband, *if she has not otherwise disposed of it, passes to the heirs of her husband.* The third case is *Tuljaram's* (5), already noticed; and the fourth is *Rindabai* v. *Anacharya* (6), which decided that females inheriting as sisters take an absolute estate in severalty, and not as joint tenants. Sir C. Sargent, C. J., remarked that the view as to the mode in which daughters and sisters take was in *Tuljaram's* case extended to all females who do not become members of the family by marriage. This refers to Sir M. Westropp's remark that the rule as to a widow inheriting from her husband, and as to a mother inheriting from her son, *would seem to be* applicable to a grandmother inheriting from her grandson, for they enter by marriage into the family whence the property comes which they inherit. With the utmost respect we are of opinion that such an *obiter dictum* is not a sufficient basis on which to found an exception to the general rule, that the property of any person descends to the heirs of that person, and not to those of any former owner. We are aware that the **[205]** matter has been regarded as settled law. Thus in *Madhavram* v. *Dave Trambaklal* (7) at pp. 744, 745, Mr. Mayne is quoted (s. 569) as saying that in Bombay the Courts divide female heirs into two classes:—(1) those who by marriage enter into the *gotra* of the male whom they

(1) 11 M.I.A. 487 = 9 W.R. 23 (P.C.). (2) 11 B. 285. (3) 17 B. 690.
(4) 21 B. 170. (5) 5 B. 662. (6) 15 B. 206. (7) 21 B. 739.

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succeed, and (2) those who are of a different *gotra* or who upon marriage become of a different *gotra*. "As regards the first class, which includes widow, mother, grandmother, the widow of a *gotraja sapinda*, &c., they only take a widow's estate in property which they take from the last male owner, husband, son, &c. A long course of decisions has established this distinction. The distinction between the two classes of female heirs was solemnly affirmed in *Babaji* v. *Balaji*(1). The restricted character of the estate taken by a widow and a mother or grandmother or *gotraja sapinda* female heir is best illustrated by the rulings in *Pranjivandas* v. *Devkuvarbai*(2), *Narsappa* v. *Sakharam* (3) and *Sakharam* v. *Sitabai* (4)."

With great respect it may be douted whether a long course of decisions has established such a distinction based upon the marriage of the female heir. Sir M. Westropp thought *it would seem to be* the rule, but no text has ever been quoted as the basis of such a proposition. The decision in *Babaji* v. *Balaji* simply followed the decision in *Haribhat* v. *Damodarbhat* (5), which was that a daughter takes absolutely with power of disposition by will. Neither in those cases nor in the cases referred to in the note to the latter was there any mention of the distinction between the two classes of female heirs founded on marriage In *Pranjivandas* v. *Devkuvarbai* (2) it was held that a widow takes a limited and a daughter an absolute estate, but not because of any distinction between the two classes of female heirs. *Narsappa's* case has been already discussed. The remark in *Sakharam* v. *Sitabai* (4), that a mother inheriting from a son takes a similar estate to a widow inheriting from a husband, was based solely on *Narsappa's* case.

[206] For these reasons we are of opinion that the question at the head of this judgment is not beyond all doubt concluded by authority on this side of India. No decided case of a grandmother inheriting from a grandchild has been found: the only authority is a remark that it *would seem* that such a case would follow the rule applicable to a mother inheriting from her son. This latter rule is in Bombay deduced in a single case (*Narsappa's*) and is based on *the exception* regarding the widow's estate in property inherited from her husband. For these reasons we make the reference.

The question being thus referred, it was argued before a Full Bench consisting of Jenkins, C.J., and Parsons, Candy, Ranade and Crowe, JJ.

* *Setlur* with *Lallubhai A. Shah*, for the appellant (plaintiff).— We submit that Bai Amrat, who inherited the property from her grandchild, the infant daughter of Nahalchand, took it as absolute owner and had power to dispose of it by will, and that the plaintiff as executor of her will is, therefore, now entitled to recover it. Bai Amrat inherited as a paternal grandmother, *i.e.*, as an ancestor. The general rule in Bombay is that all property inherited by a woman is stridhan and is her absolute property—*Vinayak* v. *Lakshmibai*(6); *Bhaskar* v. *Mahadev*(7); *Vijiarangam* v. *Lakshuman*(8); *Bhagirthibai* v. *Kahnujirav*(9). To this rule the first exception is that of a widow inheriting to her husband. It was held that she took a limited estate first in *Pranjivandas* v. *Devkuvarbai*(2) where Sausse, C. J., expressly bases the decision on a custom contrary to

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* For a fuller text of the argument, see 1 Bom. L.R. 574, pp. 589.—598.—ED.

(1) 5 B. 660. (2) 1 B H.C.R. 130. (3) 6 B H C.R. (A.C J.) 215.
(4) 3 B. 353 (368). (5) 3 B. 171. (6) 1 B.H C.R. 117.
(7) 6 B.H.C.R. O.C.J. 1. (8) 8 B.H.C.R. O.C.J. 244. (9) 11 B. 285.

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the general rule. Other authorities are *Bechar* v. *Bai Lakshmi* (1); *Jamiyatram* v. *Bai Jamna*(2); *Lakshmibai* v. *Ganpat*(3); and *Gadadhar Bhat* v. *Chandrabhagabai*(4). The most recent case is a Full Bench decision and limits the absolute power of the widow over her husband's moveables to her life-time, and applies the doctrine of reverter to it. *Moti Lal* v. **[207]** *Ratilal* (5) affirms the power of the husband to enlarge the widow's power over property inherited from him.

The second exception to the rule is the case of gotraja sapinda widows. They were recognised as heirs in *Lallubhai* v. *Mankuvarbai*(6). The decision was affirmed by the Privy Council in *Lallubhai* v. *Cassibai* (7). See also *Bhirmingavda* v. *Rudrapgavda* (8); *Madhavram* v. *Dave Trambaklal* (9).

As to the estate taken by a mother and other female ancestors, there is only one case in Bombay—*Narsappa* v. *Sakharam* (10). It is referred to by West, J., in *Vijiarangam* v. *Lakshuman* (11). The decision was based on a dictum in *Jamiyatram* v. *Bai Jamna* (2). But as to this dictum see *Lakshmibai* v. *Ganpat* (3); *Bhasker* v. *Mahadev*(12). The next authorities on the point are: Mitakshara, ch. II, sec. 1, paras. 1 and 21; Stokes' Hindu Law, p. 427; Mitakshara, ch. II, s. 11; Vyavahar Mayukh, ch. IV, s. 8, paras. 1 and 2; Stokes' Hindu Law, p. 84; Mandlik's Hindu Law, p. 77, ch. IV, para. 5; Stokes' Hindu Law, p. 51; Mandlik's Hindu Law, p. 43.

As to a grandmother, there is no decided case. There is a dictum of Westropp, C. J., in *Tuljaram* v. *Mathuradas*(13), and it has been followed in *Madhavram* v. *Dave Trambaklal* (9). A grandmother is a specially mentioned heir, and the principle of *stare decisis* is not applicable, as there is no decided case on the point. Her case, therefore, should fall under the principle laid down by the Full Bench in *Bhagirthibai* v. *Kahnujirav*(14).

The following cases were also referred to:—*Gojabai* v. *Shrimant Shahajirao* (15); *Manilal* v. *Bai Rewa* (16); *Haribhat* v. *Damodarbhat* (17); *Jankibai* v *Sundra* (18); *Huri Dayal* v. *Grish Chunder* (19); **[208]** *Narsayya* v. *Venkayya*(20); *Virasangappa* v. *Rudrappa*(21); *Venkataramakrishna* v. *Bhujanga* (22); *Muttu Vaduganadha* v. *Dora Singha*(23); and *Rachava* v. *Kalingapa* (24).

Macpherson with *Bhaishankar* and *Kanga* and *Keshavlal Vithaldas*, for respondent No. 1 (defendant No. 1).—No doubt in Western India women take larger rights of property than elsewhere—Mayne's Hindu Law, para. 36; Stokes' Mayukha, p. 77. But to this rule there are exceptions, *e.g.*, the case of a widow inheriting from her husband and of a widow inheriting as a gotraja sapinda. We contend that the grandmother's estate is similarly limited.

The following authorities were cited:—Mayne's Hindu Law, s. 563; Stokes' Hindu Law, p. 375; Mitakshara, ch I, s. 1, pl. 27; ch. II, s. 11, pl. 9, 13, 25, 29, and 30; Stokes's Hindu Law, p. 548, s. 11, and p. 460, pl. 9; Mandlik's Hindu Law, p. 81; Mayukh, ch. IV, s. 8, p. 19; *Lakshmibai* v. *Jayram*(25); *Tuljaram* v. *Mathuradas*(13); *Rindabai* v. *Annacharya*(26);

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(1) 1 B.H.C.R. 56.
(2) 2 B.H.C.R. A.C. 11.
(3) 5 B.H.C.R. O.C. 128.
(4) 17 B. 690.
(5) 21 B. 170.
(6) 2 B. 388.
(7) 5 B. 110.
(8) 4 B. 191.
(9) 21 B. 739.
(10) 6 B. H.C.R. 215.
(11) 9 B.H.C.R. O.C. 244.
(12) 6 B. H.C.R. O.C. 1.
(13) 5 B 662.
(14) 11 B. 285.
(15) 17 B 114.
(16) 17 B. 758.
(17) 3 B. 171.
(18) 14 B. 612.
(19) 17 C. 911.
(20) 2 M.L.J. 149.
(21) 19 M. 110.
(22) 19 M. 107.
(23) 3 M 290.
(24) 16 B. 716.
(25) 6 B.H.C.R. 152.
(26) 15 B. 206.

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Madhavram v. *Dave Trambaklal* (1), as inheritance of female is concerned on this side of India has been conceded. It was also conceded that the property in the hands of Bai Amrat was stridhan, but it was argued that the grandmother's title was based on her marriage to her husband,—that is, she became a gotraja on account of her marriage. Gotraja does not mean gotraja widow only, and, therefore, we contend that there is no sufficient ground to limit her estate. The contention is against all the principles laid down in the Mitakshara and the Mayukha—*Lallubhai* v. *Mankuvarbai* (2). The definition of sapinda given at page 425 in the said case is conclusive on the point. The Mitakshara, far from recognising marriage as any title to inherit, tries to put even the claims of widows and gotraja widows on the basis of blood connection—that is, they are said to be sapindas, because they are the medium for the blood of the husband to pass to the children.

JUDGMENT.

The judgment of the Full Bench was delivered by

[209] JENKINS, C. J.—We are of opinion that the question of law referred to us should be answered in the affirmative, and in favour of the appellant. It is admitted that the maiden granddaughter inherited her father's property as her stridhan, and took an absolute interest in the same. There is also no dispute that the grand-mother succeeded to this property as heir to her granddaughter, and remained in possession of the same during her life-time, and on her death the property passed into the possession first of Manibhai and on his death of his widow the respondent No. 1, Bai Jadab, as representing the separated branch of the family. The grandmother Bai Amrat, however, made a will, and one of the executors of the will brought this suit against Bai Jadab, and three other co-executors, who refused to join in the suit to recover possession of Bai Amrat's property from Bai Jadab. The plaintiff-executor claimed that Bai Amrat took an absolute interest in the property as her stridhan, and had power to dispose of it by will, and did so dispose of it. Bai Jadab, on the other hand, contended that Bai Amrat had no such power, as she took only a widow's limited interest in the property. The Subordinate Judge, Mr. Lalshankar, took the latter view, and dismissed the claim. His reasons briefly were (1) that, under the Mayukha law, which governed the parties, property inherited by the grandmother was her stridhan, but not of the *paribhashik* or technical kind which goes to *her* heirs, but that this property came to her from her granddaughter as if this granddaughter had been her grandson. (2) That the maiden granddaughter was of the gotra of her father's family, and Bai Amrat inherited the property as a widow in the family of this gotra, into which she had entered by reason of her marriage. (3) That as a widow inheriting the property of her husband's gotra or family, Bai Amrat inherited only a limited estate like that of a widow or mother inheriting as heir to her husband or son respectively, and (4) Bai Amrat could not, therefore, dispose of the property, whether moveable or immoveable, by will.

In appeal, the referring Judges favoured the opposite view. The grounds on which it was based were principally (1) that, though in the texts which specially regulate the order of succession to a maiden, only brother, mother and father are mentioned, the list is **[210]** not exclusive or exhaustive, and the father's kinsmen come in as heirs after the father, and

(1) 21 B. 739.
(2) 2 B. 388.

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among these kinsmen, the paternal grandmother comes first in order under the Mitakshara law, and even under the Mayukha she comes in as a specified heir before the sister and grandfather. Bai Amrat came in her own right, and not as heir to her husband. (2) Even if the special rules about succession to maidens be left out of account, and the ordinary stridhan law, as it prevails in this Presidency, was applied, it did not recognise the Bengal doctrine that once an heir has succeeded to a property as stridhan it ceases to be a stridhan in the hands of the succeeding heirs, and such succession was governed by the ordinary law under which in this Presidency a female heir succeeding a female may inherit the property as stridhan. (3) That the analogy of the limited estate of a Hindu widow does not govern the rights of a grandmother when she succeeds as heir to a grandson or granddaugther, as she comes in in her own right, and not in her husband's right. (4) The distinction between female heirs coming in by marriage and those who succeed by birth is a useful generalization, but is not quite accurate, and that the proper position to hold is that female heirs in this Presidency generally take absolute interest unless, as in the case of widows, special exceptions have been made by our decisions. (5) The referring Bench were also of opinion that the reasons given in *Narsappa* v. *Sakharam* (1) for assimilating the case of a mother inheriting from her son to that of a widow inheriting from her husband were not good in law. They were, therefore, unable to follow that decision as an authority in the present case. On these grounds, the referring Judges were of opinion that the grandmother in this case could dispose of the property she inherited as stridhan from her granddaughter by will. As the point was not free from doubt, the present reference was made to the Full Bench.

The arguments on both sides have been above set forth, and the question for consideration is whether Bai Amrat had a full right to dispose of the property in dispute, or whether she had only a limited interest in the same. The question as to the extent of the power of disposition turns upon the inquiry whether the [211] property on Bai Amrat's death goes to her heirs, or to the heirs of the person (her granddaughter) from whom she got the estate. If the property is proved to be Bai Amrat's stridhan property, there is no dispute as to her right to dispose of it. The property was stridhan in the hands of the granddaughter. This is admitted, and the only question is,—did it cease to be so in the hands of the grandmother? Mr. Macpherson, counsel for the respondent, considerably narrowed the points in the controversy when he conceded the position that the law of Western India differed considerably from that prevalent elsewhere as to the rights of female heirs. He admitted that, governed as this Presidency is by the Mitakshara and Mayukha, the general rule is opposed to all limitation on the power of female heirs except where, as in the case of widows, &c., such restrictions have been specially imposed. Mr. Macpherson laid stress chiefly on two points and these alone require special notice. (1) It was contended that the texts which lay down the rules of succession to maidens, mention only three heirs,—brother, mother, father. No mention is made of the grandmother in this place, as is the case in the order of male succession. If the grandmother under these circumstances succeeds as heir, she can come in only as paternal kinsman in which capacity she succeeds as the widow of her husband. She could, therefore, only take a widow's limited estate.(2) It was next contended that the grandmother, like the

(1) 6 B. H.C.R. A.C.J. 215.

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mother or the widow, is not gotraja proper, not being born in the family. They are all allowed to come in as continuations of their husbands or sons respectively. The female gotraja heirs proper, such as daughters and sisters, take an absolute interest under the law of this Presidency. But mother and grandmother are only sagotra and not gotraja proper, and they take, as widows, a qualified interest only in inherited property. Neither of the two positions taken up by the respondents' counsel appears to be properly supported by the text writers and the decisions of this Court.

As regards the succession to maidens, no inference can be drawn to the prejudice of the grandmother by reason of her name not being specified along with the brother, mother and father in Baudhayana's text—Mitakshara, ch. II, s. 11, pl. 26—30. This is a special solitary text which has necessarily to be [212] supplemented by other texts such as those quoted in Dayakrama from Paithinasi or Narada (Daya. K. S., ch. II, 1, 2) or from the general law of stridhan ; and where this law also fails, from the still more general law of succession, Mitakshara, ch. II, 11, 19 and 25. The special rules of stridhan succession have thus to be expressly or impliedly supplemented (Viramitrodaya, 241). The special heirs are first named, and then connection is established with the husband and his heirs in the superior forms of marriage and with the mother and father in the inferior forms of marriage. Whether the grandmother comes in by special mention, or on the strength of this general connection, no difference in her status results therefrom. The essential point is if she comes in her own right as owner of stridhan property. Under the Mitakshara law, by rules of construction, she comes in first before the grandfather after the brother's son, and in the Mayukha she comes in by reason of special mention before the sister and grandfather. Sons and grandsons succeeding to the grandmother's wealth are specially referred to in Mitakshara, ch. II, s. 11, pl. 24, and the present case is the reverse when she succeeds other heirs. Bai Amrat, therefore, came in in her own right, and not as her husband's widow. This objection, therefore, fails.

As regards the other objection noted above, namely, that a grandmother is not a gotraja, but only a sagotra sapinda, it need only be observed that it is too late at this date to raise any doubts on this point. Both the Mitakshara and the Mayukha, though they have their minor differences, agree in regarding the grandmother to be the first gotraja sapinda in the compact order of heirs, and both seem to rest their preference on express text such as those of Manu and other sages. The grandmother's claim was indeed found so strong that it served to help the widows of collateral sapindas to be also recognized as gotraja sapindas— *Lallubhoy* v. *Cassibai* (1), *Lallubai* v. *Mankuvarbai* (2). The word gotraja may or may not be etymologically correct, but the right of heirship it signifies cannot be questioned. The grandmother here also comes in as heir in her own right, and not on the strength of a legal fiction of continuity.

[213] Mr. Macpherson did not raise any objection to the other positions laid down in the judgment of the referring Judges. The judgment of the Court of first instance appears to have been chiefly influenced by the distinctions made in several cases between female heirs who enter the family by marriage and those others who are born in the family—*Tuljaram* v. *Mathuradas* (3), *Rindabai* v. *Anacharya* (4) ; *Madhavram* v. *Dave Trambaklal* (5). Westropp, C. J., first suggested this kind of

(1) 7 I. A. 212=5 B. 110. (2) 2 B. 389. (3) 5 B. 662.
(4) 15 B. 206. (5) 21 B. 739.

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generalization contrasting the two sets of heirs, and frequent references have been made in more recent cases. It is, however, clear that it is not the act of marriage, but the sapinda relationship, or capacity for the same, which it creates, that confers on the one class of heirs, as birth does on the other, the status they hold in the family. The daughters and sisters and nieces not being brought under the influence of Katyana and Manu and other prohibitory texts have secured a recognition of independence and dominion which has been denied to the widowed wife, mother, the daughter-in-law, or the widow of a collateral sapinda. It is a useful generalization, as far as it goes, but it is neither precise nor suggestive if extended to all female heirs or relations. When, as in this case, the succession comes not through males, but through females, the female heirs who thus succeed can hardly be governed by analogies based on the patriarchal theory of a family held together by agnatic and dependent relationship. In the case of the succession to stridhan property the tie is quite distinct, and is based on a preference to maternal and female relations where the patriarchal analogies and preferences do not hold good. This distinction appears to have been lost sight of by the Court of first instance. The decisions restricting female rights, so far as they have gone, all relate to inheritance by widows from male heirs. In regard to female stridhan succession, the decisions have been all in favour of complete dominion. There are numerous decisions which assert the full dominion and absolute power of the daughter where she succeeds as heir to her father, and her right to dispose of by gift or will her inherited stridhan property has been affirmed repeatedly—*Pranjivandas* v. *Devkuvarbai* (1); **[214]** *Navalram* v. *Nandkishor* (2); *Bhaskar* v. *Mahadev* (3); *Kotarbasapa* v. *Chanverova* (4); *Haribhat* v. *Damodarbhat* (5); *Bulakhidas* v. *Kesavlal* (6); *Jankibai* v. *Sundra* (7); *Babaji* v. *Balaji* (8). Similar decisions have established the sisters' and nieces' right—*Vinayak* v. *Lakshmibai* (9); *Rindabai* v. *Anacharya* (10); *Tuljaram* v. *Mathuradas* (11). These analogies must regulate the general rule when it has to be applied to a female succeeding as heir to another female. The analogies of dependent widows, mothers, collateral sapindas, and daughters-in-law inheriting from male heirs should, in our opinion, be regarded in this Presidency as exceptions to the general rule of female inheritance—*Bechar Bhagvan* v. *Bai Lakshmi* (12); *Pranjivandas* v. *Devkuvarbai* (1); *Vinayak* v. *Lakshmibai* (9); *Narsappa* v. *Sakharam* (13); *Sakharam* v. *Sitabai* (14); *Bharmangavda* v. *Rudrapgavda* (15); *Madhavram* v. *Dave Trambaklal* (16); *Gadadhar* v. *Chandrabhagabai* (17). The principle of dependence which perhaps governs the extent of power may regulate the exceptions where widowed females inherit from males, but in all other cases the rule of absolute dominion must be allowed to prevail.

On these grounds we think that the grandmother, Bai Amrat, had full dominion over the property she inherited from her granddaughter, and that she had full power of disposition in this case.

PARSONS, RANADE and CROWE, JJ., concurred.

CANDY, J.—I concur in the proposed answer to the question which has been referred to the Full Bench, but as I am unable to subscribe to

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(1) 1 B. H.C.R. 130. (2) 1 B.H.C.R. 209. (3) 6 B.H.C.R. 1.
(4) 10 B.H.C.R. 403. (5) 3 B. 171. (6) 6 B. 85.
(7) 14 B 612. (8) 5 B. 660. (9) 1 B H.C R. 117 (121).
(10) 15 B. 206. (11) 5 B. 662. (12) 1 B H C.R. 56.
(13) 6 B.H.C.R. 217. (14) 3 B. 353. (15) 4 B. 187.
(16) 21 B. 739. (17) 17 B. 690.

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all the *dicta* in the judgment just read by the learned Chief Justice, I will briefly state the reasons which have led me to the conclusion arrived at by me.

[215] It is unnecessary to add much to the judgment which I wrote when the question was referred to the Full Bench. Its main propositions have not been attacked by the learned counsel for the respondent, who before the Full Bench contended that (*a*) Amrat succeeded to the property as the widow of the grandfather, and, therefore, took but a limited estate; (*b*) Amrat could not be a *gotraja* sapinda, as she was not born in the gotra. will briefly notice these contentions.

(*a*) The position taken up by the learned counsel was thus stated:—

'In the case of a grandmother inheriting from a granddaughter I submit that the grandmother takes but a limited estate. I contend for the same rule in the case of grandmother inheriting from her grandson, but I am not so sure of my ground in that case as I am in the case of a grandmother inheriting from her granddaughter. My reasons are that in chap. II of the Mitakshara, s. 11—on the separate property of a woman—is quite at the end of the chapter, and far removed from the sections dealing with the general rules of succession. The special text of Baudhayana as to a maiden's property practically makes no difference in the present case, but when we come to the general rules for succession to a woman's property (*e. g*, Mayukha, IV, 10, 28 and 30), we find that the grandmother is not named, that is, she is excluded, and so she can only come in as the widow of the grandfather,—in other words, as the widow of a gotraja sapinda,—a position closely analogous to that of a widow inheriting from her husband, and so the estate on her death reverts to the heir of the last holder.'

The answer to that contention is that the section as to woman's property is found both in the Mitakshara and in the Mayukha in an appropriate position, *i. e.*, towards the close of the sections dealing with inheritance. There is nothing unnatural in this, nor any indication that where necessary the general rules of succession may not be applied. On the contrary, the inference is that those general rules must be called in aid. It is obvious that in the case of a maiden the rules in pl. 28 and 30 of Mayukha, IV, s. 11, cannot be applied, for they depend on the form of **[216]** marriage entered into by the woman. They cannot avail in the case of a maiden. Therefore Mitra Misra after quoting Bauddhayana's text adds—"on failure of the mother and the father it goes to their nearest relations"—(Sarkar's translation of the Viramitrodaya, p. 241). And in the last section of the same chapter (idem p. 244) Mitra Misra sums up the conclusion that in the succession to woman's property only those women are entitled to inherit whose right of succession has been expressly mentioned in texts such as 'The wife and the daughters also, &c.'—but that others are certainly prohibited from taking heritage by the texts of the Sruti and of Manu. Mr. Macpherson did not quote this passage in his argument. Perhaps it had escaped his notice: perhaps he saw that it was in reality fatal to his argument that the grandmother Amrat had not taken as a named heir. For if she took *not* as a named heir, then, according to the text just quoted, she was a trespasser, and her adverse possession for more than twelve years made the property her own, and her heirs succeed to it; but if she took not as a trespasser, then it must have been as a named heir, and not simply as the widow of a gotraja sapinda, and this disposes of the learned counsel's argument.

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Further, the text "the wife and the daughters also" is the text of Yajnavalkya, which both in the Mayukha (IV, VIII, 1) and in the Mitakshara (II, 1, 2) forms the foundation of the general rules as to inheritance. There can be no doubt, therefore, that Mitra Misra was right in calling in aid the general rules, and that in this case Amrat succeeded to the property as specially named as the first of the paternal relatives, who would succeed in default of brother or parents.

(*b*) The second line of argument needs but few remarks. It will suffice among numerous authorities to allude to the remarks of Sir M. R. Westropp, C.J., in the well-known *Mankuverbai's* case (1). The fact cannot be gainsaid that the text books in Western India do—whether etymologically right or not—include the paternal grandmother among the *gotrajas*. She was by her marriage born in the *gotra* in which she inherits. How, then, does **[217]** the case stand? The learned counsel for respondent admitted that in Western India the general rule is that females inheriting take the full estate transmissible to their own heirs (*Cf.* Mayne, s. 36), an exception being the case of a widow inheriting from her husband. This exception is based on certain special texts, and is evidently founded on the idea of the widow's dependence on her husband's relatives for maintenance. The question is, does the case of a grandmother inheriting from her grandchild come within the rule or within the exception? To that my answer is obviously not within the exception, for she *does not succeed as widow*. She succeeds as grandmother, whether her husband is alive or not. It may be that the principle of dependence, which perhaps governs the extent of power, may regulate the exceptions where *widowed females* inherit, but this principle would not apply to a grandmother inheriting from a grandchild—whether male or female—for the grandmother does no inherit as a *widowed female*. She need not be a dependent widow. Neither is the mother inheriting from her son. He may have acquired some property of which he is the sole owner and on his death his mother may inherit it, though her husband is alive, and yet it has been held that the mother in such a case takes a widow's estate only. This is so; and for this reason it is necessary to review the decision in *Narsappa* v. *Sakharam* (2), which contains the ruling in question, which has been frequently referred to in subsequent cases, though it has not, I believe, formed the basis of any other decision. It may be perfectly good law in a province in which it is held that inherited property is not stridhan. But in Bombay, property inherited by a woman (whether from a male or female) is stridhan. No distinction is drawn in the Mitakshara between property inherited by a woman from a male and from a female. The language of Vijnanesvara is broad and general, and there is no foundation for the idea that he did not intend to include both sorts of property within his proposition (see remarks in *Virasangappa* v. *Rudrappa* (3)).

This is not a case in which we are asked to unsettle a rule of inheritance affirmed by a long course of decisions, and even if it were so, it is in my opinion so manifestly opposed to law and reason **[218]** that we ought not to hesitate—*Chotay Lal* v. *Chunno Lall* (4). At present we are open to the reproach that our decisions are illogical and inconsistent. Mr. Mayne says that our mistaken view of a text of the Mitakshara is "at the root of a conflicting series of decisions" (s. 565), and he naturally says (s. 567) that if the mother and grandmother when inheriting from a son or grandson take

(1) 2 B. 383 (420).
(2) 6 B. H C.R. A.C.J. 215.
(3) 19 M. 110 (118).
(4) 6 I.A. 15 (32) = 4 C. 744.

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an estate similar in all respects to that of a widow, the presumption is very strong that the passage should be interpreted in the case of other female heirs, so as to admit of a similar application.

For all these reasons I hold that when Amrat inherited her grandchild's property—whether it was (according to the old rendering of Mayukha IV, 10, 26) as if the grandchild had been a male, or whether the grandchild had been male or female—she inherited the full estate with power of disposing of it by will. This is the answer which in my opinion should be returned to the referring Bench.

Order accordingly.

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APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

VALUBAI (*Original Opponent No.* 1), *Appellant v.* GOVIND KASHINATH (*Original Petitioner*), *Respondent.**

[12th September, 1899.]

Hindu law—Adoption—Adoption of brother's son— Datta homa—*Omission of* Datta homa *ceremony*—*Adoption valid.*

Among Brahmans in the Presidency of Bombay the performance of the *datta homa* ceremony is not essential to the validity of the adoption of a brother's son.

[Cited, 27 Ind. Cas. 39 = 20 C.L.J. 319.]

APPEAL from the decision of M. P. Khareghat, District Judge of Ratnagiri.

The applicant, alleging that he was the adopted son of one Kashinath Abaji Joshi, prayed for a certificate to collect the debts due to Kashinath. The adoption was stated to have taken [219] place on the 16th August, 1896, and Kashinath died on the 3rd November, 1896. The applicant further alleged that Kashinath had left a will in his favour. The parties were Brahmans.

Kashinath's widow, Valubai (opponent No. 1), opposed the application and denied the adoption, and further alleged that even if a ceremony purporting to be an adoption had taken place it was defective and invalid, inasmuch as the *datta homa* ceremony did not form part of it. She also denied the alleged will.

The Judge granted the certificate, holding that Kashinath had made a will in applicant's favour ; that the applicant had been adopted by Kashinath ; that the adoption was not invalid by reason of the *datta homa* ceremony not having been performed ; and that the performance of that ceremony was not necessary, as the applicant was a *sagotra*, being Kashinath's brother's son.

Valubai appealed.

Narayan V. Gokhale, for the appellant (opponent No. 1).—The alleged adoption was invalid, inasmuch as the *datta homa* ceremony was not performed. That is an essential part of the ceremony of adoption among Brahmans. In Western India the Shastris have always insisted upon the performance of this ceremony. Amongst Brahmans there may

* Appeal No. 62 of 1899.

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be retraction till the *datta homa* is celebrated, but not afterwards. Without it no spiritual benefit can be obtained from adoption—West and Buhler, pp. 1082-4, 1125 6. According to Steele's Hindu Law and Customs, pp. 46 and 184, its performance marks the completion of the ceremony of adoption—Bhattacharya's Hindu Law, p. 188; Sarkar on Adoption, pp. 379-80. In *Huebut Rao* v. *Govindrao* (1) the parties were not Brahmans. The distinction drawn in that case with regard to the adoption of a nephew is not supported by the Dattaka Chandrika and the Dattaka Mimansa. A nephew's *gotra* is changed by his adoption, and, therefore, the *datta homa* is necessary. As to the meaning of the word "*gotra*" see Dattaka Mimansa, s. II, pl. 4-7; Golapchunder Sarkar on Adoption, p. 382; Dattaka Mimansa, s. V, pl. 45, 46, 55 and 56; and Dattaka Chandrika, s. II, pl. 17; Vyavastha Darapana, pp. 871-2; Sarasvati Vilasa, verse 30. Yama's text on which the Allahabad High Court has relied in *Atma Ram* v. *Madho Rao*(2), as well as Rao [220] Saheb Mandlik in his Hindu Law, p. 483, is to be found in no code now extant, and is, therefore, not binding—Mayne's Hindu Law, para. 140.

There is no decided case on the point so far as the Konkanastha Brahmans are concerned. In *Ravji* v. *Lakshmibai* (3), Farran, J., was not prepared to hold that religious ceremonies were not necessary amongst Brahmans in Western India. The cases decided by the other High Courts are not applicable to the Konkanastha Brahmans.

Religious ceremonies are strictly insisted upon amongst the Konkanastha Brahmans. We submit that inquiry should be made as the custom relating to the performance of the *Datta homa* among them—*Govindayyar* v. *Dorasami* (4).

Vasudev G. Bhandarkar, for the respondent (applicant).—The Judge has considered the evidence in the case and has come to the conclusion that the ceremony of adoption did take place. What is essential for the validity of an adoption is the giving and receiving the boy. In this Presidency the Dattaka Chandrika and the Dattaka Mimansa do not possess the authority which they do in the other Presidencies. Here they are considered to be merely supplementary authorities on the subject —West and Buhler, pp. 10, 11. The performance of *datta homa* is not essential for the validity of an adoption—*Gopal* v. *Hanmant* (5); Mandlik's Hindu Law, p. 509; Jolly on Adoption, pp. 159, 160; Strange's Hindu Law, Vol. I, pp. 95, 96. The effect of the performance of *datta homa* is to change the *gotra* of the adopted son. By the performance of the *homa* he exchanges the *gotra* of his natural father for that of his adoptive father. In the present case the *homa* was not necessary, because the adoptive father was the paternal uncle of the adopted son. The change of the *gotra* was not required—*Govindayyar* v. *Dorasami* (4). It has been held that in the case of Shudras the performance of the *datta homa* ceremony is not necessary for the validity of an adoption. This shows that the ceremony is not necessary to constitute adoption. In second appeal No. 165 of 1865, the [221] parties to which were Brahmans, this Court (Newton and Warden, JJ.) held that the performance of the *homa* ceremony was not necessary to validate the adoption.

Even if the adoption be held invalid, we would be entitled to take the property under the will. The will operates as a deed of gift in our

(1) (1821) 2 Borrodaile 83. (2) 6 A. 276. (3) 11 B. 391.
(4) 11 M. 5 (9, 10). (5) 3 B. 273 (277).

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favour—*Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (1); *Kullean Sing* v. *Kripa Sing* (2).

Narayan V. Gokhale in reply.—The will shows that the testator intended that the gift should take effect after the adoption was made. The *persona designata* is the adopted son and not the nephew—*Famindra Deb* v. *Rajeswar Das* (3); *Abbu* v. *Kuppammal* (4); *Shama Vahoo* v. *Dwarkadas* (5).

The authority of the Dattaka Chandrika and the Dattaka Mimansa cannot now be questioned in Western India: see *Waman Raghupati* v. *Krishnaji Kashiraj* (6).

JUDGMENT.

JENKINS, C. J.—The respondent in this case applied in the Court of the District Judge of Ratnagiri for a certificate to collect the debts of Kashinath Abaji Joshi. His application was based on the allegation that Kashinath had, on the 16th August, 1896, adopted him as his son and executed a testamentary document in his favour, and on the 3rd November, 1896, had died leaving property within the jurisdiction of the Court.

The application was opposed by the deceased's widow, Valubai, and by Shivram Bapuji Joshi, who maintained that the adoption did not take place, or was at any rate defective in a material particular; that the alleged testamentary disposition was not executed by the deceased, or if executed was not understood by him; and that in any case it would not operate in the applicant's favour if the adoption is not good. The District Judge has, notwithstanding these objections, granted the certificate sought, and it is from this decision the present appeal is preferred by Valubai alone.

The District Judge has found, as a fact, that on the 16th of August there was a ceremony of adoption; that there was a giving [222] and taking of the applicant in adoption; but that the *datta homa* ceremony was not performed. He has further held that the testamentary disposition (Ex. 49) was executed by the deceased, that he was at that time capable of disposing, and that he knew and understood what he was doing. There is ample oral evidence to support these conclusions, and notwithstanding the arguments urged against their correctness, such as the antecedent improbability arising out of the prior strained relations, the complete character of the previous dispositions, the failure to register, the omission of the ordinary rites, the inauspiciousness of the day and the other matters brought to our notice, we do not think we should be justified in refusing to accept the District Judge's finding of fact. The considerations urged before us must have been present to his mind, and he had the advantage, which we do not enjoy, of having heard and seen the witnesses who have deposed in this case. Agreeing, therefore, with the Judge's findings of fact, it is unnecessary that we should review the evidence, and we will confine ourselves to delaing with the points of law that have been urged before us.

It has been contended (i) that the omission of the *datta homa* ceremony is fatal, (ii) that even if that be not so generally, still it is so in this particular case, because there was an intention to perform that ceremony, and (iii) that the applicant cannot take as *persona designata*

(1) 3 I. A. 253=26 W.R. 91. (2) (1795) 1 Cal. S.D. 9. (3) 12 I.A. 72=11 C. 463.
(4) 16 M. 355. (5) 12 B. 202. (6) 14 B. 249 (259).

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under the will, Ex. 49. It has been argued before us that in the case of the three regenerate classes—and the parties here as Chitpavan Brahmans would fall within that category—the *datta homa* ceremony is an indispensable rite. On the other side it is contended that, assuming there is a rule which prescribes the performance of that rite generally, still it is founded on a reason which makes it inapplicable where, as here, the adopted son is his adoptive father's brother's son. This contention it is sought to support on the authority of a text, of cases, and writers of long standing and acknowledged repute.

The leading text on the subject is one of Yama, which has been thus translated: "The homa or the like ceremony is not (necessary) in the case (of adoption) of the daughter's or the brother's son; by the verbal gift (and acceptance) alone that is accomplished; this is declared by the Lord Yama." In Babu Golapchundra [223] Sarkar's work on Hindu Law an interesting account of this text is given from which it will be seen that though in no code now extant can this text be found, still it has made its way into works on adoption. This text was quoted as long back as 1821 by some Bombay Shastris who were consulted in connection with the case of *Huebut Rao* v. *Govindrao* (1). Though the names of the parties concerned in that suit would indicate that they were Mahrattas and not members of the three regenerate classes, still the decision went upon no such distinction, and rule there enunciated was treated as being, at any rate in this Presidency, of universal application, and it was there considered that the adoption of a nephew would be valid even without a burnt sacrifice and would be complete by word of mouth alone. That case does not stand alone, for the same doctrine has been expressed and acted on in other cases. In an unreported decision of this Court, No. 165 of 1865, decided in August, 1865, the parties concerned being of the three regenerate classes, it was held by Newton and Warden, JJ., that the ceremony of *datta homa* was not essential to the legal validity of an adoption. Then in Madras it was held by a Full Bench in the case of *Govindayyar* v. *Dorasami* (2), that even among Brahmans the *datta homa* ceremony was not necessary in the adoption of a brother's son, and the distinction arising out of identity of *gotra* enunciated in that case was further recognised in a later case of *Ranganayakamma* v. *Alwar Setti* (3). The same view is held in the North-West Provinces, where there is a Full Bench decision that in the case of Dakhni Brahmans the *datta homa* ceremony is not required to give validity to the adoption of a brother's son (*Atma Ram* v. *Madho Rao* (4)).

It was suggested before us, in argument, that there had been a similar decision in Bengal, and in support of this the case of *Kullean* v. *Kirpa* (5) was cited. That case, however, manifestly cannot be called in aid, for the adoption was in Trihut and, therefore, would be in the Kritrima form where no religious ceremonies are required. But though this cannot be properly relied [224] on, we find that the rule has not passed unrecognised in Bengal, for in the case of *Nittyanund Ghose* v. *Kishen Dyal Ghose* (6) Mr. Justice Bayley says: "In addition to this, we have the prominent fact in the present case, that the adopted son is a brother's son, a member of the same family, in regard to whom the mere giving and taking may be sufficient to give validity to the adoption."

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(1) (1821) 2 Borradile 83. (2) 11 M. 5. (3) 13 M. 214 (219).
(4) 6 A. 276. (5) (1795) 1 Cal. S.D. 9. (6) 15 W.R. 300.

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As against these cases we have been referred to the decision of Farran, J., in *Ravji* v. *Lakshmibai* (1), where at page 395 he says that he would hesitate long before holding that an adoption is valid among Brahmans, even in Western India, without the performance of the essential religious ceremonies. But to this expression of view it may be answered that the opinion, though entitled to great weight as proceeding from so eminent a Judge, was after all not a part of his decision, and that the special point with which we are now concerned was not before the Court. But, then, it is said that there is no true foundation for the principle on which these cases profess to be based, so that we will now shortly proceed to examine that principle. The case of *Huebut Rao* proceeds upon the text of Yama which we have already quoted, and if that text is to be taken as a governing rule, it places the matter beyond question. In *Atma Ram's* case, too, reliance was placed on Yama's text as applicable to Dakhni Brahmans. So that it must be conceded that, though the text cannot now be traced, it has been regarded in two Presidencies as governing this question. The Full Bench of the Madras Court in *Govindayyar's* case in coming to the conclusion that, when the adoptive father and the adopted son are of the same *gotra*, the *datta homa* ceremony is not essential, did not rely on the text of Yama, but proceeded upon the opinion of Ellis as set forth in Vol. II, Strange's Hindu Law, at p. 104. By way of answer to this, Mr. Gokhale, adopting for this purpose an argument derived from Babu Golapchunder Sarkar's Book on Adoption at p. 382, has urged that the rule founded on the absence of any change of *gotra* is due to a misconception; for *gotra* in this connection means "state of lineage" and not "connection by the same general family;" and consequently in every adoption there must [225] be a change of *gotra* and, therefore, a *datta homa* ceremony. In support of this reference is made to pl. 4-7 of the Dattaka Mimansa, s. II. Placitum 4 cites a text of Vriddha Gautama, which is translated by Mr. Sutherland as follows:—"The sons given, purchased, and the rest, who are adopted from those of his own general family, by observance of form, acquire the state of lineage (*gotraja*) to the adopter," and it is this text which is the foundation of this argument. This same text is also to be found in the Mayuka, Chap. IV, s. V, pl. 33, where it is translated by Mr. Mandlik as follows:—"The sons given, purchased, and the rest whose ceremonies have been performed in the adopter's *gotra* enter the *gotra* by the observance of the ceremony." This rendering is perhaps hardly as favourable to the argument. Be that, however, as it may, we find that the text writers as well as the cases have not in this connection ascribed to the word "*gotra*" the meaning suggested by Mr. Gokhale's argument. They, in conformity with the cases to which we have referred, propound the view that the parties may stand to each other in such a relationship as that adoption affects no change of *gotra*, and that when this is so, the *datta homa* ceremony is not necessary. Thus at p. 89 of Strange's Hindu Law, Vol. II, it is said "ceremonial adoption cannot be necessary in the case of a Sudra, since by the *datta homam* the adopted son is converted from the stock (*gotram*) of the natural, to that of his adoptive father; and Sudras have no *gotra*." Then, again, in an account at p. 219 of the same volume of the ritual of *datta homa* from the Datta-Mimansa of Savara Swami communicated by Mr. Ellis, after describing the ritual, it is stated "the above rite regards the adoption of a son from a different *gotram*;" and further on

(1) 11 B. 381.

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there is the following passage:—"It is further observed by him that the author declares this ceremony to regard only the adoption of a son from a different *gotram*;—that though not improper, it is consequently not necessary when the adopted child is taken, as in the great majority of instances it is, from the adopted father's *gotram*."

Then, again, Mr. Sutherland, the translator of the Dattaka Mimansa and Dattaka Chandrika, in his Synopsis of the Hindu Law of Adoption seems to think that a nephew affiliated by an [226] uncle may not come within the rule which prescribes the observance of religious rites. (Head Third, last paragraph.) While Mr. Steele in his book on the Law and Custom of Hindu Castes within the Dekkhan Provinces writes that it is said the *homa* ceremony is unnecessary in the adoption of a brother's son which is performed by *wakyadan* or verbal gift; and in support of this he refers to 2 Borrodaile, 85, and, on the authority of Bhalchundra Shastri, he says the same rule holds in the case of an elder brother. Later on he says: "On account of the previous enquiry, few cases can occur of the discovery subsequent to adoption that the boy has not been adopted in the prescribed order, or that his age exceeds the limit, or that he was an only son, or that the consent of the prescribed persons has not been obtained; should such a discovery be made, the adoption cannot be annulled after the above ceremonies have been performed, and they are not essential where the adoptee is of the same *gotra*. But in case of discovery that the boy, being of another *gotra*, was not adopted with those ceremonies, or that he was of another caste, the adoption is null."

These are all writers of considerable authority, and now of some antiquity, so that in face of their opinions and of the decided cases and the text of Yama, to which we have referred, it would not be right for us at this date to impose upon the adoption, in this province, of a brother's son as an essential condition of its validity the performance of the *datta homa* ceremony, even though the parties be members of one of the three regenerate classes. This is eminently a case in which the principle *stare decisis* should be applied, and if we were now to accede to the proposition for which the appellant contends, it might, for aught we know, distrub a large number of titles to property. In our opinion, therefore, we must hold that in the adoption of a brother's son the *datta homa* ceremony is not essential in this province.

This brings us to the point whether the adoption was bad in consequence of the failure to perform an intended ceremony. In support of this contention we have been referred to s. 144 of Mr. Mayne's Book and the authorities he there names. It appears to us that this is not so much a rule of law as an inference of fact, and all that it comes to is, that the omission of a rite may, [227] under certain circumstances, induce the inference of an intention that the adoption should, until the subsequent performance of that rite, remain incomplete. If, however, the omission is to be attributed to a determination to abandon that part of the adoption without any intention of performing it at some subsequent time, then there would be nothing in it to make the omission of the ceremony, if unessential, fatal to the adoption, for it evidences no intention inconsistent with a determination that the adoption should be regarded as final and complete. In our opinion, on the facts of this case, the omission does not lead to the inference that there was an intention to leave anything unfinished with a view to its completion on a later day, and we see nothing in it that would invalidate the adoption.

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Having arrived at these conclusions, from which it follows that there was a good adoption, it is unnecessary to consider whether the respondent could have claimed under Ex. 49 as *persona designata*, for he clearly takes, if, as we hold, the adoption was good. The result is that the appeal must be dismissed and the decree of the lower Court affirmed with costs.

Decree confirmed.

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24 B. 227 = 1 Bom. L.R. 786.

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Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

DOSHI TALAKSHI (*Original Plaintiff*), *Appellant v.* SHAH UJAMSI VELSI (*Original Defendants*), *Respondents.**

[18th September, 1899.]

Wager—Wagering contracts—Satta *transactions—Suit to recover brokerage in respect of* satta *transactions—Bombay Act III of* 1865—*Contract Act* (*IX of* 1872), *s.* 30.

Plaintiff was employed by defendants to enter into cotton transactions on their behalf at Dholera. The contracts for the sale and purchase of cotton were made on terms contained in a printed form which incorporated the rules framed by the cotton merchants of Dholera. These rules expressly provided for the delivery of cotton in every case and forbade all gambling in differences. In spite of these rules, and the express terms of the contracts, the course of dealings was such that none of the contracts were ever completed except by payment of [228] differences between the contract price and the market price in Bombay on the *Vaida* day. The plaintiff entered into numerous transactions of this kind on the defendants' behalf. He now sued to recover from them the balance due to him on account of brokerage, commission and losses incurred in the said transactions.

Held, that the transactions were a mere gambling for differences, and no suit would lie, under Bombay Act III of 1865, to recover any of the items connected with such transactions.

In order to determine whether a contract is a wagering contract, the Court will not only look at the terms of the written contract, but also probe among the surrounding circumstances to find out the true intentions of the parties.

Universal Stock Exchange, Limited v. *Strachan* (1) and *In re Gieve* (2), followed.

[R., 30 B. 83 (89 and 99) = 7 Bom.L.R. 385 ; 9 Bom.L.R 125 (136); 15 C.P.L.R. 58 (61) ; D., 14 M.L.J. 326 (328) ; 46 P.R. 1901 = 95 P.L.R. 1901.]

CROSS-APPEALS from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad.

The plaintiff Doshi Talakshi Zaverbhai sued to recover Rs. 1,655 from the defendants Ujamsi and his brother Chotalal. He alleged that Ujamsi and Chotalal were owners of a firm at Dholera, carried on in the name of Ujamsi Velsi ; that on behalf of this firm he had entered into large cotton transactions at Dholera as commission agent ; that there was a balance of Rs. 1,655 due to him on account of brokerage, commission and losses incurred in these cotton transactions.

Defendant No. 1, Ujamsi, pleaded (*inter alia*) that the cotton transactions in question were all *satta* dealings, or wagering contracts ; that it

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* Cross-appeals Nos. 77 and 78 of 1899.

(1) (1896) Ap. Ca. 166.

(2) (1899) 1 Q.B. 794.

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was never intended to perform any of the contracts by actual delivery of cotton, but that merely the differences in price were to be paid or received on the *Vaida* day ; and that no brokerage or commission could be claimed in respect of such transactions.

Defendant No. 2, Chotalal, pleaded that he was not a partner in the firm of Ujamsi Velsi, and had no concern with the said transactions. He, therefore, denied his liability to satisfy the whole or any part of the plaintiff's claim.

The Subordinate Judge held that Chotalal (defendant No. 2) was not a partner in the firm of Ujamsi Velsi ; that the cotton transactions entered into by the plaintiff on behalf of the **[229]** defendants' firm were speculative, but not wagering ; and that he was entitled to recover from defendant No. 1 alone the amount claimed. He passed a decree for the plaintiff.

The parties preferred cross-appeals to the District Court. These appeals were afterwards transferred to the High Court.

Ganpat S. Rao, for plaintiff-appellant.

Bhaishankar, for defendant-respondent.

The following authorities were cited in argument :—*Universal Stock Exchange, Limited* v. *Strachan* (1); *In re Gieve* (2); *Tod* v. *Lakhmidas* (3) ; *Perosha Cursetji* v. *Manekji Dossabhoy* (4).

JUDGMENT.

JENKINS, C.J.—The plaintiff has brought this suit to recover Rs. 1,655 as the amount due to him on a balance of account, and in the Court of the First Class Subordinate Judge of Ahmedabad he obtained a decree for Rs. 1,359-8-0 against the first defendant alone. From this decree both the plaintiff and the defendant No. 1 have appealed, and both appeals have come on for hearing together.

On the plaintiff's part it is contended that the lower Court should have awarded him the full sum he claimed, and that it should have passed a decree for that amount against Chotalal, the second defendant, as well as against Ujamsi, the first defendant. Ujamsi, the first defendant, on the other hand, has contended that the plaintiff's decree should have been for less than it was, as the Rs. 1,359-8-0 awarded was in part made up of sums attributable to, or connected with, wagering contracts. It will be more convenient to dispose of this last point first.

Wagers are not favoured by the law, and agreements by way of wager are void—The Contract Act, s. 30. In this Presidency the law on wagering agreements is carried still further, for by the Bombay Act III of 1865 contracts collateral to wagers cannot support a suit. Wagering transactions may assume a variety of forms, and a type with which the Courts have constantly dealt is that which provides for the payment of differences. That such a transaction comes within the mischief of those provisions, which are directed against wagers, is beyond doubt, and **[230]** it is said that some at least of the transactions on which the plaintiff's claim is based fall within that category.

To decide whether or no these transactions were by way of wager, it will be necessary to give a short narrative of the more salient facts, premising this by way of explanation that at present I will speak of the defendant Ujamsi alone and to the exclusion of Chotalal, reserving for consideration later on the relationship between the two.

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(1) (1896) A.C. 166.
(2) (1899) 1 Q.B. 794.
(3) 16 B. 441.
(4) 22 B. 899.

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Ujamsi resided at the date of the dealings in hand at Limri, but he also carried on business at Dholera, where the plaintiff lived and worked. At Dholera, dealings in Broach cotton are a favourite commercial pursuit, and have been so far some time past. The merchants of the place seem to have been so much interested in this class of business that they framed and passed a set of rules which provide with an unqualified emphasis that cotton must be delivered. All gamblers in differences are excluded: they are to find no place among the cotton dealers of Dholera. Then it seems that there is in common use a printed form which incorporates the rules of Dholera, and it is by the necessary adaptation of this form that all the contracts with which we are now concerned were made. Talakshi made these contracts on Ujamsi's behalf. Now, if only we could stop at this convenient spot—look only to the contracts and the rules, all would be well, for they repel the idea of anything that savours of a wager. Unfortunately, however, that cannot be, for the law says that we must find, as best we can, the true intentions of the parties; we must not take them at their written word, but we must probe among the surrounding circumstances to find out what they really meant. This I take to be the result of the decision of the House of Lords in the case of *Universal Stock Exchange, Limited* v. *Strachan* (1), which has since been followed in the more recent case of *In re Gieve* (2). We are not, and we must not, be bound by the mere formal rectitude of the documents, if in fact there lurks behind them the common intention to wager, and parties cannot be allowed to obtain from the Courts any sanction for their wagers merely because they use a form which is not a true expression of their common purpose and intentions. But **[231]** then it has been argued that we are bound by two earlier decisions of this Court—*Tod* v. *Lakhmidas* (3) and *Perosha Curseiji* v. *Manekji Dossabhoy* (4). I have carefully examined those cases, but without finding in them any proposition of law which does not agree with the principles I have attributed to the two English cases. It is true that in those cases it was held that the contracts or transactions under consideration were not by way of wager, but that in no way touches the present case. The conclusions at which the learned Judges there arrived, turned on their findings of fact that the intention to gamble was not established by the evidence. But the findings of fact in one case furnish no authority or even guidance as to what the findings of fact should be in another where the evidence is not the same. Both cases recognise, as indeed they were bound, the soundness of the proposition that the paper expressions of the parties were not a conclusive clue to their real intentions.

I now, therefore, pass to consider the question what in this case was the intention of the parties concerned, a matter manifestly to be determined solely on the evidence in this case. The surrounding facts are so suggestive that Mr. Rao was constrained to urge us not to look at them: he would have it that they were not fitting objects for our gaze; that we have only to regard the intention with which the contracts were made, not the mode in which they may have been performed. It is quite true that we are only concerned with the intentions of the contracting parties, but there arises the important question, how are we to learn what those intentions were except from those surrounding circumstances? They and the position of the parties and the history of dealings of this class are legitimate, though not exclusive, matters for our investigation into the

(1) (1896) A. C. 166.
(2) (1899) 1 Q. B. 794.
(3) 16 B. 441.
(4) 22 B. 899.

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true intention of the parties. The subject of these dealings is Broach cotton, a commodity which apparently never finds its way either by production or delivery to Dholera. The account or difference is settled according to the rate at Bombay on the 25th of March, and it is in Bombay that delivery is to be made. Here in each case the contract was made at Dholera, between men of Dholera, and under the rules of Dholera, and from the evidence we know that the witnesses who have been [232] called have not been able to indicate with certainty or even to suggest, with one doubtful exception, a single instance since the formulation of those rules in 1892 in which any one of numerous contracts similar to that with which we are now dealing has been completed otherwise than by payment of differences. Is it an unnatural or strained inference to draw from these facts that behind these apparently innocent documents there is a tacit and recognised understanding according to which parties who enter into these contracts do so without any intention of performing them otherwise than they have consistently and without exception been performed,—that is to say, by payment of differences? In my opinion that is the reasonable and natural inference to be drawn; it agrees with the experience of the past; and it represents the actual results in the particular instances we are now considering. Much has been made of a man said to be employed in Bombay and authorized to take delivery here of cotton under the contracts. I, however, attach little, if any, importance to this sinecurist: his existence and appointment are but a part of the scheme, and he, like the documents, is but an item of the scheme by which it is sought to give to the dealings an appearance that is no part of their true and real nature: it is all a mere blind.

The conclusion, then, to which I come is that the dealings in cotton out of which a great part of the plaintiff's claim arises were by way of wager. If this be so, then in this Presidency no suit by the plaintiff, though he may have only been an agent, can be allowed, for this is the result of the far reaching terms of the Bombay Act III of 1865. Therefore the plaintiff cannot recover the sums connected with these contracts and this would exclude the items of Rs. 8-4, 15-13, 42-3 and 6-2-9 disallowed on other grounds by the learned Judge. The claim for Rs. 223-1-3 for interest must also be disallowed, as I agree with the lower Court that the plaintiff has failed to establish his claim to it. This will leave, as the sum recoverable, Rs. 816-2-9, and he will further be entitled to interest on that sum from the commencement of this suit.

It only remains to be considered whether Chotalal should not be made liable for these amounts as well as Ujamsi. The facts relevant to this issue may be shortly stated thus. It is conceded [233] that the two were jointly interested in the business from 1869 up to January, 1895, but from then it is contended that the business belonged to Ujamsi alone. Now the law provides, in the clearest terms, that when the question is whether persons are partners, and it has been shown that they have been acting as such, the burden of proving that they have ceased to stand to each other in that relationship is on the person who affirms it. Therefore the burden of proof in this case clearly lies on Chotalal; and how does he seek to discharge it? He relies on the fact that the business ceased to be carried on in his name as had been the case, and was thenceforward conducted in Ujamsi's name. He does not himself venture into the witness box to support his case; it is not suggested that any notice of dissolution or severance was published or circulated among the customers; the shop was carried on in the same place; the stock remained the same.

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Chotalal does not produce the partition deed on which he has in other cases relied, and until after the evidence was closed not a single book of account was forthcoming. Then it was that one of the Limri books was produced, and we find in that book an entry of April, 1895, strongly indicative of a continuance to that date of the joint liability of the brothers. Much has been made of the fact that in the plaintiff's books the account stood in Ujamsi's name, but then admittedly some of the transactions recorded in that account were at a time when the brothers were jointly interested and before even the date of the suggested separation. In addition to this, the plaintiff has sought to utilise certain decrees, which form part of the record, but which the lower Court refused to consider on this point. The question of their admissibility has been argued before us with considerable earnestness, but I do not think it necessary to express any opinion on this point. To my mind Chotalal has wholly failed to discharge the burden cast on him; indeed I think it no exaggeration to say that apart even from the decrees the evidence the other way is overwhelming, and I feel no doubt that the plaintiff is right in his contention that Chotalal as well as his brother must be made liable.

The decree of the lower Court must, therefore, be varied, and we now direct that there should be a decree against both Ujamsi [234] and Chotalal for Rs. 816-2-9 with interest at 6 per cent. per annum from the institution of the suit. Plaintiff to get half his costs in the Court below from both defendants and half the costs of appeal No. 77 from defendant Chotalal. No costs in appeal No. 78.

CANDY, J.—In these cross-appeals a point of very wide importance arises. Talakshi, the plaintiff and agent of his principal, Ujamsi, sued to recover from Ujamsi the balance of an account current between them. The principal items in that account were on the debit side a sum of Rs. 6,767-6-5, due on certain cotton transactions entered into by the agent at Dholera on behalf of his principal at Limri, and on the credit side a sum of Rs. 6,200, which we find as a fact were caused to be paid by the principal (Ujamsi)—not, as he says, as a loan to his agent Talakshi, but as a part settlement of the balance due on the cotton transactions. The question for our consideration is whether these cotton transactions should not be excluded from the account under Bombay Act III of 1865, on the ground that they were wagering contracts.

The First Class Subordinate Judge, on the authority of *Tod* v. *Lakhmidas* (1), held that as there was no evidence to show the intention of the parties when the contracts were entered into, the transactions though speculative must be taken to be not wagering. Since the above decision was given, two important cases in England on the point have been reported. In *Universal Stock Exchange* v. *Strachan* (2) in the House of Lords in 1896, Lord Halsbury, L.C., and Lord Herschell delivered important judgments dealing with these wagering contracts, *viz.*, contracts to pay differences: and in March, 1899, the subject was again considered by the Court of appeal in *In re Gieve* (3). In the former case it was pointed out that "the whole transaction has to be looked to and the whole nature of the institution whatever it is." On the evidence in that case it appeared that it was a concern expressly designed for the purpose of enabling people to gamble in such a way as to evade the provisions of the law. There were certain "terms of business" which the

(1) 16 B. 441. (2) (1896) A.C. 166. (3) (1899) 1 Q.B. 794.

customers were called on [235] to sign, and which were to constitute the contractual relations between the parties. Lord Halsbury thought that the whole scheme appeared to be intended with great ingenuity to pretend that there is to be a real transaction, and Lord Herschell said (p. 173): "The proposition amounts to this, that parties who intended to gamble with one another, but wanted to have the security against one another of being able in a Court of Justice to recover their bets, could compel a Court of Justice to adjudicate and secure to them their bets by a judgment, if only they inserted in their contract a provision which might in certain events become operative to compel the goods to be delivered and received, although neither of them anticipated such a contingency; the purpose of inserting the provision creating an obligation being only to cloak the fact that it was a gambling transaction and enable them to sue one another for gambling debts. The proposition contended for by the learned counsel for the appellants would really lead to that result, and I should require much consideration before I gave my assent to a proposition involving such consequences." The above remarks are very applicable to the present case, in which the cotton merchants of Dholera arranged "terms of business" for dealing in Broach ginned cotton (Ex. 70) with the obvious intention of evading the law. I say obvious, because it must be taken as a fact that the course of such business is for no delivery to be ever given or taken, differences merely being paid. As Lord Herschell said in the above quoted case, the documents themselves, coupled with the nature of the transactions entered into, the position of the parties who entered into them, raised a question for the jury whether these were real transactions of commerce, or whether they were a mere gambling for differences. These are first appeals, in which we are judges of fact, and I have no doubt that as a fact all the parties concerned in these transactions were simply gambling for differences.

The recent case of *In re Gieve* (1) is equally strong. In that case the Judge of the Court of first instance, like the Subordinate Judge in the present case, held that though there was the gravest suspicion that the transactions between the parties were purely gambling transactions, there was not sufficient evidence [236] that the parties had laid their heads together to conceal a bargain for differences only under cover of a bargain which, though no doubt *prima facie* resulting in differences only, was yet to some extent a real bargain. This decision was reversed by the Court of appeal; and though of course a decision on facts in one case cannot be conclusive for a decision on facts in another case, we may avail ourselves of the remarks of the Judges in the former case as showing what facts they regarded as salient, and in what way those facts bore on the conclusion at which the Judges arrived. Rigby, L.J., said (p. 801): "The real question is, what is the true construction of this contract note? The very condition that it is to be optional for the purchaser to take up the stock shows that he is not bound to do so. He may do so if he chooses, by paying an extra sum, but not otherwise. This, therefore, is a contract for the payment of differences, and for nothing else. No doubt these conditions are put in to make it appear that they are intended to protect the selling broker, but I am glad to say they are not sufficient to blind this Court to the real nature of the transaction, which was that there was no intention whatever to deliver or accept stock: the conditions are not intended to be acted upon at all." And Vaughan Williams, L. J., said (p. 802): "I am rather

(1) (1899) 1 Q. B. 794.

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24 B. 227 = 1 Bom. L.R. 786.

inclined to the view that the contract is one which entitled Moss to insist on the delivery or the acceptance of stock. Therefore I base my judgment on the same grounds as those upon which the opinions of the learned Lords were based in *Universal Stock Exchange* v. *Strachan*—that is to say, assuming that this contract is a contract which, on the face of it, would enable one or both of the parties to insist on delivery or acceptance, the mere fact that the contract contained such a term would not prevent the Court from asking the question whether the transactions between the parties were really based on the contract if that was the true meaning of it, or—to use the words of Cave, J., in his summing-up to the jury in *Universal Stock Exchange* v. *Strachan*—'notwithstanding those ostensible terms of business was there a secret understanding that the stock should never be called for or delivered, and that differences only should be dealt with? If there was that secret understanding, then the plaintiff is entitled to recover his securities. If there was not that secret understanding, then he is not entitled to recover them.'"

[237] Having regard to the principles so clearly enunciated in the above cases, I have no doubt that all the cotton transactions in the present case were a mere gambling for differences, and that all the items in the account connected with those transactions must be excluded. This disposes of items (1), Rs. 24-1-0, (2), Rs. 42-3-0, (3), Rs. 6-2-9, which Mr. Rao for plaintiff-appellant, Talakshi, urged us to allow. Item (4), Rs. 223-1-3, is an item of interest said to be due on the other items in the account (not cotton transactions), the principal ones being the items of Rs. 500 and Rs. 600. But we agree with the learned Subordinate Judge that no custom to charge interest on such current accounts has been proved.

The only other point in Talakshi's appeal is whether the decree should have been against Ujamsi alone or against Ujamsi and his brother Chotalal. I have no doubt, on the facts found, that the decree should have been against both brothers. Both had been partners in the firm. Exhibit 67 is a letter from the firm at Limri to Talakshi about one of the transactions between the firm and their agent. It is dated Kartik 1951 (November, 1894). The new firm is not said to have been opened till Posh 1961 (January, 1895). It is not pretended that any intimation was given to Talakshi of the dissolution of the old firm and of the starting of the new firm. Chotalal did not venture to go into the witness box and give evidence. The burden of proof clearly rested on him: and in my opinion he failed to discharge that burden.

I would vary the decree of the lower Court by awarding to plaintiff from defendants Nos. 1 and 2 Rs. 816-2-9 with 6 per cent. interest from date of suit till payment. Plaintiff to get half his costs in the Court below from both defendants; and half the costs of appeal No. 77 from defendant Chotalal. No costs in appeal No. 78.

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[238] APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Ranade.

SAYAD SAIFULLA (*Original Defendant*), *Applicant v.* SAYAD HAJI MIYA, A MINOR (*Original Plaintiff*), *Opponent.** [19th September, 1899.]

Minor—Mamlatdars' Act (Bom. Act III of 1876), ss. 3, 5, 6, 7 and 9—Mamlatdar's Court—Possessory suit by a minor plaintiff represented by his guardian—Plaint signed and verified by the pleader of the guardian—Right of the minor to sue.

A minor may sue or be sued in a Mamlatdar's Court he being represented by a properly appointed guardian.

A guardian mother having on behalf of her minor son brought a possessory suit in a Mamlatdar's Court.

Held, that the pleader appointed by her could sign and verify the plaint.

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb Bulakhi B., Mamlatdar of Chorasi in the Surat District.

The plaintiff, a minor represented by his mother and guardian, brought a summary suit in the Mamlatdar's Court to recover possession of certain property from the defendant. The Mamlatdar awarded the claim. The defendant applied to the High Court in its extraordinary jurisdiction to set aside the order of the Mamlatdar and obtained a rule *nisi*. It was contended (*a*) that the plaint in the Mamlatdar's Court was not properly signed and verified, that having been done only by the pleader of the minor's guardian; (*b*) that a minor could not bring a suit in a Mamlatdar's Court.

Ratanji R. Desai, for the applicant (defendant) in support of the rule.

Gokuldas K. Parekh, for the opponent (plaintiff) *contra*.

JUDGMENT.

JENKINS, C. J.—In this case the minor plaintiff by his guardian mother brought a possessory suit in the Mamlatdar's Court against the defendant and obtained a decree. The defendant made the present application in the extraodinary jurisdiction to this Court chiefly on the ground that the plaint in the [239] Mamlatdar's Court was not properly signed and verified, as it was signed and verified by the pleader of the minor plaintiff's natural guardian. It was further urged that the minor plaintiff could not bring a suit in the Mamlatdar's Court. The rule granted to the applicant was expressly confined to these points of law.

We feel satisfied that the applicant's objection on both points must be overruled. The applicant's argument was that, under s. 5 of the Mamlatdars' Act, a plaint must be presented in open Court by the plaintiff, and the plaintiff must subscribe and verify the same (s. 6). If the plaintiff cannot write, the subscription and verification may be written for him in open Court at his request and in his presence (s. 7). If the plaintiff declines to verify or subscribe, the plaint must be dismissed (s. 9). It was contended that a minor plaintiff cannot discharge these duties, and, therefore, cannot maintain the suit. It has, however, been held in *Dattatraya* v. *Vaman* (1) that a minor can sue by his guardian. A minor

* Application No. 150 of 1899 under extraordinary jurisdiction.

(1) 21 B. 88.

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may also be sued, care being taken that he is represented by a properly appointed guardian.

As regards the objection about a pleader's power to sign and verify the plaint, s. 3 of the Act expressly lays down that the words "plaintiff" and "defendant" include a duly appointed pleader. The guardian mother could thus, as plaintiff, bring the suit, and the pleader appointed by her could sign and verify the plaint. To hold otherwise would involve the inconvenience of shutting out minors and females from resorting to the Mamlatdars' Courts, which could not well be presumed to have been the intention of the law. The rule is, therefore, discharged with costs.

Rule discharged.

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[240] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade, and on reference before Mr. Justice Candy.

NAYAK PURSHOTUM GHELJI (*Original Plaintiff*), *Appellant v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Original Defendant*), *Respondent.** [27th September, 1899.]

Land Revenue Code (Bom. Act V of 1879), ss. 65 and 66—Fine leviable for appropriation of land to a non-agricultural purpose—Collector's omission to acknowledge receipt of application not a good defence to the imposition of fine—Construction.

Per PARSONS and CANDY, JJ.—Under ss. 65 and 66 of the Bombay Land Revenue Code (Bom. Act V of 1879), where a person appropriates lands to a non-agricultural purpose he must, in order to escape liability to the fine imposed by s. 66, be able to show either (*a*) that he first obtained the permission of the Collector, or (*b*) that he waited for three months from the date of the Collector's acknowledgment of his application for permission so to appropriate it. But the three months' time does not begin to run until such acknowledgment has been received, so that where a person is charged with thus appropriating his land, it is no defence to plead that the Collector, though he received the application, neglected to furnish the applicant with a written acknowledgment of the receipt of the application.

Per RANADE, J.—Where the Collector has received the application and omitted to send an acknowledgement, the occupant need only wait for three months from the time of his sending in the application. After the expiration of this time, if the occupant appropriates his land to a non-agricultural purpose, the Collector cannot levy the fine provided by s. 66.

SECOND appeal from the decision of T. D. Fry, District Judge of Ahmedabad.

Plaintiff was the registered occupant of certain land (Survey No. 465) in the village of Asarva near Ahmedabad.

In 1887-88 he applied to the Collector, under s. 65 (1) of the Bombay Land Revenue Code (Bom. Act V of 1879), for permission to dig pits in his land for the purpose of making bricks.

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* Second Appeal No. 464 of 1898.

(1) Sections 65 and 66 of Bombay Act V of 1879 :—

"65. An occupant of land appropriated for agriculture is entitled.....to erect farm buildings...or make any other improvements thereon for the better cultivation of the land.....But if any occupant wishes to appropriate his holding or any part thereof to any other purpose, the Collector's permission shall in the first place be applied for by the registered occupant. The Collector on receipt of such application

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[241] The Collector neither acknowledged the receipt of the application nor sent any reply.

After the expiration of more than three months from the date of his application, the plaintiff dug pits in his land and used it for brick-making.

Thereupon the Collector levied a fine upon him of Rs. 500, under s. 66 of Bombay Act V of 1879, for using the land for a non-agricultural purpose without his permission.

Plaintiff paid the fine under protest on 1st June, 1893.

In 1894 plaintiff filed the present suit against the Secretary of State for India in Council claiming to recover the amount of the fine, alleging that the same had been unjustly and iliegally levied by the Collector.

The Assistant Judge dismissed the suit, holding that as the land had been appropriated to a non-agricultural purpose without the Collector's permission, the fine had been legally levied under s. 66 of Bombay Act V of 1879.

On appeal this decree was confirmed by the District Judge, whose reasons were as follows :—

"It is urged that as the application made in 1887-88 was left without a reply, no fine is leviable. This plea, however, is unsustainable. It is true that as the appellant received no reply to his application, he was at liberty, under s. 65 **[242]** of the Land Revenue Code, to deem that permission had been granted. He was, therefore, freed from the enhanced fine which would have been leviable under s. 66 had he excavated without permission. He is still, however, liable to pay the fine which is leviable under s. 65 even when permission is granted.

"I thus find that there was nothing illegal in the levy of the fine, and that the plaintiff can obtain no relief in this Court."

Against this decision plaintiff preferred a second appeal to the High Court.

C. H. Setalvad (with *Manibhai Nanabhai*), for appellant.

Rao Bahadur *V. J. Kirtikar*, Government Pleader, for respondent No. 1.

L. A. Shah, for respondent No. 2.

The case came on for hearing before a Division Bench (Parsons and Ranade, JJ.), who passed the following interlocutory judgment :—

The appellant (original plaintiff) brought this suit to recover a fine levied from him by the Collector for the appropriation of his land for other than agricultural purposes. The order of the Collector is not on the record, but the fine was evidently imposed under s. 66 of the Bombay

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[241] shall at once furnish the applicant with a written acknowledgment of its receipt, and after inquiry may grant or refuse the same ; but, if the applicant receives no answer within three months from the date of the said acknowledgment, the Collector's permission may be deemed to have been granted.....

When any such land is thus appropriated to any purpose unconnected with agriculture, it shall be lawful for the Collector, subject to the general orders of Government, to require the payment of a fine in addition to any new assessment which may be leviable under the provisions of s. 48.

"66. If any such land be so appropriated without the permission of the Collector being first obtained, or before the expiry of three months from the date of the aforesaid acknowledgment, the occupant and any tenant or other person holding under or through him, shall be liable to be summarily evicted by the Collector from the land so appropriated, and from the entire field or survey number of which it may form a part, and the registered occupant shall also be liable to pay, in addition to the new assessment which may be leviable under the provisions of s. 48 for the period during which the said land has been so appropriated, such fine as the Collector may, subject to the general orders of Government, direct.

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Land Revenue Code, since that was the only section relied on by the Collector in his written statement as justifying his action. The fifth issue in the first Court raised this point,—*viz.*, whether the plaintiff appropriated the land to a non-agricultural purpose and whether he obtained permission to do so,—but, curiously enough, no finding was recorded thereon.

On appeal the District Judge raised the very insufficient issue "whether the plaintiff subsequently to the revenue year 1886-87 excavated land in his field and thus appropriated it to non-agricultural purposes." He decided it in the affirmative. There was never any dispute about it. In his judgment, however, he says that the plaintiff applied for permission, and, as he received no reply to his application, he was at liberty, under s. 65 of the Land Revenue Code, to deem that permission had been granted. He was, therefore, "freed from the enhanced fine which would have been leviable under s. 66 had he excavated without **[243]** permission. He is still, however, liable to pay the fine which is leviable under s. 65 even when permission is granted."

The Judge thus made an entirely new case for the defence and one which is not based upon any evidence on the record to which we have been referred. Had there been evidence to support the finding that the Collector's action was not justified by s. 65, we should have been obliged to decide in the plaintiff's favour. As it is, we must have a fresh enquiry confined to the points properly at issue in this suit. We cannot allow the introduction of s. 65 into the case, for the fine was not imposed under that section, and it is impossible for any Court to say what fine, or if indeed any fine at all, would have been imposed by the Collector had he known that the plaintiff had obtained permission to use his land in the way he did. Under the rules of Government the imposition of a fine seems to be optional, but the fine imposable under s. 66 is five times as much as that imposable under s. 65.

We frame these issues:—

1. Did the plaintiff apply to the Collector for permission, under s. 65 of the Land Revenue Code, to use his land for a non-agricultural purpose, and was he furnished with a written acknowledgment of its receipt?

2 Did he receive no answer within three months from the date of such acknowledgment?

3. Did he use his land before or after the expiration of three months from such date?

The parties are at liberty to adduce evidence, and the findings and evidence should be certified to this Court within two months.

On the first issue the Joint Judge found that the plaintiff had applied to the Collector for permission, under s. 65 of the Land Revenue Code, to use his land for a non-agricultural purpose, but that he had not been furnished with a written acknowledgment of receipt.

The Joint Judge recorded no findings on the second and third issues.

[244] After the return of the above finding, the case came on for final hearing before Parsons and Ranade, JJ.

C. H. Setalvad (with him *Manubhai Nanabhai*), for appellant.

R. V. Desai, for Government Pleader, for respondent No. 1.

JUDGMENT.

PARSONS, J.—The Joint Judge has found "on the first issue that the plaintiff applied to the Collector for permission under s. 65, Land Revenue Code, to use his land for a non-agricultural purpose, but that he was not furnished with a written acknowledgment of receipt." No findings are

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recorded on the second and third issues. It was argued for the appellant that the default of the Collector to obey the provisions of the law and send an acknowledgment ought not to prejudice the appellant, and that, he having waited three months from the date of his application, was entitled to appropriate his land. On the other hand it was contended that the appellant was bound to wait until he got an acknowledgment and three months' time from that date before he appropriated his land, and that, not having done so, he was properly fined under s. 66 of the Land Revenue Code. In my opinion the contention is good.

The law as contained in s. 66 has expressly made the appropriation of land conditional on the permission of the Collector being first obtained or on the expiry of three months from the date of acknowledgment of receipt of the application for permission to appropriate. The appellant's counsel cited the case of *Thompson* v. *Harvey* (1), in which it was said that "it is a rule of construction that matters shall not be deemed to be conditions precedent unless they are declared to be so. That is a sound rule to apply to statutes, and unless the Legislature has in plain words said that a certain thing shall be a condition precedent, we must not so construe it" (p. 262). That is the converse of the present case, for here the Legislature has said plainly that there shall be a condition precedent, *viz.*, the expiry of three months' time from the date of the acknowledgment. This acknowledgment the appellant never obtained, and time, therefore, never began to run. I think that it is not within the power of a Civil Court to substitute any other time for the time provided by [245] statute however equitable such a substitution may appear to be, and that it is no defence against the subsequent action of the Collector to say that the application was made, but that the Collector wrongfully omitted to furnish a written acknowledgment of its receipt. The appellant might have sent in another application, or he might have availed himself of his remedy by way of petition, or appeal to higher authority against that omission, but in my opinion he had no right to take the law in his own hand and appropriate his land before the time allowed by the law had expired. I see, therefore, no necessity for any findings to be recorded on the other issues, and I would confirm the decree. At the same time, considering the facts of the case, I would order each party to bear his own costs.

RANADE, J.—There has apparently been some confusion on the part of the lower appellate Court in determining the chief point or points really at issue in this case. The original suit was brought to recover a fine levied by the Collector of Ahmedabad under s. 66 of the Land Revenue Code, which the appellant-plaintiff claimed was unjustly levied from him. The fine was levied on the ground that the appellant had appropriated his land for non-agricultural purposes without obtaining the permission of the Collector. The appellant's case as set forth in the plaint was that the use made by him of the land, in the way of digging pits for making bricks, did not spoil the land, but improved the same. The Assistant Judge held that the question of improvement or injury was immaterial, but that the fine was properly levied, as it was proved that the land was appropriated to non-agricultural purposes without first obtaining the Collector's permission.

The District Judge on appeal held that the appellant had applied for permission under s. 65 of the Land Revenue Code, and as no reply was

(1) (1859) 4 H. and N. 254.

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received from the Collector, the appellant was freed from the enhanced fine leviable under s. 66. The District Judge, however, thought that a fine was still leviable under s. 65, and on this latter ground he confirmed the decree of the Assistant Judge.

In second appeal we held that as the fine was actually levied under s. 66, it was not open to the lower appellate Court [246] to make out a new case that the fine was leviable under s. 65. We accordingly sent down three issues for determination by the lower Court of appeal, *viz.*:—

(1) Did the plaintiff apply to the Collector for permission, under s. 65 of the Land Revenue Code, to use his land for a non-agricultural purpose, and was he furnished with a written acknowledgment of its receipt ?

(2) Did he receive no answer within three months from the date of such acknowledgment ?

(3) Did he use his land before or after the expiration of three months from such date ?

The District Judge on remand held on the first issue that the plaintiff did apply to the Collector for permission under s. 65 to use his land for a non-agricultural purpose, but that he was not furnished with a written acknowledgment of its receipt. The District Judge recorded no findings on the second and third points.

The Government Pleader filed objections, the chief among them being that no petition under s. 65 was made, as held by the lower appellate Court, and secondly, that the District Judge ought to have recorded findings on the second and third issues sent down.

The first of these contentions relates to a matter of fact, and the District Judge has recorded his view definitely in appellant's favour in the first inquiry, as also in the remand inquiry. Witness Balgovind, examined after remand. Ex. 12, distinctly stated that there was such a petition made for permission to dig in the year 1887-88, as shown by the Barnishi, Ex. 65. This objection of the Government Pleader must accordingly be overruled.

His other objection, however, appears to me to be well founded. If the appellant-plaintiff had applied for permission under s. 65, the Collector was bound to send him an acknowledgment under the provisions of the section, and he was also bound, within three months from the date of the acknowledgment, to send a reply either granting the request, or refusing the same. [247] The section further provides that, if no such reply is sent, the Collector's permission may be deemed to have been granted. In his first judgment the District Judge apparently assumed, from the fact that an application had been made, and no reply was received thereto, that the applicant was freed from all liability to the enhanced fine under s. 66, though he might be liable to the smaller fine leviable under s. 65. This last liability we have not now to consider. The liability under s. 66, however, attaches (1) when there has been no application, (2) when though application is made, the occupant enters upon the use of the land before the three months' term fixed for a reply has expired. It was with reference to this latter alternative that we framed the second and third issues in the order of remand. The necessity of an inquiry on the second issue cannot be dispensed with merely because no acknowledgment was sent by the Collector. The third issue, moreover, had also to be decided anyhow, for appellant would render

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himself liable to the fine under s. 66 if he appropriated the land before the three months' term was over. His application under s. 65 would not protect the occupant from this liability. It was on this account that the respondent's pleader obviously laid so much stress on the contention that the District Judge should have recorded his findings on the remaining issues. The extent of the liability turned entirely upon the question whether the appropriation was made before or after three months from the date of the acknowledgment of the application. If it was made after three months without reply, s. 65 would protect the occupant. If it was used before the three months' term, s. 66 would be applicable, and the fine would be leviable even though an application had been made under s. 65.

In support of the District Judge's view, it might be suggested that as no acknowledgment was sent by the Collector to his application for permission, the occupant could not use the power conferred by s. 65 when no answer was sent within three months from the date of the acknowledgment. As there was no acknowledgment, the application failed, and it must be treated as if there had been no application. This seems to me to be ascribing an unnecessary importance to the provision about [248] "acknowledgment," and defeating the main purpose of the statutory provision which empowers an occupant to use his land as he deems most desirable. The occupant could not insist upon the Collector acknowledging the application sent to him, and if the Collector simply neglects to send an acknowledgment, he may, if this view be true, defeat the provision without taking any action on the application made to him. The necessity of acknowledgment is obviously intended only to furnish the occupant with evidence of the fact that he presented his application. This acknowledgment fulfils the purpose of the notice provided for under s. 33 of Bombay Act VI of 1873, and the notice under ss. 342 and 345 of Bombay Act III of 1888. In both these cases, notice has to be given before any building work is undertaken, and the law provides that, if the Municipal authorities send no reply within one month from the date of the notice, the building work may be commenced as proposed without waiting for sanction. The acknowledgment obviously is intended to be a convenient proof of the receipt of notice or application made to the Collector. The Collector's failure to make an acknowledgment cannot take away the occupant's power to use his land. To hold otherwise would be tantamount to permitting the Collector to make the occupant responsible for his own failure to comply with the law.

The District Judge has in this case been of opinion, on the merits, that the appellant has been harshly treated in the matter of the levy of the fine. This circumstance, however, cannot dispense with the necessity of inquiring into the question whether the appropriation of the land was made before or after the three months' term fixed by law. If it is shown that the occupant-appellant waited for three months and then dug the pits, &c., he would be protected under s. 65. If he did not wait for three months, he would be liable to the penalty under s. 66. Issues 2 and 3 thus stand good with the slight change suggested below by the fact that no acknowledgment was sent. A reasonable interval over and above the date of the application may be allowed. I would accordingly remand the case for the decision of these amended issues.

Their Lordships thus differing in opinion referred the case to a third Judge under s. 575 of the Civil Procedure Code (Act XIV of 1882).

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[249] The reference was in the following terms :—

It will be seen from the above judgments that the Court differs in opinion upon a question of law, namely, upon the construction to be placed upon s. 66 of the Bombay Land Revenue Code, 1879. Parsons, J., thinks that before a person can appropriate his land to a non-agricultural purpose without incurring the penalty of the fine provided for therein, he must wait for three months from the date of the acknowledgment of the application required to be given by the Collector by s. 65 of the same Code, and that it is no defence to plead that the Collector, though he received the application, omitted to send an acknowledgment. Ranade, J., thinks that in a case where the Collector has received the application and omitted to send the acknowledgment, the occupant need only wait three months' time from the date of his sending in his application, and that the Collector could not levy the fine in a case where he has omitted to send an acknowledgment and the occupant has appropriated his land within a reasonable time after the expiry of three months from the date of his applying for permission to so appropriate his land. If the view of Parsons, J., be correct, it will be decisive of the appeal and no further issues need be tried. As we differ on this point, we, under the provisions of s. 575 of the Civil Procedure Code, refer the appeal to the learned Chief Justice of this Court.

The case was thereupon referred to Candy, J., who delivered the following judgment :—

FINAL JUDGMENT.

CANDY, J.—I agree with Mr. Justice Parsons that under ss. 65 and 66 of the Land Revenue Code, before a person can appropriate his land to a non-agricultural purpose without incurring the penalty of the increased fine described in s. 66, he must show that he first obtained the permission of the Collector, or that he waited for three months from the date of the Collector's acknowledgment of his application, the prayer of which has been neither granted nor refused : it is no defence to plead that the Collector, though he received the application, neglected to perform the statutory obligation imposed upon him, *viz.*, to furnish the applicant with a written acknowledgment of the receipt of the application. The law may possibly work harshly ; but we sit here to administer the law as it is, not to spell out an enactment which is not on the statute [250] book. The acknowledgment (as Mr. Justice Ranade says) is obviously intended by the Legislature to be a convenient proof of the receipt of the application made to the Collector. To prevent disputes as to whether an alleged application was really made or not, the Legislature provides that the applicant cannot take the Collector's silence to mean that the prayer of the application has been granted, unless he obtains the Collector's acknowledgment in writing of the receipt of the application. Such an interpretation is not making the Act absurd by introducing a matter which could never have been within the calculation or consideration of the Legislature. On the contrary, taking the words of the section in their plain ordinary sense, it is, I think, clear that it was within the calculation and consideration of the Legislature that the applicant should be forced to obtain an acknowledgment of the receipt of his application. The Collector could always be made to perform his duty by petition to the Revenue Commissioner or Government.

As to the case of *Thompson* v. *Harvey* (1) cited by the learned counsel for plaintiff, it is only necessary to read the whole judgment of Baron

(1) (1859) 4 H. and N. 254.

Martin (and not an isolated sentence) to see that the decision in that case in no way conflicts with my interpretation of ss. 65 and 66 of the Land Revenue Code.

I would confirm the decree of the lower appellate Court, but under the special circumstances of the case each party should bear his own costs throughout.

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APPELLATE CIVIL.

24 B. 240 = 1 Bom L.R. 669.

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24 B. 251 (F.B.) = 1 Bom. L.R. 660.

[251] APPELLATE CIVIL—FULL BENCH.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Candy and Mr. Justice Ranade.

RAMCHANDRA BALAJI PHADNIS (*Original Defendant*), *Applicant v.* NARSIMHACHARYA YEDUNATHACHARYA KATTI (*Original Plaintiff*), *Opponent.** [18th September, 1899.]

Mamlatdars' Act (Bom. Act III of 1876), s. 18—Specific Relief Act (I of 1877), s. 9—Res judicata—Possessory suit in Mamlatdar's Court—Dismissal of suit by Mamlatdar on the merits—Subsequent suit in Civil Court under s. 9 of the Specific Relief Act (I of 1877).

A possessory suit filed in the Mamlatdar's Court was dismissed by the Mamlatdar on the merits. The plaintiff thereupon filed another suit under s. 9 of the Specific Relief Act (I of 1877) in a Civil Court which allowed the claim and passed a decree in his favour. The defendant applied to the High Court in its extraordinary jurisdiction and contended that the plaintiff's claim was *res judicata* and that the Mamlatdar's decree barred the second suit.

Held, that having regard to s. 18 of the Mamlatdars' Courts Act (Bom. Act III of 1876) the Mamlatdar's decision was not conclusive, and that the plaintiff was entitled to bring the second suit under s. 9 of the Specific Relief Act (I of 1877).

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb V. V. Kalyanpurkar, Subordinate Judge of Saundatti.

The plaintiff sued in the Mamlatdar's Court of Parasgad for possession of a house. The suit was heard and was dismissed on the merits, the Mamlatdar holding that the plaintiff had not been in possession of the house within six months prior to the institution of the suit (see Bombay Act III of 1876, s. 4).

The plaintiff then filed a suit under s. 9 of the Specific Relief Act (I of 1877) in the Court of the Subordinate Judge of Saundatti for possession of the house. The defendant contended that the suit was *res judicata*, but the Court allowed the claim and passed a decree for the plaintiff.

[252] The defendant then applied to the High Court in its extraordinary jurisdiction for a rule to set aside the decree of the Subordinate Judge. The application was heard by Jenkins, C.J., and Candy, J., who refused to grant the rule prayed for. The defendant then applied for a review of the order of refusal on the ground that in the case of *Ramchandra* v. *Bhikibai* (1) it had been decided that the order of a Mamlatdar rejecting a plaintiff's claim was a bar to a subsequent suit by him under s. 9 of the Specific Relief Act (I of 1877). The Court granted a rule, which now came on for hearing before a Full Bench, consisting of Jenkins, C.J., and Candy and Ranade, JJ.

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* Application for Review No. 194 of 1899.

(1) 6 B. 477.

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Manekshah J. Taleyarkhan, for the applicant (defendant).—The plaintiff was not entitled to bring a second suit, the first having been dismissed by the Mamlatdar. His case was heard on its merits by the Mamlatdar. Even where a case was dismissed by a Mamlatdar for non-appearance of the plaintiff it was held that another suit under s. 9 of the Specific Relief Act could not be brought—*Ramchandra* v. *Bhikibai* (1). *A fortitori* that must be so where the Mamlatdar heard and decided the case on its merits. See also *Gulabbhai* v. *Kasanji* (2).

The powers of the Mamlatdar under the Mamlatdars' Act and those of the Subordinate Judge under s. 9 of the Specific Relief Act are exactly the same. The procedure of both the Courts is summary and they cannot investigate the question of title. If the view taken in *Ramchandra* v. *Bhikibai* (1) be held to be incorrect, the result will be that every plaintiff, who is defeated in the Mamlatdar's Court, will seek to upset the Mamlatdar's decree by a fresh suit under s. 9 of the Specific Relief Act in a Civil Court. The Civil Court will thus virtually act as an appellate Court, and a right of appeal will be given to a disappointed plaintiff, but no such right to a disappointed defendant, because s. 18(3) of the Mamlatdars' Act (XIII of 1876) clearly contemplates the case of an unsuccessful plaintiff [253] and not that of a defendant. Further, such a result would make s. 19 of the Mamlatdars' Act, which forbids an appeal, a dead letter. A remedy by civil suit is left open to an unsuccessful party in the Mamlatdar's Court because the Mamlatdar cannot investigate the question of title. Similarly a Subordinate Judge acting under s. 9 of the Specific Relief Act cannot go into the question of title. We, therefore, submit that the Subordinate Judge was wrong in entertaining the suit.

Mahadeo V. Bhat, for the opponent (plaintiff), was not called upon.

JUDGMENT.

JENKINS, C. J.—The plaintiff brought a suit in the Mamlatdar's Court, but it was dismissed. Then he instituted this present suit in the ordinary Court under the Specific Relief Act, and obtained a decree. The question is whether the decree in the first suit is a bar to the second suit.

In support of the affirmative, reliance is placed on *Ramchandra* v. *Bhikibai*. There a suit was dismissed by the Mamlatdar for want of appearance, and it was held that such dismissal gave rise to the plea of *res judicata*. That decision was based on s. 13 of the Code of Civil Procedure, which imposes the condition that the former suit shall have been heard and finally decided, and it was said that a suit dismissed for want of appearance must be deemed to have been heard and finally decided within the meaning of s. 13 of the Code of Civil Procedure, because s. 13 of the Mamlatdars' Act provides that the plaintiff may take certain steps

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(1) 6 B. 477. (2) P.J. (1897), p. 246

(3) Section 18 of the Mamlatdars' Act (Bom. Act III of 1876) :—

18. The party to whom the Mamlatdar shall give immediate possession, or restore a use, or in whose favour an injunction has been granted, shall continue in possession or use until ousted by a decree or order of a Civil Court:

[253] Provided that nothing in this section shall prevent the party against whom the Mamlatdar's decision is passed from recovering by a suit in the Civil Court mesne profits for the time he may be kept out of possession of any property, or out of enjoyment of any use:

Provided further that in any subsequent suit or other proceeding in the ordinary Civil Court between the same parties, or other persons claiming under them, the Mamlatdar's decision respecting the possession of any property, or the enjoyment of any use, shall not be held to be conclusive.

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to have a suit rejected for non-appearance "re-heard." When analysed what the reasoning comes to is that the meaning of words in the Code of Civil Procedure is to be determined by the Bombay Mamlatdars' Act, and the result is to attribute to s. 13 of the Code of Civil Procedure **[254]** a meaning which its words taken in their ordinary acceptation would not, in my opinion, bear. Seven pages further on in the same volume I find a decision of Mr. Justice Latham—*Rungrav Ravji* v. *Sidhi Mahomed* (1)—who expressed the conclusion that a matter cannot be said to be heard and finally decided by a Court which does not try that matter. The soundness of this view is clear, and it is unnecessary to examine the numerous authorities which might be vouched to support the proposition that a dismissal *in limine* does not give rise to the plea of *res judicata*; it will be enough to refer to the authoritative statement of the Privy Council in *Radha Prasad Singh* v. *Lal Sahab Rai* (2).

The decision, therefore, in *Ramchandra* v. *Bhikibai* (3), cannot, in my opinion, be supported on the grounds on which it is rested, and, therefore, is not an authority by which we are bound. It still, however, remains to be seen whether the Mamlatdar's decree in this case constitutes a bar to the present suit, for here the Mamlatdar did hear and decide the suit. We have to see what was the effect of that decision. Now s. 18 of the Mamlatdars' Act provides that in any subsequent suit or other proceeding in the ordinary Civil Courts between the same parties or other persons claiming under them, the Mamlatdar's decision respecting the possession of any property or the enjoyment of any use shall not be held to be conclusive. Clearly, then, the decision is no bar to an ordinary suit in the ordinary Civil Courts, but it is said that it constitutes a bar when that suit is brought under the Specific Relief Act. We must construe the words as they stand, for our function is *jus dicere non jus dare*. The proviso says nothing about an ordinary suit; on the contrary it says suit or proceeding and, therefore, presumably contemplates something other than an ordinary suit. To give to the section the meaning for which Mr. Manekshah contends, we should have to interpolate some such words as "other than a suit brought under s. 15 of Act XIV of 1859"—on which apparently s. 9 of the Specific Relief Act was founded. In my opinion we are not entitled to subject the proviso to such treatment. If the result is one to be desired, then the remedy can only be applied by the **[255]** Legislature. Though under the particular circumstances of the case the earlier decree is no bar, still I can imagine cases where a decree might have the effect of preventing a subsequent suit under the Mamlatdars' Act: for instance a plaintiff might successfully sue for possession under the Mamlatdars' Act, and then if he were put into possession under the decree, I conceive a subsequent suit would not lie at the instance of the unsuccessful defendant. But this would be because he could not predicate of himself, in the words of s. 9 of the Specific Relief Act, that he was a person "dispossessed otherwise than in due course of law," a reason that has no place here.

In my opinion, therefore, a Mamlatdar's decision respecting the possession of immoveable property is not conclusive in a subsequent suit even though it be brought under s. 9 of the Specific Relief Act. At the same time it would be *prima facie* evidence to which no doubt the Court would under ordinary circumstances attribute considerable weight. In my opinion the rule must be discharged with costs.

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(1) 6 B. 482. (2) 13 A. 53 = 17 I. A. 150. (3) 6 B. 477.

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CANDY, J., concurred.*

RANADE, J.—This was an application for the review of an order of dismissal passed under the following circumstances. The plaintiff failed in a possessory suit brought by him against the defendant in the Parasgad Mamlatdar's Court, and thereupon he brought a suit in the Subordinate Judge's Court of Saundatti, under s. 9 of the Specific Relief Act, to recover possession of the house in dispute. The defendant raised the objection that the plaintiff's claim was barred by the decision in the Mamlatdar's Court. The Subordinate Judge held that the Mamlatdar had not been appointed to exercise powers under Bombay Act III of 1876 at the time he disposed of the possessory claim, and had thus no jurisdiction to try the suit. On the merits, the Subordinate Judge found in favour of the plaintiff, and awarded his claim. The defendant thereupon applied to this Court under its extraordinary jurisdiction, but his application was dismissed.

The present review application was made chiefly on the ground that the order of dismissal was opposed to a ruling of this Court in *Ramchandra* v. *Bhikibai* (1), where it was held that a decision **[256]** by the Mamlatdar's Court rejecting a claim was a bar to a subsequent civil suit under s. 9 of the Specific Relief Act for possession of the property in dispute. There can be no doubt that the ruling in *Ramchandra* v. *Bhikibai* supports the contention of the applicant's pleader, Mr. Manekshah.* In that case there was, however, no necessity for referring to the point of *res judicata*. The decision in that case was passed on the ground of the default of the plaintiff, and s. 13 of Bombay Act III of 1876 expressly provides that such cases of dismissal may be reheard on application being made within fifteen days, and the chief good cause shown for excusing the default. This was reason on which the decision was virtually based. Its subsequent reference to the operation of s. 13, Civil Procedure Code, was strictly unnecessary for the actual decision of the point in issue before the Court. A Mamlatdar's Court is no doubt for certain purposes and in some sense, a Civil Court, but it is not a Civil Court to which the Civil Procedure Code can be held generally applicable. The Mamlatdars' Act and the Specific Relief Act, s. 9, no doubt relate to the same subject of adjective law, being intended to give relief in cases of dispossession of immoveable property, but there is a very radical difference between the two Acts. Section 9 permits the institution of a suit for possession in all cases where such dispossession results without consent, and otherwise than in due course of law. In the present case the plaintiff, when he failed before the Mamlatdar, cannot be said to have been deprived of possession by any process of the law, and there was, therefore, no bar to his suit in the Civil Court. Section 18 of the Mamlatdars' Act, moreover, expressly provides that the possession or use, as ordered by the Mamlatdar, shall continue *until* a decree or order of a Civil Court is passed to the contrary; no distinction is here made between decrees or orders of Civil Courts under s. 9 of Act I of 1877, and any other orders or decrees under the Civil Procedure Code. The Mamlatdar's Court's order is thus obviously intended not to be final, but it holds good provisionally till the Civil Court passes its decree on the same point in dispute. The Mamlatdar's orders and decrees in possessory suits stand thus on very much the same footing as s. 145, cl. 6, and **[257]** s. 147 of

* For further observation of Candy, J. see 1 Bom. L. R. 662.

(1) 6 B. 477.

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the Criminal Procedure Code. Proviso No. 1 to s. 18 of the Mamlatdars' Act permits the unsuccessful party to sue for mesne profits in a Civil Court, and Proviso No. 2 directs that the Mamlatdar's decision shall not be held conclusive in civil disputes. The decision of the Mamlatdar under Bombay Act III of 1876 was, therefore, never intended to operate as a bar to a suit for possession in the Civil Court. The order of dismissal must be upheld, and the application for review rejected.

Rule discharged with costs.

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24 B. 257 = 2 Bom. L. R. 401.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Tyabji and Mr. Justice Russell.

IN THE MATTER OF THE INDIAN STAMP ACT, 1899, SECTION 57.*

[2nd March, 1900.]

Stamp—Sale of leasehold property—Rent reserved not liable to ad valorem *duty—Stamp duty leviable only on the actual consideration money—Stamp Act (II of* 1899), *ss* 24, 25 *and sch. I, art.* 63.

Certain leasehold property demised by the Secretary of State for India to the original lessee for a term of 999 years, at the yearly rent of Rs. 39-11-0, was assigned to the trustees of a charity for the sum of Rs. 1,02,000, the trustees consenting on their part to pay the rent reserved by the original lease. The deed bore a stamp of the value of Rs. 1,020:—Rs. 1,02,000 having been assumed to be the consideration for the transfer. The Collector of Bombay referred to the High Court the question whether under s. 24 of the Stamp Act (II of 1899), the payment of the rent reserved by the deed should not be taken as part of the 'consideration' in respect whereof the transfer was chargeable with *ad valorem* duty.

Held that the *ad valorem* duty was only payable on the money consideration actually mentioned in the conveyance (*viz.*, the amount of the purchase-money).

REFERENCE by the Collector and Superintendent of Stamps, Bombay.

The reference was in the following terms:—

"1. By deed of transfer of leasehold property entered into on the 6th day of December, 1899, between Beramji Navrosji Darabsett of the one part and Lakhmidas Khimji, Goverdhandas Goculdas Tejpal, and Naranji Dwarkadas, officiating trustees of the Goculdas Tejpal Charities, of the other part, after reciting **[258]** that by an indenture of lease dated the 2nd day of December, 1871, and expressed to be made between the Secretary of State for India in Council of the one part and Cooverji Ludha of the other part, certain premises therein mentioned, with their rights, easements and appurtenances, were demised by the said Secretary of State unto the said Cooverji Ludha, his executors, administrators and assigns, for the term of 999 years from the 26th day of August, 1867, at the yearly rent of Rs. 39-11-0, and subject to the covenants and conditions by the lessee to be observed and performed, and reciting that under an indenture dated the 16th day of October, 1888, and made between Kesserbai of Bombay, widow of Cooverji Ludha, of the one part and the said Beramji Navrosji Darabsett of the other part, the said premises comprised in the hereinbefore recited indenture of lease had become

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* Reference No. 4 of 1899.

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vested in the said Beramji Navrosji Darabsett for the then residue of the said term of 999 years, and reciting that the said Lakhmidas Khimji, Goverdhandas Goculdas Tejpal, and Naranji Dwarkadas were the officiating trustees of the Goculdas Tejpal Charities, and reciting (*inter alia*) an agreement dated the 24th day of October, 1899, and made between the parties to those presents whereby the said Beramji Navrosji Darabsett agreed with the said officiating trustees for the sale to them of the said premises comprised in the hereinbefore recited indenture of lease with their appurtenances for the residue then unexpired of the said term of 999 years free from all incumbrances except the rent reserved by and the covenants on the part of the lessee contained in the said recited indenture of lease subject to all existing tenancies at or for the price or sum of Rs. 1,02,000, of which the sum of Rs. 7,000 was then paid to the said Beramji Navrosji Darabsett as a deposit. It was witnessed that in pursuance of the said agreement, and in consideration of the sum of Rs. 7,000 so paid as a deposit as aforesaid, and of the further sum of Rs. 95,000 upon the execution of those presents paid by the said Lakhmidas Khimji, Goverdhandas Goculdas Tejpal, and Naranji Dwarkadas as such officiating trustees as aforesaid, making together the sum of Rs. 1,02,000, he, the said Beramji Navrosji Darabsett, did thereby assign unto the said officiating trustees, their heirs, executors, administrators, and assigns all the [259] premises comprised in and demised by the hereinbefore recited indenture of lease or expressed so to be, with their rights, easements and appurtenances, to have and hold the said premises thereinbefore expressed to be thereby assigned or expressed so to be unto the said officiating trustees, their heirs, executors administrators and assigns for all the residue then unexpired of the said term of 999 years at and under the rent reserved by the said indenture of lease and under and subject to the covenants and conditions in the same indenture contained and which thenceforth on the part of the lessees, their executors, administrators or assigns ought to be observed and performed and subject also to the existing tenancies; and in the deed were set out.

> Covenants on the part of the said Beramji Navrosji Darabsett that the therein recited indenture of lease was a good, valid and subsisting lease and had not been forfeited or surrendered, &c. And that he had good right to assign, &c., for the residue of the said term, for quiet enjoyment, and that the premises were free from incumbrances made by the said Beramji Navrosji Darabsett and for further assurance.

And the deed also set out a

> Covenant on the part of the said officiating trustees that they would pay the rent reserved by the said recited lease and observe and perform all the covenants and conditions contained therein.

"2. A full copy of the deed which has been executed by the parties thereto, is hereto annexed and marked A. The deed bears stamp to the value of Rs. 1,020.

"3. This amount of stamp duty has been estimated by the parties to the deed under art. 63 of sch. I to the Indian Stamp Act, 1899, the Rs. 1,02,000 paid by the trustees as mentioned in the deed having been assumed by them to be the "consideration for the transfer" referred to in that article.

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"4. I, however, have some doubt whether, having regard to the wording of s. 24 of the Act, the payment of the rent reserved by the deed should not be taken as part of the "consideration" in respect whereof the transfer is chargeable with **[260]** *ad valorem* duty. If s. 24 has application in this matter, I am further in some doubt whether the stamp duty payable should be assessed under s. 25 or how it should be assessed. I, therefore, beg to refer these questions for the opinion of this Honourable Court."

Lang (Advocate General) for the Crown.

JUDGMENT.

JENKINS, C. J.— Having regard to the terms of art. 63 of the first schedule to the Indian Stamp Act, 1899, I am of opinion that *ad valorem* duty is only payable on the consideration money actually mentioned in the conveyance (*viz.*, the amount of the purchase-money), and that the rent reserved by the deed should not be taken as part of the consideration in respect whereof the transfer is chargeable with *ad valorem* duty.

Attorney for Government:— *Government Solicitor.*

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24 B. 260 (F.B.) = 1 Bom. L.R. 799.

APPELLATE CIVIL—FULL BENCH.

Before Sir L.H. Jenkins, Chief Justice and Candy, Ranade, Tyabji and Russell, JJ.

SHRINIVAS MURAR, A MINOR, BY HIS NEXT FRIEND AND ADOPTIVE MOTHER MAINABAI (*Original Plaintiff*), *Appellant v.* HANMANT CHAVDO DESHAPANDE AND OTHERS (*Original Defendants*), *Respondents.** [22nd September and 9th and 11th October, 1899.]

Adoption by widow—Suit for a declaration that adoption was invalid and for recovery of possession—Reversioner—Bar of limitation to claim for declaration—Limitation Act (XV of 1877), sch. II, arts. 118, 119 and 141—Limitation Act (IX of 1871), sch. II, art 129—Limitation Act (XIV of 1859), s. 1, cls. 6 and 12—Specific Relief Act (I of 1877), s. 42.

Shrinivasrao and Konherrao were two divided brothers. They were members of a vatandar family. Konherrao-died leaving two sons Swamirao and Timaji. Swamirao was given in adoption to Shrinivasrao. Timaji died leaving a widow and three daughters. In 1872 Timaji's widow, Gangabai, adopted defendant No. 1, and she died in the year 1890. In 1894 Shrinivasrao's grandson by adoption, the present plaintiff, a minor represented by his adoptive mother, sued for a declaration that the adoption of defendant No. 1 was invalid, for a declaration of ownership and possession of property with mesne profits, and for an injunction.

[261] *Held*, that the suit for a declaration that the adoption was invalid was governed by art. 118, sch. II of the Limitation Act (XV of 1877), and being barred under that article, the whole claim was time-barred.

Per JENKINS, C.J.—A combination of several claims would not in general deprive each claim of its specific character and description.

Per CANDY, J.—Primarily the case is governed by art. 141, but if the defendant in possession can plead "I am to your knowledge or to the knowledge of your predecessor in title in possession as a son alleged to have been validly adopted by the widow, on whose death you claim possession," then the case is governed by art. 118.

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* Appeal No. 53 of 1898.

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Per TYABJI, J.—(1) Article 118 of sch. II of the Limitation Act (XV of 1877) applies to every suit where the validity of the defendant's adoption is the substantial question in dispute, whether such question is raised by the plaintiff in the first instance or arises in consequence of defendant setting up his own adoption as a bar to the plaintiff's success.

(2) Article 141 applies to the ordinary simple case of a reversioner where the validity of the adoption is not the substantial point in dispute, or where the plaintiff can succeed without impugning the validity of the defendant's adoption.

Fannyamma v. *Manjaya* (1) overruled.

[Diss., 24 A. 195 (198) = 22 A.W.N. 10; 26A. 40 (48) = 23 A.W.N. 163; 25 Ind. Cas. 429 = 81 P.R. 1914 = 203 P.L.R. 1914 = 104 P.W R. 1914; **F.**, 25 B. 26 (28) = 2 Bom. L.R. 495; 27 B. 614 (616) = 5 Bom. L.R. 588; 32 B. 7 (9) = 9 Bom. L.R. 1054; 68 P.R. 1903 = 13 P.L.R. 1904; **App.**, 26 M. 291 (296, 318); **R.**, 26 B. 720 (728) = 4 Bom. L.R. 516; 26 B. 730 (734) = 4 Bom. L.R. 513; 30 C. 990 (996) = 7 C.W.N. 864; 4 Bom. L.R. 892 (907); 9 C.W.N. 222 (224); 2 N.L.R. 98 (99); 1 P.R. 1907 = 31 P.W.R. 1907; 20 P.R. 1902 = 11 P.L.R. 1902; 35 P.R. 1904; 56 P.R. 1903 = 93 P.L.R. 1903 (F B.); 81 P.R. 1902 = 116 P.L.R. 1902; 96 P R. 1903 = 79 P.W.R. 1908; 6 S.L.R. 210; 20 M.C.C.R. 16; **Cons.**, 3 Bom. L.R. 682 (684); 15 C.L.J. 97 = 15 C.W.N. 524 = 7 Ind. Cas. 427 (432).]

APPEAL from the decision of Rao Bahadur G. V. Bhanap, First Class Subordinate Judge of Dharwar, in Suit No. 97 of 1894.

Suit as reversionary heir for a declaration that the adoption of defendant No. 1 was invalid, a declaration of ownership, possession with mesne profits, and an injunction.

The plaintiff, a minor represented by his next friend and adoptive mother, sued the defendants alleging as follows :—One Murarrao was the original ancestor of the plaintiff's family. He died leaving two sons, Shrinivasrao and Konherrao, who divided the family property among themselves. Shrinivasrao died without any issue and Konherrao left two sons, Swamirao and Timaji. Swamirao was given in adoption to his uncle Shrinivasrao and he left a son Murarrao, the husband of Mainabai, the adoptive mother and next friend of the minor plaintiff. Timaji died without any male issue, leaving him surviving a widow, Gangabai, and three daughters, Yemunabai, Tungabai and Savitribai, defendants Nos. 4, 5 and 6, respectively. Defendant No. 1 was the alleged adopted son of Gangabai. As the plaintiff's family was desai, **[262]** *jamindar* and vatandar and as the whole of the property in suit consisted of *desgat* vatan and other vatans such as *patilki* and *kulkarni*, and other *hakbabs* depending upon it and appertaining to it, the minor plaintiff, as the next male reversionary heir of Timaji, was entitled to succeed to the whole property by right of inheritance, after his widow Gangabai's death, according to the terms of the Gordon settlement and the provisions of the Bombay Vatan Act (Bombay Act V of 1886), in preference to Timaji's daughters, defendants Nos. 4, 5 and 6. Defendant No. 1 alleged himself to be the adopted son of Timaji by his widow Gangabai and claimed the whole property in suit by virtue of his adoption, but his allegations were not true. He was not, in the first place, adopted by his alleged adoptive mother, and, secondly, he being her daughter's son and an only son of his natural father at the alleged date of adoption, his adoption, even if proved, was illegal, invalid and contrary to Hindu law and the custom of the country. The plaintiff's adoptive grandfather, Swamirao, had filed a suit No. 846 of 1878, in the Court of the Subordinate Judge of Haveri to have the

(1) 21 B. 159.

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adoption of defendant No. 1 declared invalid, but the suit was dismissed on the ground that the adoption of a daughter's son was allowed by custom. On appeal the District Judge confirmed the decree on the 12th August, 1882, holding that Swamirao had not any right then to bring such a suit, and that he could sue after the death of Gangabai for recovery of possession of the property, which belonged to her husband and which was in her possession as widow. Gangabai, having died on the 25th August, 1890, the plaintiff instituted the present suit in the year 1894 for the recovery of possession of the property in suit on the ground of his being the male reversionary heir of Timapa after the death of his widow, Gangabai, and as such being entitled to succeed to the said property by right of inheritance and the settlement as stated above. The cause of action with respect to recovery of possession arose on the death of Gangabai and with respect to mesne profits on the 1st March, 1892, 1893 and 1894.

Defendant No. 2 was joined, because certain property was mortgaged with possession to his father, and defendant No. 3 was joined because he was the assignee of the mortgage of defendant No. 2.

[263] The plaintiff prayed for a declaration that the adoption of defendant No. 1 was invalid and that he was the owner of the property in dispute. He also prayed for several other declarations with respect to several other reliefs, for recovery of possession with mesne profits, and for a permanent injunction against defendant No. 1, restraining him from interfering with plaintiff's management.

Defendant No. 1 answered (*inter alia*) that the plaintiff's adoption was invalid and ineffectual to entitle him to claim the property in suit as reversionary heir, because before his adoption the plaintiff belonged to another vatandar family and he was the only son of his natural father at the time of the adoption; that the defendant was adopted by Gangabai in August, 1872, according to the direction of her husband, and he was not the only son at the time of the adoption; that his adoption having been made in conformity with the custom of the country and the family was perfectly valid and gave him all the rights of an adopted son, and that the suit was time-barred, as it was not filed within six years from the date of his adoption.

Defendant No. 2 set up a usufructuary mortgage, dated the 1st January, 1881, and pleaded assignment of it to defendant No. 3, who admitted the assignment.

Defendants Nos. 4, 5 and 6, the daughters of Gangabai, denied and disputed the plaintiff's claim, contending that the suit was not maintainable; that the plaintiff was not properly adopted and, therefore, he was not entitled to sue, and that these defendants being the daughters of Gangabai were the legal heirs of their father Timaji after their mother's death, but defendant No. 1 having been legally adopted by their mother, and his adoption being valid according to Hindu law and the custom of the country, he was the proper and legal heir of Timaji and entitled to inherit the whole of his property.

The Subordinate Judge found (*inter alia*) that the adoption of a daughter's son being sanctioned by custom in the Dharwar District, the adoption of defendant No. 1 was valid and that the claim was time-barred. He, therefore, dismissed the suit. With respect to the plaintiff's contention that the property being vatan, **[264]** the sanction of Govern-

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ment ought to have been obtained for defendant's adoption, the Subordinate Judge observed :—

"The plaintiff contends that Government having not granted permission but even withheld it from Gangabai to adopt one from a different family before the first defendant's adoption was made by her, his adoption was invalid, as it was not permitted nor sanctioned by Government. But this contention also does not hold good. In the first place, as has been already stated, no such permission was ever asked for by Timapa or his widow Gangabai, and the Collector had no reason or right to grant or withhold his permission to the adoption; and, secondly, there is no provision of the Hindu law, the Vatandar's Act or of any other law cited by the plaintiff, to show that a sanction of Government is necessary to validate an adoption made by a vatandar. The provisions of ss. 33, 34 and 35 of the Vatandar's Act, No. III of 1874, as amended by s. 7 of Act V of 1886, on this subject simply require that a notice or report of such an adoption should be made by the vatandar to the Collector within a certain period, and the latter should not recognize it without such a report or notice having been given to him. But these provisions even distinctly apply, as the sections show, to an adoption made by a registered representative vatandar or his widow and not to one made by any other co-sharer or pot-hisedar of the vatan who is not a registered representative vatandar. On the other hand, the following authorities are cited for the first defendant to show that the sanction of Government is not necessary to validate such an adpotion. It has been held in *Ramchandra Vasudev* v. *Nanaji Timaji*, 7 Bom. H. C. R. A. C. J., 26, that a formal adoption is not invalid because it has not received the sanction of the ruling power, and that an adoption without such sanction entitles the adopted son to succeed to property of the nature of a service vatan. Similarly it is laid down in *Narhar Govind* v. *Narain Vithal*, I. L. R., 1 Bom., 607, and *Rangubai* v. *Bhagirthibai*, I. L. R., 2 Bom., 377, that the sanction of Government to an adoption by a kulkarni is not necessary to make it valid, nor has Government any right to prohibit or intervene in such an adoption.

"For the reasons stated above, I hold that the first defendant's adoption is not invalid even assuming that it was not sanctioned or even prohibited by Government as alleged by the plaintiff. It appears, however, from Ex. 177 produced by the first defendant that after the death of Gangabai the revenue authorities had actually recognized the first defendant's adoption and ordered the transfer of Government lands which stood in her name as khatadar to his name as her adopted son, and these lands admittedly stand even now in the name of the first defendant as khatadar."

The plaintiff appealed.

Scott (Acting Advocate-General with *H. C. Coyaji* for *Manekshah J. Taleyarkhan*), for the appellant (plaintiff).

Macpherson (with *Narayan G. Chandavarkar* and *Shivram V. Bhandarkar*), for the respondents (defendants).

[265] 1899, *September* 22. JENKINS, C. J.—One of the questions arising on this appeal is whether the suit is barred by the Indian Limitation Act, 1877, and the facts out of which it arises may be shortly stated.

The plaintiff alleges that he is the next male heir of one Timaji, who died many years ago, and as such he claims to be entitled to the property

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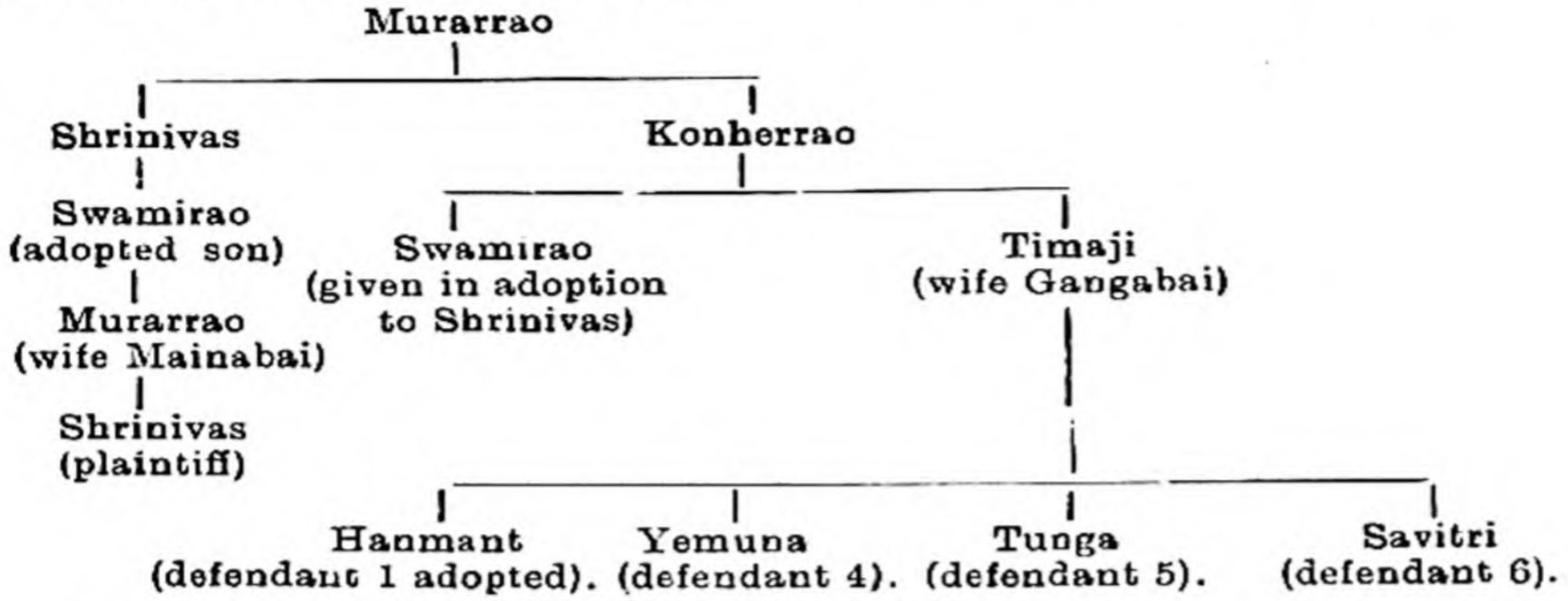
in suit. The family pedigree so far as now material will be seen from the following tabular statement :—



The branches of Shrinivasrao and Konherrao were separated, so that on Timaji's death Gangabai as his widow became entitled to his property, and the persons then presumptively entitled on her death were her daughters. In 1872, however, Gangabai adopted the first defendant, so that assuming the adoption was valid, he then became entitled to the property. Its validity, however, was contested on the ground that the adoptee was a daughter's son, and in 1878 Swamirao, the plaintiff's adoptive grandfather, sued to have the first defendant's adoption declared invalid. In the first Court the suit was dismissed on the ground that a custom to adopt a daughter's son was established. On appeal that decision was affirmed, not, however, on the ground taken by the first Court, but because Swamirao had not sufficient interest to support the suit. The decree of the appellate Court was passed on the 12th of August, 1881.

On the 28th of January, 1887, the Bombay Act V of 1886 was passed and by it the female members of a vatan family were postponed **[266]** to the male members, with the result that Swamirao became the person who would have been presumptively entitled to the property on Gangabai's death in case the adoption were out of the way, and consequently he then could (apart from any question of limitation) clearly have brought a suit to obtain a declaration that the adoption was invalid. (Specific Relief Act, s. 42, illustration (*f*).)

Swamirao, however, died in 1889-90 without having brought a suit, nor were any proceedings taken until the commencement of this present suit in 1894, twenty-two years after the date of the adoption.

The present plaintiff, it is true, is an infant ; still time began to run in the time of his adult predecessor Swamirao and consequently the plaintiff's minority did not stop it. (Limitation Act, s. 9.) It is under these circumstances that the present suit has been commenced, wherby the plaintiff (amongst other things) seeks a declaration that defendant No. 1's adoption, if proved, is invalid, a declaration of his title to the property in suit, and consequent relief.

The decision of this case may turn on whether or not art. 118 in the 2nd Schedule to the Indian Limitation Act of 1877 applies. There is a prior decision of this Court in which it has been held that in a case like the present it does not – *Fannyamma* v. *Manjaya* (1). It appears, however, doubtful whether the ruling is consistent with the grounds on which the

(1) 21 B. 159.

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decisions of the Privy Council proceed in the two cases of *Jagadamba* v. *Dakhina Mohun* (1) and *Mohesh Narain* v. *Taruck Nath* (2). Those cases were no doubt concerned with the Act of 1871, but they cannot be sufficiently distinguished for that alone, if they are based on reasoning which would apply to the interpretation of the Act of 1877. I would, therefore, refer for the determination of a Full Bench the question, whether or not this case is governed by art. 118 of the Limitation Act, 1877.

CANDY, J.—In my judgment in *Fannayamma* v. *Manjaya Hebber* (3), I showed the difficulties which arise in regard to this [267] question of limitation, and I came to the conclusion (with hesitation) that we should continue to follow the course of decisions of this Court till corrected by the authority of the Privy Council. Since the above case was decided, the question has been exhaustively considered by the High Courts of Calcutta and Madras; and those Courts do not agree in their opinions. Under these circumstances, I agree with the learned Chief Justice that the point is one which may suitably be referred to a Full Bench of our Court.

The point being thus referred, it was argued before a Full Bench composed of Jenkins, C. J. and Candy, Ranade, Tyabji and Russell, JJ.

Scott (Acting Advocate General with *H. C. Coyaji*, for *Manekshah J. Taleyarkhan*) for the appellant (plaintiff).—We sue as the reversionary heir of Timaji, the husband of Gangabai. We seek to obtain several declarations and also possession and injunction. If we had sued only for declaration without consequential relief, namely possession, then six years' limitation would have been applicable under art. 118, sch. II of the Limitation Act, and our claim would have been beyond time. But we have prayed for possession also, and the article applicable is art. 140 of the same schedule, which gives twelve years' limitation. Therefore, art. 118 should be considered along with art. 140 in such a case. Our contention is that the suit is governed by twelve years' limitation. The declaration sought for is merely an ancillary relief, while the main relief is the recovery of possession of immoveable property. Having regard to the structure of the Limitation Act, it seems doubtful whether the Legislature intended to curtail the rights of litigants by a shorter period of limitation. The current of decisions clearly shows that a suit is governed by the limitation applicable to the main relief, namely, twelve years—*Nathu Singh* v. *Gulab Singh* (4); *Padajirav* v. *Ramrav* (5); *Fannyamma* v. *Manjaya* (3); *Harilal* v. *Bai Reva* (6). The first note of dissent from this current of authorities was struck by the Madras High Court in *Parvathi Ammal* v. *Saminatha Gurukal* (7).

[268] TYABJI, J.—That case shows that under art. 118 of the Limitation Act the plaintiff would be barred, and under art. 119 the defence would be barred, and nothing more.]

In that case the question as to possession of immoveable property was, it seems, not present to the mind of the Court.

The structure of the Limitation Act of 1871 also supports our argument. We submit that in determining the applicability of a particular article, the manner in which the articles relating to declarations and possession of immoveable property are arranged, should be considered. From the position of art. 129 of the Act of 1871 we contend that the

(1) 13 I.A. 84 = 13 C. 308. (2) 20 I.A. 30 = 20 C. 487. (3) 21 B. 159.
(4) 17 A. 167 (171). (5) 13 B. 160. (6) 21 B. 376.
(7) 20 M. 40.

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Legislature intended that a longer period of limitation should govern a case like the present.

[JENKINS, C. J.—The Privy Council has laid down certain tests in *Jagadamba's* case(1).]

That case turns upon the question as to what is the meaning of the expressions 'suit to recover possession' and 'suit to set aside an adoption'.

[CANDY, J.—The argument in *Jagadamba's* case shows that the plaintiff sought relief under art. 142 of the Limitation Act of 1871, which relates to recovery of possession of immoveable property.]

That case, however, mainly turned upon the question as to what is the meaning of the language of that Act.

The last decision on the point is *Jagannath Prasad* v. *Kunjit Singh*(2). This is a converse case, and it supports the view taken in *Fannyamma* v. *Manjaya* (3).

Jagadamba's case(1) lays down that a suit for setting aside an adoption means a suit for consequential relief also, that is, a suit for recovery of possession. It lays down that the expression 'a suit to set aside an adoption' is wide enough to embrace a suit for the recovery of possession of immoveable property. See also *Mohesh Narain* v. *Taruck Nath*(4).

[269] [TYABJI, J.—If the plaintiff were to sue merely as a reversioner without seeking to set aside the adoption of defendant No. 1, then he will be entitled to twelve years' limitation from the time of Gangabai's death.]

Quite so. The plaintiff is a minor, and the question as to his minority will also have to be considered.

Finally we submit that there is nothing in *Jagadamba's* case (1) which will induce the Court to differ from the long current of authorities prevailing at Bombay, Allahabad and Calcutta.

Macpherson (with *Narayan G. Chandavarkar* and *Shivram V. Bhandarkar*) for the respondents (defendants).—At the time of Gangabai's death plaintiff was not adopted. Swamirao was then alive, and the reversion having once opened in his favour it would never stop. A reversioner, howsoever remote, can bring a suit to establish his right if the nearer reversioner is negligent—*Kooer Golab Singh* v. *Rao Kurun Singh* (5); *Rani Anand Koer* v. *The Court of Wards* (6); *Bhikaji Apaji* v. *Jagannath Vithal* (7); *Ramabai* v. *Rangrao* (8); *Anyaba* v. *Daji* (9). The reversion having once opened, s. 7 of the Limitation Act would apply. The period is to be reckoned from the death of Gangabai when Swamirao represented the reversion. The ruling in *Chhaganram* v. *Bai Motigavri*(10) also supports our contention. This was a decision under art. 120 of the Limitation Act. There is a distinction between art. 119 and art. 120 as to the date of the cause of action. The cause of action as a reversioner enures to all the reversioners whether near or remote. This is rather a question for the consideration of the Division Bench than the present full Bench.

On the merits we have to consider what is the effect of the ruling in *Jagadamba's* case(1). It is instructive to trace how the first impression of the true meaning of the Limitation Act of 1871 arose. It seems that the construction put on the Act was founded **[270]** on a misconception of

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(1) 13 I. A. 84 = 13 C. 308. (2) 25 C. 354. (3) 21 B. 159.
(4) 20 I. A. 30 = 20 C. 487. (5) 14 M.I.A. 176. (6) 8 I.A. 14 = 6 C. 764.
(7) 10 B.H.C.R. 351. (8) 19 B. 614. (9) 20 B. 202 (205).
(10) 14 B. 512.

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the Privy Council ruling in *Raj Bahadoor Singh* v. *Achumbit Lal* (1). The misconception was pointed out by Field, J., in *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (2). We contend that the article applicable is the article relating to adoption and not to possession. *Jagadamba's* case (3) was referred to in *Mahabir Pershad* v. *Hurrihur Pershad* (4) and *Hasan Ali* v. *Nazo* (5). The remarks in *Padajirav* v. *Ramrav* (6) are merely *obiter dicta*. The ruling in *Parvathi Ammal* v. *Saminath Gurukal* (7) is entirely in our favour. There is nothing in the Limitation Act of 1877 which prevents the operation of the Limitation Act of 1871.

Scott (Advocate General) in reply.—As to reversion and limitation, the ruling in *Chhaganram* v. *Motigavri* (8) is not applicable. The same remark applies to *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (2).

JUDGMENT.

1899, *October* 9*th*. JENKINS, C. J.—The facts out of which this reference arises are stated in the judgments of the Division Bench and need not be here repeated. They should, however, be supplemented by stating that Gangabai survived Swamirao. The question submitted for our opinion is whether or not, under these circumstances, the case is governed by art. 118 of the 2nd schedule to the Indian Limitation Act, 1877. The necessity for the reference is a prior decision of this Court pronounced by Mr. Justice Parsons and Mr. Justice Candy in the case of *Fannyamma* v. *Manjaya* (9). This decision was in accordance with opinions to be found in prior decisions of this Court and was no doubt influenced by them, but the point had not been actually decided in this Presidency; it was also in agreement with prior decisions of the High Courts of Bengal and Allahabad. The Madras High Court has since taken the opposite view.

As the matter now comes before us as a Full Bench, it will serve no useful purpose to enter into an examination of these several conflicting rulings, and, therefore, I propose to examine the [271] provisions of the Legislature and the decisions of the Privy Council, which are binding on all Courts alike.

The Law of Limitation in India has been governed by successive Regulations and Acts, but it was not until Act XIV of 1859 that there was one uniform law applicable to all the Presidencies. This Act was superseded by Act IX of 1871, which in turn gave place to Act XV of 1877, and for my present purpose it will suffice to limit myself to an examination of these two Acts.

It is in the Act of 1871 that the tricolumnar schedule, with which we are now familiar, is first to be found, and the article of that Act which related to questions of adoption was the 129th. It is as follows:—

Description of suit.	Period of limitation.	Time when period begins to run.
129.—To establish or set aside an adoption.	12 years.	The date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father.

(1) 6 I.A. 110. (2) 12 C. 69. (3) 13 I.A. 84 = 13 C. 308.
(4) 19 C. 629. (5) 11 A. 456. (6) 13 B. 160.
(7) 20 M. 40. (8) 14 B. 512. (9) 21 B. 159.

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In the Indian Limitation Act of 1877 suits relating to adoption are the subject of two articles, the 118th and 119th, which are in these terms :—

Description of suit.	Period of limitation.	Time from which period begins to run.
118.—To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	Six years.	When the alleged adoption becomes known to the plaintiff.
119.—To obtain a declaration that an adoption is valid.	Do.	When the rights of the adopted son, as such, are interfered with.

It will be noticed, that there is a change both in the language and in the substance of the two Acts, but in view of the judgment of the Privy Council to which I now propose to call attention, I refrain at this point from speculating as to the motive for the change.

[272] In 1886, the case of *Jagadamba* v. *Dakhina* (1) came before their Lordships of the Privy Council, and the question for their decisions was, whether, under circumstances such as we have here, art. 129 of the Indian Limitation Act, 1871, applied. In the course of the argument Lord Blackburn asked the counsel for the appellant "how do you make them out to be suits to set aside adoptions? They seek to recover possession and may admit adoption, while denying their efficacy to pass title." This is precisely the line of argument which has been used in the cases on which the present appellant relies, and I refer to it because it becomes apparent that the phraseology of the old Act was susceptible of that meaning, and also because it shows that the point was present to the mind of their Lordships from the first, and at one time appeared to find favour with one of their number. The answer of counsel was, "to construe Act IX of 1871 it is necessary to refer to the previous legislation. It is a great hardship on an adopted son to have to prove his adoption more than twelve years after date."

The judgment was delivered by Lord Hobhouse and it is one of such importance, and so pregnant, that almost every word demands careful consideration.

So much is this so that I refrain from quoting any one part of it, and instead I will endeavour to express the deducible principles which appear to me to govern the decision of this case.

The *ratio decidendi* may, I think, be put in the form of three questions :—

1. Can the plaintiffs recover possession without disturbing the adoption ?

2. Is there any principle on which suits involving the issue of adoption or no adoption must, if of a declaratory nature, be brought within one period of time, but if involving relief based on that declaration, may be brought within another period of time ?

3. Are the words of the Limitation Act such as to denote exclusively a suit confined to a declaration that an alleged adoption is invalid in law or in fact never took place ?

(1) 13 I.A. 84 = 13 C. 308.

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[273] The first and second questions have been answered by the Privy Council in the clearest terms. They have said that when the defendant is in possession in the character of an adopted son, the *prima facie* title is with him, and until that is displaced, he ought to retain his possession. That is their answer to the first question.

The judgment further furnishes, in my opinion, a clear answer to the second of these questions, and that answer is in the negative. The principle involved in this answer was enunciated close on half a century ago by a learned Judge of the Sadar Divani Adalat of Bengal in the case of *Bhyrub Chunder Chowdhree* v. *Kalee Kishwur Raee* (1), where he says: "This conclusion appears to me the only correct one in principle; and were it at all relaxed in practice, a party might for years be assenting tacitly to a succession, and might yet, upon any family quarrel, revive a claim upon the mere accident of a long survival of a widow who had attempted to make no claim for herself in her lifetime."

The sound sense expressed in these words is abundantly confirmed by the enormous bulk of litigation which finds its origin in disputed adoptions. I pause here to point out that the principles involved in the first two questions are of universal application and do not depend upon the construction of any particular legislative enactment though I concede that their application may be excluded by words properly capable of that interpretation.

And this brings me to the third of the questions: Are the words of the Indian Limitation Act, 1877, such as to denote exclusively a suit confined to a declaration, that an alleged adoption is invalid in law, or in fact never took place, and to exclude a suit of which such a declaration forms a necessary part if it also seeks (as this suit does) possession or other relief?

For my own part I fail to find anything in art. 118 which calls for such a construction, nor can I see anything inconsistent between art. 118 and art. 141.

[274] If a plaintiff can recover possession without challenging an apparent adoption, then art. 118 is not in his way and obviously has no application. But if, on the other hand, a successful challenge of the apparent adoption is a necessary condition precedent to his claim for possession, then it appears to me to follow irresistibly that he must prevail in so much of his suit as seeks a declaration that the adoption is invalid before he can invite the Court to investigate the claim to possession, which can only arise if the adoption is out of the way. And if this be so, then it seems to me manifest that his suit quoad the declaration impugning the adoption falls within the precise terms of art. 118.

Speaking generally a suit, in my opinion, none the less falls within the description of a particular article because there is combined with it a prayer for relief which may be more aptly described by another article: in other words, the combination of several claims would not in general deprive each claim of its own specific character and description.

This may be illustrated by obvious instances. Thus I take it to be clear that a man can with the requisite leave combine in one suit a claim to establish his status as an adopted son, where his rights as such had been interfered with and a claim to recover possession of property, his title to which depends on a devise; and no one I imagine would, in so obvious a case, think of suggesting that the suit, so far as it sought a declaration that the adoption was valid, did not fall within art. 119. Similarly, a

(1) S. D. A. R. (Beng.) for 1850, 369.

man might combine in one suit a claim for a declaration that an alleged adoption was invalid, and as a separate matter, a claim to recover from the same defendant possession of self-acquired property of the adoptive father, the plaintiffs' title to which depended on assurance either *inter vivos* or testamentary, and in this case, too, I take it to be manifest that the suit, so far as it challenged the adoption, fall within art. 118.

I use these illustrations to establish the position that the language, neither of art. 118, nor 119, requires that the suit to which they are applicable should be confined to the claim which in those articles is used as descriptive of the suit. And if this be true of the language, then we knew from the answer to the **[275]** second of the three questions which I have formulated, there is no principle which demands a different result. If it were desired to find further support for this conclusion, it might, I think, be found in the language of art. 119 which may fairly be regarded in determining the true interpretation of art. 118. The suit to which art. 119 refers is one in respect of which time runs from the period "when the rights of the adopted son as such are interfered with," and that suit is described in the first column as one "to obtain a declaration that an adoption is valid." Now the starting point indicates circumstances which almost necessarily must give a claim to some measure of relief, at least to an injunction. But then it is provided by s. 42 of the Specific Relief Act (passed a few months before the Indian Limitation Act of 1877) that no Court shall make a declaration that a person is entitled to a legal character if, being able to seek further relief than a mere declaration of title to such character, he omits to do so.

The result, then, is that though the description of art. 119 refers only to a suit for a declaration, still for the reasons I have stated the suit must almost necessarily include a claim for relief.

How, then, can it be said that art. 119 refers only to those suits which ask for a declaration and nothing more? If it be conceded that art. 119 is not capable of this restricted and restrictive construction, it is, I think, no forced analogy to say that the same must be true of the sister art. 118.

I have now endeavoured to construe art. 118 in the light of the principles which appear to be established by *Jagadamba's* case, and it only remains for me to see whether there is anything in the later authorities binding on this Full Bench which support or overthrow the view I have expressed.

The first case is that of *Mohesh Narain Moonshi* v. *Taruck Nath Moitra* (1) which came to the Privy Council on appeal from the High Court of Calcutta, where it had been held the suit was barred both under art. 129 of the Limitation Act of 1871 and art. 141 of the Limitation Act of 1877.

The Privy Council came to the conclusion that it was unnecessary to form any opinion on the questions arising under art. 141, **[276]** and decided the case on art. 129 alone following *Jagadamba's* case and re-affirming the principles there enunciated. In the course of the argument, however, it had been suggested that the case was governed by the Indian Limitation Act, 1877, and that consequently *Jagadamba's* case had no application, and it was in reference to this argument that Lord Shand, who delivered the judgment of the Board, remarked: "It was suggested that the Act of 1871 having been superseded by the Act of 1877, the question of limitation should be determined with reference to the provisions of the

(1) 20 I. A. 30=20 C. 487.

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later statute, in which the language used is somewhat different, the suit there referred to, as necessary to save the limitation, being described as one "to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place." It seems to be more than doubtful whether, if these were the words of the statute applicable to the case, the plaintiff would thereby take any advantage."

This it is true is only a guarded expression of opinon, still it appears to me to indicate as the view of the Privy Council, that the changed phraseology had probably made no difference.

Nor should I havefelt any doubt that this was so had not a Divisional Bench of the Calcutta High Court in the recent case of *Jagannath Prasad Gupta* v. *Runjit Singh* (1) expressed with apparent certainty the view that Lord Shand's remarks had reference to the other circumstances of the case.

It appears to me that this view hardly does adequate justice to the logical sequence of the judgment in which the remark is contained, and notwithstanding the view expressed by the Calcutta High Court I read Lord Shand's language differently.

There is but one more decision to which I need refer: it is the case of *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar* (2). By the suit the plaintiff asked for a declaration of title and for possession, the defendant pleaded his adoption. From the Calcutta report it appears that "the High Court, taking into consideration the 118th article of schedule II of the Limitation Act (XV of 1877) and the decision in *Jagadamba Chowdhrani* v. [277] *Dakhina Mohun Roy Chowdhri* (I. L. R., 13 Cal., 308; L. R., 13 I. A., 84) that the art. 129, sch. II of Act IX of 1871, corresponding to art. 118 of the later Act, applied to all suits which could not succeed unless without an apparent adoption having to be displaced, held that the present case did not fall thereunder, but rather resembled *Raj Bahadoor Singh* v. *Achumbit Lal* (L.R., 6 I. A., 110), where the adoption had been made to the widow herself, and not to her husband."

Before the Privy Council it was argued by Mr. Doyne for the appellant that the suit was time-barred under art 118; he said: "The construction placed on the 118th article by reference to the law enacted in 1871 as interpreted by *Jagadamba's* case was that the limitation of six years applied to suits which could not succeed without displacing an apparent adoption." The judgment was delivered by Lord Shand and he deals with this argument of Mr. Doyne's as follows:—

"The appellant's counsel, founding on s. 118 of the schedule to the Limitation Act, argued that the limitation of six years from the date of the alleged adoption of the appellant barred the suit. It was maintained that the suit was one, in effect, to obtain a declaration that the adoption of the appellant was invalid, or had never in fact been made, and that six years had elapsed after the alleged adoption had become known to the respondent before the suit was instituted. If the adoption was really made by Bhuina Chowdhrain of a son to herself and not to her husband, which the High Court has held to be the true construction of the deed of adoption produced, the plea of limitation could have no application in this suit, which relates entirely to the husband's estate. But, in the opinion of their Lordships, there is another ground in respect of which this defence clearly fails, *viz.*, that it has not been proved that the alleged adoption did become known to the respondent till the death of

(1) 25 C. 354 (363).

(2) 22 I. A. 51 = 22 C. 609 (611).

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Bhuina Chowdhrain, which occurred within two years of the institution of the suit. It has been held by both Courts that the appellant, who is said to have been adopted about two years after the death of Kishan Lal Chowdhri, when he was about five years of age, had no possession until [278] after Bhuina Chowdhrain's death. So far as possession was concerned, the respondent had, therefore, no notice of the alleged adoption as long as Bhuina Chowdhrain lived. Further, there is no direct evidence that the respondent was in any way made aware of the appellant's alleged adoption until after her death. The only evidence to a different effect to which the appellant's counsel could refer in order to show the requisite knowledge was a passage in the respondent's own deposition in which, after a denial that the appellant had been adopted, he says: 'Had Bhuina Chowdhrain adopted the defendant, I must have known it,' on which it was said that his knowledge must be inferred, as it was proved that he was frequently in Bhuina Chowdhrain's house after the alleged adoption took place, and that in this way he must have been aware of it. It is clear that such evidence is plainly insufficient to prove the requisite knowledge, and the plea of limitation, therefore, fails."

It iss aid that this is not a binding decision, inasmuch as their Lordships held that art. 118 did not bar the suit. What was actually decided was, that the plea of limitation failed, and the basis of that decision was, that the period of limitation was that indicated by art. 118, or, in other words, that art. 118 governed the case. The judgment does not profess to proceed on an assumption made merely for the purposes of the decision, and I think it must be left for their Lordships alone to distinguish the case on the ground that has been suggested at the bar, if it be necessary. It certainly does not appear to me to be paying due respect to their Lordships' considered judgment—for such it was—to say that they either overlooked a point which must have been brought to their notice, or that without so expressing themselves they decided on an article of the Limitation Act which had no application. One cannot overlook, too, the fact, that the judgment in this case as well as in *Mohesh Narain's* case, where an argument had been advanced on the difference of language, was delivered by the same noble Lord; and that no less than three of their Lordships had been parties to one or other of the previous Privy Council decisions to which I have referred.

These are the only decisions of the Privy Council subsequent to *Jagadamba's* case in which this question of limitation has been [279] raised, and they both of them appear to me to support the view that the altered language of art. 118 has made no difference in the law of limitation applicable to suits where an apparent adoption is called in question.

It has been argued that this construction of the Act may lead to inconvenience and hardship, but the instances cited in support of this are for the most part more apparent than real, and it would not be hard to imagine cases where an opposite view of the Act would be attended with the same results. It would, I think, be profitless to discuss these conflicting hypothetical cases, for after all said and done the only result is a balance of inconveniences which in the view I take of the Privy Council decisions would in no case justify or require us to come to a different conclusion.

I would, therefore, to the question propounded in the reference answer that this case is governed by art. 118 of the Indian Limitation Act, 1877.

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CANDY, J.—I said nearly all that I have to say on this question in my judgment in *Fannyamma* v. *Manjaya Hebbar* (1). I would merely add, what does not appear in the report of that case, that the property in question in that case was admittedly ancestral. If, therefore, Nagabhatta had in fact adopted the defendant, and it was a valid adoption, then the devise in favour of the plaintiffs was void.

Further, I remarked in that case (p. 168):

"Mr. Shamrav, for appellants, referred to the judgment of the Privy Council in *Lachman Lal* v. *Kanhaya Lal* (2), but there is nothing in the judgment which really bears on the point at issue."

I erred in making that statement. A closer examination of the Privy Council judgment in question shows that their Lordships of the Judicial Committee held that such a case as the present would be governed by art. 118 of the Limitation Act of 1877. The plaintiff in that case sued within two years of the death of the childless widow, Bhuina, on whose death he claimed to inherit as the nearest *bandhu*.

[280] The defendant in possession defended the suit on the ground (*inter alia*) that he had been adopted by Bhuina under authority from her husband.

The Courts below found that the defendant had failed to prove that Bhuina had authority to adopt him to her husband, or that she had, in fact, so adopted him, but that she had adopted the defendant as *her* son, and that she retained her husband's estate down to her death. Counsel for the appellant-defendant argued before the Privy Council that the plaintiff's suit was time barred under the 118th article, sch. II of Act XV of 1877. On this Lord Shand, delivering the judgment of the Privy Council, said (p. 614 of I. L. R., 22 Cal.):

"The appellants' counsel, founding on s. 118 of the schedule to the Limitation Act, argued that the limitation of six years from the date of the alleged adoption of the appellant barred the suit. It was maintained that the suit was one, in effect, to obtain a declaration that the adoption of the appellant was invalid, or had never in fact been made, and that six years had elapsed after the alleged adoption had become known to the respondent before the suit was instituted. If the adoption was really made by Bhuina Chowdhrain of a son to herself and not to her husband, which the High Court has held to be the true construction of the deed of adoption produced, the plea of limitation could have no application in this suit, which relates entirely to the husband's estate. But, in the opinion of their Lordships, there is another ground in respect of which also this defence clearly fails, *viz.*, that it has not been proved that the alleged adoption did become known to the respondent till the death of Bhuina Chowdhrain, which occurred within two years of the institution of the suit."

I think that this is more than a mere *obiter dictum*, to the effect that admitting, for the sake of argument, that art. 118 applies, then as a fact defendant has failed to prove that plaintiff knew of the adoption. It is apparently taken to be beyond question that art. 118 would apply to the ordinary case of a reversioner seeking possession of an estate on the death of the widow, and being met by the plea of the defendant in possession **[281]** that he (defendant) had been to the knowledge of the plaintiff validly adopted by the widow as a son to her husband.

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(1) 21 B. 159.

(2) 22 I. A. 51 = 22 C. 609.

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This, then, is the state of the law as interpreted by the highest authority. Primarily the case is governed by art. 141 : but if the defendant in possession can plead—"I am to your knowledge or to the knowledge of your predecessor in title in possession as a son alleged to have been validly adopted by the widow, on whose death you claim possession," then the case is governed by art. 118.

This is the answer which I would return to the referring Bench.

It will be for that Bench to decide how precisely art. 118 is to be applied.

Were it not for the authority of the Privy Council I should be prepared simply, on the language of Act XV of 1877, to say that arts. 118 and 119 of sch. II apply in cases where a declaration only, and no consequential relief, is sought, and that arts. 140 and 141 apply when consequential relief is sought,—that is, when possession is claimed because the estate has fallen into possession or the female has died.

This was the view taken of the law under the old Act of 1859 : see for instance the judgment of the Calcutta Full Bench delivered by Peacock, C.J., in 1869 in *Sreenath Gangooly* v. *Mohesh Chunder Roy*(1). The same view was taken in Madras in 1874 in *Kotamarti Sitarammayya* v. *Kotamarti Vardhanamma*(2). This was the view of the present Law of Limitation taken by Edge, C. J., and Banerji, J., in 1895 in *Natthu Singh* v. *Gulab Singh* (3) having regard to the ordinary construction of the language of the Act. Tottenham and Ghose, JJ., had taken the same view in 1887. See *Lala Parbhu Lal* v. *Mylne* (4). On the other hand, I cannot resist the conclusion that the Privy Council do not so interpret the language of the Act ; and I must bow to that authority.

RANADE, J.—I am of opinion that art. 118 of the Limitation Act applies to the present suit. The appellant-plaintiff in his **[282]** plaint seeks to obtain a declaration that the respondent-defendant No. 1's adoption was invalid. Independently of other considerations, such a suit naturally falls under art. 118. The plaint, however, over and above this declaratory relief, seeks, other declarations, as also claims, injunctions and possession of the property in dispute. As this claim for possession is made in the right of his being the sole reversionary male heir of the deceased Timaji after the death of his widow Gangabai, appellant contends that the suit falls under art. 141. There have been several decisions of this Court, as also of the other High Courts, in which it has been held that where a person seeks to recover possession of immoveable property in right of his being reversionary heir on the death of the widow, the suit falls under art. 141, which permits a period of twelve years from the death of the widow, and if in such a suit a reversioner has also to secure a declaration of the invalidity of an adoption made by the widow, the suit is held not barred by the six years' limitation under art. 118. This was the view taken by a Division Bench of this Court in *Fannyamma* v. *Manjaya Hebbar*(5), in which case the earlier decisions of this Court are fully noticed—*Padajirav* v. *Ramrav* (6) ; *Kalgvada* v. *Lingavda* (7) ; *Revubai* v. *Nagapa* (8) ; *Harilal* v. *Bai Rewa* (9) ; *Abdul Rahim* v. *Kirparam*(10). In all these cases this Court has apparently adopted the view taken by the Allahabad High Court in several cases, where it held that arts. 118 and 119 only apply where the plaint is confined to a declaratory relief and does not include a

(1) 4 B.L.R. (F. B.) 3=12 W. R. (F. B.) 14. (2) 7 M. H. C. R. 351.
(3) 17 A. 167 (171). (4) 14 C. 401 (417). (5) 21. B. 159.
(6) 13 B. 160. (7) P. J. (1889), p. 86. (8) P. J. (1892), p. 34.
(9) 21 B. 376. (10) P. J. (1891), p. 79.

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claim by a reversioner for the recovery of the possession of immoveable property—*Basdeo* v. *Gopal* (1); *Ganga Sahai* v. *Lekhraj Singh* (2), *Ghandharap Singn* v. *Lachman Singh*(3); *Natthu Singh* v. *Gulab Singh* (4). The Calcutta High Court took the same view of the scope of art. 118—*Lala Parbhu Lal* v. *Mylne* (5). These authorities favour the view that where the relief sought is only declaratory, and the plaint seeks [283] to invalidate or establish a disputed adoption, art. 118 must apply, but this article does not govern where the claim is made for possession, in which latter case art. 140 or 141 would govern the period of limitation. The High Court of Madars, on the contrary, has taken an exactly opposite view—*Parvathi Ammal* v. *Saminatha Gurukal* (6).

This difference of view is apparently due to the construction placed by the several High Courts on certain decisions of the Privy Council, notably the decision in *Jagadamba* v. *Dakhina Mohun* (7); followed later on in *Mohesh Narain* v. *Taruck Nath* (8); and *Luchman Lal* v. *Kanhya Lal* (9). The first of these decisions was passed on the interpretation of art. 129 of the Limitation Act of 1871. That article provided for suits brought to establish or set aside an adoption. Their Lordships of the Privy Council held that the words "to set aside adoption," meant suits in which the validity or invalidity of an adoption was brought into question, and it was further held that such latter suits included all suits where a party cannot succeed without displacing an apparent adoption in virtue of which the opposite party was in possession. This decision was followed in *Mohesh Narain* v. *Taruck Nath* and *Luchman Lal* v. *Kanhya Lal*. The principle underlying these decisions was expressly stated by their Lordships to be that of allowing only a moderate time within which delicate subjects like adoption disputes should be brought in Civil Courts for disposal. The shortening of the period of limitation from twelve to six years in the Limitation Act of 1877 was obviously made by the Legislature in accordance with the views expressed by their Lordships of the Privy Council. In the decisions which were passed under the new Act, sufficient attention does not appear to have been given to these decisions under Act IX of 1871, and, apparently under a misconception of the decision in *Raj Bahadur Singh* v. *Achumbit Lal* (10), it came to be held that the new Act altered the old law, and made a distinction not recognized by the Act of 1871, between [284] declaratory suits and suits for possession by reversioners. The decisions of the Privy Council recognised no such distinction. Suits for a declaration under Act IX of 1871 in matters of adoption were held to embrace all suits where a suitor cannot succeed without displacing an adoption in virtue of which the opposite party was in possession. This principle has been applied on general grounds in cases where the obstacle in the way of the recovery of possession is not a disputed adoption, but is a deed of gift, or agreement which must be impugned, and if not successfully impugned or set aside within the smaller period of limitation provided by law, must bar the suit for possession—*Raghubar Dyal Sahu* v. *Bhikya Lal*(11); *Hasan Ali* v. *Nazo* (12); *Mahabir Pershad* v. *Hurirhur Pershad* (13). This principle must govern a claim where, as in the present case, a reversioner claims property after first setting aside an adoption. This last can only be done by him within the

(1) 8 A. 644. (2) 9 A. 253. (3) 10 A. 485.
(4) 17 A. 167. (5) 14 C. 401. (6) 20 M. 40.
(7) 13 I.A. 84=13 C. 308. (8) 20 I.A. 30=20 C. 487. (9) 22 I.A. 51=22 C. 609.
(10) 6 I.A. 110. (11) 12 C. 69 (72). (12) 11 A. 456.
(13) 19 C. 629.

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time of six years allowed by law under art. 118. Any other course involves the obvious inconvenience of leaving it to the party interested to determine the period of limitation within which he should sue, which could never have been intended by the Legislature. The appellant can only succeed in his suit for possession if he can prove that his suit is not barred under art. 118.

TYABJI, J.—I concur generally in the judgments just delivered by my learned colleagues. I am clearly of opinion that art. 118 of the Limitation Act (XV of 1877) applies to this suit so far as it seeks for a declaration that the adoption of the defendant is invalid. I am also of opinion that art. 141 applies in so far as the suit merely seeks to recover the property of Timaji apart from the question of the defendant's adoption. If the prayer for declaring the invalidity of the defendant's adoption had been from the first omitted from the plaint, or if the plaintiff does not now rely on that portion of the prayer and if he ask the Court to treat it as struck out from the plaint, the suit would, in my opinion, be simply a suit by the plaintiff as reversioner, and would, therefore, be governed in the first instance entirely by art. 141. If, however, the defendant proves by way of defence his own adoption and the plaintiff's knowledge of such adoption more than six years before the filing of [285] the suit, the plaintiff would then, in my opinion, be barred from disputing the fact or the validity of such adoption by art. 118. Whether, therefore, the plaintiff prays for a declaration of the invalidity of the defendant's adoption in the first instance or whether he makes no mention of the adoption at all, and the adoption is set up by the defendant as a bar to the plaintiff's success, the result, so far as limitation is concerned, will be substantially identical. The substantial question for the decision of the Court in each case being the fact of the validity of the defendant's adoption—no matter in what form or by whom the question of the adoption is first raised—the plaintiff's right to dispute the validity of such adoption must be determined by art. 118. I can see no inconsistency between art. 141 which applies to a suit by a reversioner without more and art. 118 which is the period fixed for disputing the validity of an adoption after the fact of such adoption has been brought to the notice of the plaintiff or of any person from or through whom he claims. If the plaintiff can succeed as reversioner without disputing the validity of the defendant's adoption, he has twelve years for so doing under art. 141, but if he must set aside the adoption before he can succeed, then he has six years from the date of his knowledge of such adoption. It may, no doubt, be hard that reversioners should be compelled to file a suit in the life-time of the widow for the purpose of setting aside the adoption before their own right has become perfected or the estate has become actually vested in themselves by the death of the widow. On the other hand, it would not be less hard on the adopted son that the fact of the validity of his adoption should be impeached years after it actually took place, and, it may be, after all evidence in its support has disappeared. Acts of Limitation are in their very nature more or less arbitrary, and I do not think that we should be justified in straining the language of the Act or in trying to explain away the significance of the decisions of the Privy Council in order to provide what may, under certain circumstances, be possibly a more equitable period of limitation. The reasoning of the Privy Council and the principles clearly enunciated by their Lordships in the cases of *Jagadamba* v. *Dakhina Mohun* (1) and *Mohesh Narain* v. *Taruck Nath* (2)

(1) 13 I.A. 84 = 13 C. 308.

(2) 20 I.A. 30 = 20 C. 487.

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seem to me [286] to apply with quite as much force to the Limitation Act of 1877 as to that of 1871. I have of course read and most respectfully considered the decisions of the various High Courts bearing on this point and which have been referred to and discussed with so much ability at the bar. I must, however, confess that I am not able to see that there is any sufficient difference either in the language or in the structure of the present Limitation Act to make the decisions of the Privy Council on similar provisions of the Act of 1871 inapplicable or to distinguish them from the present case. Indeed the cases *Mohesh Narain* v. *Taruck Nath* and *Lachman Lal* v. *Kanhaya Lal* (1) seem to me almost conclusive authorities to the contrary. I would, therefore, answer the question put to us by the Division Bench as follows, namely—

(1) Article 118 applies to every suit where the validity of the defendant's adoption is the substantial question in dispute whether such question is raised by the plaintiff in the first instance or arises in consequence of the defendant setting up his own adoption as a bar to the plaintiff's success.

(2) Article 141 applies to the ordinary simple case of a reversioner where the validity of the adoption is not the substantial point in dispute, or where the plaintiff can succeed without impugning the validity of the defendant's adoption.

RUSSELL, J.—I also concur in the judgments which have been delivered. The plaintiff by his plaint herein specifically claims (*inter alia*) that the adoption of the defendant should be set aside as invalid, and consequently *upon the pleadings* the suit should be held to come within art. 118 of the Limitation Act. But even if the plaint were not expressly so framed, it seems to me that we must follow the decisions of the Judicial Committee in *Jagadamba* v. *Dakhina Mohun* (2) and *Mohesh Narain* v. *Taruck Nath* (3), in neither of which cases does it appear that there was a specific prayer with regard to adoption as there is in the present case.

Apart from the pleading it is clear in this case that the plaintiff must be, in the words of the Judicial Committee, "embarrassed by the defendant's adoption: and he cannot recover the [287] property without disturbing the adoption." It is an obstacle in his way which in order to succeed he must either get over or get past. The Judicial Committee have said that the true principle of the Legislature is that only a moderate time within which such delicate and intricate questions as those involved in adoption shall be brought into dispute is to be allowed, so that it shall strike alike at all cases in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession. The question of adoption is a question of status, and it is important, no doubt, that the limitation applicable to such questions should be short. But so also is the question of legitimacy or illegitimacy with reference to which, as is pointed out in *Jagannath Prasad* v. *Ranjit Singh* (4), the anomaly exists that a period of twelve years is applicable. As regards *Jagannath Prasad* v. *Ranjit Singh*, it is to be observed that the plaintiff there did not specifically claim to have the adoption in question declared valid, and the learned Judges say that "it is by no means clear that the same considerations apply to art. 119 as to art. 118," see p. 360. I would answer the

(1) 22 C. 609.
(2) 13 I.A. 84 = 13 C. 308.
(3) 20 I.A. 30 = 20 C. 487.
(4) 25 C. 354.

question referred to us by saying that the plaintiff's suit is barred by the Law of Limitation, and the judgment in *Parvathi Ammal* v. *Saminatha Gurukal* (1) is directly in point and to be followed.

In accordance with the above answer the Division Bench confirmed the decree.*

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APPELLATE CRIMINAL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

QUEEN-EMPRESS v. BAKU AND ANOTHER.* [9th October, 1899.]

Indian Penal Code (Act XLV of 1860), ss. 108-A, 372—Disposing of a minor for immoral purposes—Abetment—Offence committed out of British India—Jurisdiction—Offence not triable except with the certificate of Political Agent or sanction of Government—Criminal Procedure Code (Act V of 1898), s. 188.

A minor girl under the age of sixteen years was taken by accused No. 1, under the direction of accused No. 2, from Sholapur to Tuljapur (in the Nizam's territory), and there dedicated to the goddess Amba, with intent or knowing it to be likely that the minor would be used for purposes of prostitution.

[288] The District Magistrate of Sholapur convicted accused No. 1 of an offence under s. 372 and accused No. 2 of abetment of the offence under ss. 372 and 108-A of the Indian Penal Code, and sentenced them each to six months' rigorous imprisonment.

Held, that as the offence of the disposal of the minor took place out of British India, the Magistrate had no jurisdiction to try the offence, in the absence of a certificate of the Political Agent or the sanction of the Local Government as required by s. 188 of the Code of Criminal Procedure (Act V of 1898).

Held, also, that accused No. 2 was not guilty of abetment, and s. 108-A of the Indian Penal Code had no application to the present case.

Mere intention not followed by any act cannot constitute any offence, and an indirect preparation which does not amount to an act which amounts to a commencement of the offence does not constitute either a principal offence or an attempt or abetment of the same.

The intention of either of the accused while they were staying at Sholapur did not constitute any offence, and their removal with the girl to Tuljapur did not by itself constitute an abetment.

APPEAL by the Local Government from an order of acquittal passed by E. M. Pratt, Sessions Judge of Sholapur.

Piri was a girl under the age of sixteen years, and living under the care and protection of her grandmother Baku and her grandfather Tukaram.

The charge against Baku was that she took the minor from Sholapur to Tuljapur, a town in the Nizam's territory, and there dedicated the girl to the temple of the goddess Amba with intent or knowing it likely that the minor would be employed or used for purposes of prostitution. She was, therefore, charged with committing an offence under s. 372 of the Indian Penal Code (Act XLV of 1860).

Tukaram was charged with abetment of the offence, in having directed Baku to dispose of the minor for an immoral purpose.

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* [For a complete text of the Final Judgment of the Division Bench [see 1 Bom. L. R. pp. 817—821—ED.]

† Criminal Appeal No. 336 of 1899.

(1) 20 M. 40.

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The District Magistrate of Sholapur found both the accused guilty of the offences charged, and convicted them under ss. 372, and 372 and 108-A of the Penal Code, 1860, respectively, and sentenced them each to six months' rigorous imprisonment.

On appeal the Sessions Judge reversed the convictions and sentences, holding that as the offence of disposal of the minor [289] took place at Tuljapur out of British India, the District Magistrate had no jurisdiction to try the offence, in the absence of a certificate of the Political Agent or the sanction of the Local Government as required by s. 188 of the Criminal Procedure Code (Act V of 1898). The Sessions Judge also held that the removal of the minor from Sholapur to Tuljapur was, at the most, a preparation for the commission of the offence, and as such did not constitute either the principal offence, or the abetment thereof. He, therefore, acquitted the accused.

Against this order of acquittal the Local Government appealed.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

D. A. Khare, for accused.

JUDGMENT.

RANADE, J.—This is an appeal by Government against the decision of the Sessions Judge of Sholapur, who reversed the conviction and sentence passed by the District Magistrate under s. 372, and ss. 372 and 109, on the accused Baku and Tukaram, respectively.

Baku was the grandmother, and Tukaram was the grandfather, of a minor girl, named Piri, under sixteen years of age, and under their care. The charge against Baku was that she took Piri from Sholapur to Tuljapur to dedicate her to the goddess Amba, with intent or knowing it to be likely that the girl would be employed or used for the purpose of prostitution, and Tukaram was charged with having directed Baku to do so, in consequence of which Piri was made an *aradhin murli*, who are intended to lead generally a life of prostitution. Both the accused were found guilty of the offences charged under s. 372, and ss. 372 and 109, and were sentenced to six months' rigorous imprisonment. In appeal, the Sessions Judge of Sholapur held that as the offence of the disposal of the minor took place at Tuljapur, where the dedication actually took place, and as Tuljapur was out of British India, the District Magistrate had no jurisdiction, in the absence of the certificate or sanction required under s. 188, Criminal Procedure Code, 1898, to try the offence. The Sessions Judge was also of opinion that the removal of the [290] minor from Sholapur to Tuljapur was, at the best, a preparation for the commission of the offence, and mere preparation was not indictable. He accordingly reversed the conviction and acquitted and discharged the accused.

The Government Pleader on behalf of Government contended (1) that the District Magistrate had jurisdiction to try the accused; (2) that the removal of the minor with the intention of disposing of her by dedication at Tuljapur was an offence triable in British India; (3) that as Tukaram was found to have instigated the other accused in Sholapur to commit the offence, the District Magistrate had at least jurisdiction to try the offence of abetment committed by him in British India.

The points for consideration are—(1) whether the District Magistrate had jurisdiction to try both or either of the accused; (2) whether the offences charged were proved as against both or either of them. As regards the first point, it is clear that the actual dedication of the girl Piri took place at Tuljapur in the Nizam's territory, and the offence, if

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any, must be held to have taken place there. The Magistrate's charge, however, shows that he was of opinion that the offence of the disposal of the minor took place at Sholapur, where the intention to dedicate the girl was first formed. This, however, seems to be an erroneous view. In a Madras case—*Bapu* v. *The Queen* (1)—a tindal was entrusted with goods at Mangalore to be taken to Calicut. While on the way to the latter port, the tindal deviated from the journey, and took the goods to Goa, and sold the same there. He was tried at Mangalore, and convicted by the Sessions Judge, but the conviction was set aside on two grounds: (1) that though the intention and deviation took place on the high seas, that did not confer jurisdiction, as the conversion took place at Goa, where the offence must be held to have taken place; and (2) that for want of a certificate from the Political Agent, the trial and conviction were illegal. In *Queen-Empress* v. *Kathaperumal* (2) this earlier decision was followed in a case where the offence was committed in the French territories; even when the District Magistrate, who tried the case, was himself the Political Agent, who had to certify under **[291]** s. 188. The absence of a certificate was held to be a defect which could not be cured under s. 532. Of course, where there is no Political Agent, a native Indian subject may be tried in British India for an offence committed beyond the limits of British India under the sanction of the Local Government—*Queen Empress* v. *Daya Bhima* (3); *Queen-Empress* v. *Shiek Abdool Rahiman* (4); *Dhadphale* v. *Gurav* (5); *Imperatrix* v. *Abdul Husen Abdul Kadir* (6). In *Empress of India* v. *Sarmukh Singh* (7) the prisoner was a native Indian subject, and a soldier subject to the articles of war, and he was tried for murder committed at Cyprus. The circumstances of the case were peculiar, and there was admittedly no Political Agent who could certify under s. 188. The absence of a certificate under s. 188 was held to be absolutely prohibitive in a case where the offence took place in Nepal—*Queen-Empress* v. *Ram Sundar* (8).

It was, however, contended that, under the amended s. 108-A, an abetment in British India by the accused Tukaram of an offence committed by the accused Baku in foreign territory might be tried in British India. That amendment was no doubt suggested by the decision of this Court in *Queen-Empress* v. *Ganpatrao Ramchandra* (9), where it was held that such abetment was not punishable. The facts of the present case, however, clearly distinguish it from the circumstances of the case noted above. There was a distinct separate offence committed in British India by the accused charged in *Queen-Empress* v. *Ganpatrao Ramchandra*, which, under the amended s. 108-A, would now make him indictable for abetment. In the present case, beyond the mere intention and indirect preparation, there was no distinct offence by way of instigating the act committed out of British India. Mere intention not followed by any act cannot constitute an offence, and an indirect preparation, which does not amount to an act which amounts to a commencement of the offence, does not constitute either a principal offence, or an attempt or abetment of the same. The intentions either of **[292]** Baku or Tukaram, while they were staying at Sholapur, did not constitute any offence, and Baku's accompanying the girl to Tuljapur by the orders of Tukaram did not by itself constitute an abetment. Tukaram was, therefore, not guilty of abetment

(1) 5 M. 23. (2) 13 M. 423. (3) 13 B. 147. (4) 14 B. 227.
(5) 6 B. 122. (6) Cr. Rul. No. 37 of 1895 (Rat. Unr. Cr. Cases 773).
(7) 2 A. 218 (8) 19 A. 109. (9) 19 B. 105.

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under s. 108A. The District Magistrate, in the absence of the certificate or sanction, had thus no jurisdiction to try the accused, and the Sessions Judge's decision on this point of law must be upheld.

It is not necessary, under the circumstances, to discuss the second question which relates to the merits. The accused were admittedly guardians of the minor girl. Mr. Khare's argument, that the evidence did not show that the girl was below sixteen years of age, is opposed to the medical evidence, and the girl's own statement, and the suggestion made by one of the accused himself. The distinction sought to be made between prostitution and concubinage is also without any basis. Both the accused admitted that they knew that the life most likely to be led by the girl in consequence of the dedication would be an immoral life, being of the same kind as that of the *Bhavins*, or dancing girls, or *Basvis*, noticed in *Reg.* v. *Jaili Bhavin* (1), *Reg.* v. *Aruna Chellam* (2), *Shrinivasa* v. *Annasami* (3), *Queen Empress* v. *Basava* (4) and *Queen-Empress* v. *Tippa* (5), among whom married life was impossible, and prostitution the usual means of livelihood. Consenting knowingly to such a dedication with all that it involved certainly constituted the offence of a disposal of the minor under s. 372. The defect caused by the absence of the Political Agent's certificate vitiated the prosecution, and the District Magistrate had no jurisdiction to try the case. The Sessions Judge was, therefore, right in reversing the sentence and discharging both the accused.

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[293] CRIMINAL REVISIONAL.

Before Sir L.H. Jenkins, Chief Justice, Mr. Justice Candy and Mr. Justice Ranade.

IN RE DADABAI JAMSEDJI.* [9th October, 1899.]

Indian Railways Act (IX of 1890), s. 110—"Compartment"—Meaning of the word.

Per JENKINS, C.J., and CANDY, J.—Good sense requires that to the word "compartment" in certain sections of the Indian Railways Act (IX of 1890) the quality of complete separation should be attributed, and it is with that force that it is used in s. 110.

Per RANADE, J.—The word "compartment" is used in s. 110 of Act IX of 1890 in the same sense in which it is used throughout the Act, and does not necessarily mean a completely partitioned division.

THIS was an application under s. 435 of the Code of Criminal Procedure (Act V of 1898).

A complaint was lodged before S.B. Spencer, Acting Fourth Presidency Magistrate, under s. 110 (6) of the Indian Railways Act (IX of 1890), charging the accused with smoking in a non-smoking compartment of a second class railway carriage without the consent of the complainant who was a fellow-passenger with him in the same compartment.

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* Criminal Revision, No. 169 of 1899.

(1) 6 B. H. C. Cr. 60. (2) 1 M. 164. (3) 15 M. 41.
(4) 15 M. 75. (5) 16 B. 737.

(6) Section 110, cl. 1 of Act IX of 1890 provides as follows:—"If a person without the consent of his fellow-passengers, if any, in the same compartment, smokes in any compartment except a compartment specially provided for the purpose, he shall be punished with fine, which may extend to twenty rupees."

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The accused was further charged with insulting the complainant and hurting his religious feelings under ss. 298 and 504 of the Indian Penal Code.

The Magistrate discharged the accused on all the charges, holding that the accused and the complainant, though they were fellow-passengers, were not in the same compartment within the meaning of s. 110 of the Indian Railways Act (IX of 1890).

Against this order of discharge the complainant applied to the High Court under its criminal revisional jurisdiction.

Macpherson (with him *R. B. Paymaster*), for complainant.

There was no appearance for the accused.

[294] JENKINS, C. J.—In this case a rule has been granted calling on the accused to show cause why the order of the Magistrate should not be set aside.

It seems that the complainant and the accused were travelling in the same carriage on the B. B. and C. I. Railway and that the accused smoked without the complainant's consent. For this he has been prosecuted under s. 110(1) of the Indian Railways Act, 1890.

That sub-section is in these words :—(His Lordship read the section and continued:—) The case was heard before Mr. Spencer, who held that the complainant and accused, though they may have been fellow-passengers, were not in the same compartment and discharged the accused. On this an application was made to this Court, and the rule to which I have referred was granted by Parsons and Ranade, JJ., who at the same time called for a report. In compliance with this Mr. Spencer has furnished us with a very careful and clear statement of the reasons which induced him to decide as he did. From his report and from what has been stated before us it seems that the portion of the carriage in which the complainant and accused were travelling was separated from the rest of the carriage by a complete partition, and that this portion was itself cut off into two sections, the dividing line between them being a partition about three feet high which served as a common back for seats in each section. This is shown by the diagram attached to Mr. Spencer's report. Now this three-feet partition manifestly would not screen passengers in one of these two sections from the sight of those in the other ; nor would it in any away interrupt the passage of smoke from the one section to the other. Therefore it is difficult to regard such a division as a compartment that would comply with the provisions of the Legislature requiring the reservation for the exclusive use of females of one compartment at least of the lowest class of carriage forming part of the train and that it should be furnished with a closet. When one bears in mind the customs intended to be respected by this provision it would be impossible to suppose that a section such as I have indicated could be taken to be a compartment within the meaning of s. 64.

[295] I now pass to consider whether the complainant can be deemed to have been in different compartments for the purpose of s. 110.

It appears to me to be obvious that the purpose of the section is to secure that no one shall smoke in a railway carriage so as to be an annoyance to any fellow-passenger. But I have already shown that the partition between the two sections of the carriage in question in no manner helped to avert this annoyance.

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It requires no great effort of imagination to see that a smoker may cause even greater annoyance to those who may be seated in the adjoining section even than to those travelling in the same one as himself. Under these circumstances is there anything which compels me to ascribe to the word 'compartment' a meaning which would result in my having to hold that the complainant and the accused were in separate compartments?

If I turn to the dictionaries I find myself under no such obligation, but I concede that this can be taken as no way conclusive as to the meaning of the word in this Act or perhaps I should say in this section.

Mr. Spencer has pointed out with perfect truth that the Act contains no definition of the word, but he would find a clue to its meaning in the 63rd section of the Act coupled with the practice of the companies. I allude to their practice of exhibiting inside or outside of each section, though divided from its neighbour only by a partial partition, the maximum number of passengers which may be carried in it.

But there are two objections to this method of reasoning, each of which seems to me to be equally destructive. In the first place it treats the B. B. and C. I. Railway Company as the infallible interpreter of this Act, and next it attributes to the Company an interpretation which does not necessarily follow from the premises.

Because they notify how many can be seated in each section, it by no means follows that they say each section is a compartment, nor would their practice otherwise be a failure to comply with the provisions of the Act, for the maximum permissible for [296] the compartment would be the sum of the maximum permissible for each section of the compartment.

It did at one time seem to me that s. 109 might support the view that each section though divided by a partial partition was a compartment within the meaning of the Act, but on the whole I think it does not. The truth is that the word 'compartment' is not used throughout the Act with the same precise force, and whereas certain provisions of the Act would be satisfied if there be a partial partition, there are other provisions in which it appears to me that good sense requires that we should attribute to compartment the quality of complete separation, and it is with that force that in my opinion it is used in s. 110. It results, then, from this that in my judgment the complainant and accused were in different parts of the same compartment, and that consequently the accused was not entitled to smoke without the complainant's consent.

I pass to consider whether the offence was of so trivial a nature that it falls within s. 95 of the Indian Penal Code.

I think it cannot be so treated: to a smoker it may perhaps appear too trivial to be an offence to smoke even in a place where it is forbidden and despite the protest of one whose consent is necessary. Still that is not the view of the Legislature, for it has provided otherwise, and I, therefore, think the case should, in my opinion, go back to the Magistrate to be tried. As to the other charge, I would not disturb the conclusion of the Magistrate, who is eminently qualified to form an opinion on such a subject.

RANADE, J.—This was an application for the revision of an order of discharge passed by the Fourth Presidency Magistrate in a complaint brought by the applicant under ss. 504 and 298 of the Indian Penal Code, 1860. A further charge was added at the instance of the complainant's pleader under s. 110 of the Indian Railways Act. The latter charge was dismissed on the ground that the compartment in which the complainant was travelling was not the same as that in which the accused was seated.

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and that even if accused had smoked in that compartment, he committed no offence, and that under the circumstances no other offence was disclosed. The [297] applicant seeks a revision of the order of discharge on the ground (1) that the Magistrate was in error in holding that the complainant was sitting in a different compartment and (2) that even if there was no offence under the Railways Act, the Magistrate ought to have inquired into the complaint under ss. 504, and 298, in respect of which it was not necessary that the complainant and the accused should be sitting in the same compartment.

It is clear that in so far as the offence under s. 110 of the Railways Act is concerned, the question turns upon the definition of the word "compartment." Section 110 provides that if any person, without the consent of his fellow-passenger, if any, in the same compartment, smokes in any compartment except a compartment specially provided for that purpose, he shall be punished with fine. The accused must, therefore, be shown to have been sitting in the same compartment when he smoked to the annoyance of the complainant. The Magistrate held, on the evidence, that the accused was sitting in a separate compartment. Mr. Macpherson, who appeared as counsel for the complainant, contended that the Magistrate was in error in his interpretation of the words "same compartment" in s. 110. He contended that a compartment implies that the separating partition should be a complete partition, which was admittedly not the case in the division separating the place where the complainant was sitting from the place where the accused is alleged to have been smoking. Section 64 was referred to as showing that under it provision has to be made of one compartment for the exclusive use of females, and it was suggested that for such a purpose, the separating partition must be complete. This is, however, only an inference. In these carriages the height of the half shut-up backs would be about four feet and the protection intended for the females is thus practically ensured in the half shut-up compartment, and such compartments are so used occasionally. The use of the word "compartment" in the other sections shows clearly that the separating partition of compartments might be half as in the present case. Section 63, for instance, requires that the number of passengers to be carried shall be exhibited outside or inside each compartment. The [298] words "to seat ten persons" are admittedly written in each of the half of a division which makes a compartment, whether the compartment is shut out completely or otherwise. The word occurs in a similar connection in s. 93. Section 95 refers to s. 64 noticed above. Section 102 has reference to s. 63, and it punishes railway servants who compel passengers to enter compartments in which a maximum number of passengers are seated. This obviously does not refer to completely partitioned divisions only, but intends half shut-out compartments as well. Sections 109 and 119 use the word "compartment" similarly.

Reading all the sections together it is clear that the word "compartment" must be understood as having been used in the same sense throughout, and s. 69 does not necessarily suggest the word was used in different senses in different places.

The Magistrate's interpretation of the word "compartment" was, therefore, correct, and though the place in which complainant was sitting was not completely partitioned off from the place where accused was smoking, it cannot be said that they were sitting in the same

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compartment under s. 110. The complaint under the Railway Act was, therefore, very properly dismissed.

As regards the offence under the Indian Penal Code, the Magistrate's report shows that he dismissed that complaint under s. 95 of the Code, as the matter complained of was too trivial to constitute an offence.

I would dismiss the application, as also the companion case No. 168.

The Judges having differed, the case was by order of the Chief Justice referred to Mr. Justice Candy for opinion under s. 429 of the Criminal Procedure Code (Act V of 1898), who recorded the following judgment :—

JUDGMENT.

9*th October*, 1899. CANDY, J.—This case has been referred to me under s. 429 of the Criminal Procedure Code (Act V of 1898). I have not thought it fit to direct any further hearing.

On the case as laid before me I deliver my opinion that the view taken by the learned Chief Justice is correct, and that the [299] complainant and the accused were " in the same compartment " as provided by s. 110 of the Indian Railways Act, 1890.

There is no definition in the Act of the word " compartment." It is possible that it may be used in different senses in various sections of the Act. In the Oxford New Dictionary " compartment" is " a division separated by partitions : a part partitioned off." In each of the second class carriages of the B. B. and C. I. Railway used between Bandora and Bombay there are (as shown in the plan attached to Mr. Spencer's report) three main compartments. They are divisions separated from each other by partitions right up to the roof of the carriage. Each division is thus completely screened off from its adjoining division. Each division is thus a compartment. But each of such divisions is further sub-divided by a partition which is about three feet high. Each sub-division or section is in itself a compartment, for it is a part of the original compartment, which is partitioned off and it has its own door for entrance and egress. For the purpose of exhibiting the maximum number of passengers for each compartment (ss. 63, 93, 102 and 109) the Railway administration treat each section or sub-division as a " compartment." They may be perfectly right in so doing : it is not inconsistent with the language of the section. But if they follow the same line with regard to ss. 64, 95 and 119 (reservation of compartments for females) or 110 (smoking), then their action is not consistent with the intention of the Legislature. A thing is not within the statute unless it is within the intention of the statute. Obviously the intention of the Legislature is that in certain cases there shall be a compartment reserved for the exclusive use of females, so that they may have privacy and be unmolested by males. A section or sub-division of a compartment, as I have described above, is certainly not such a compartment. So, too, with smoking: it is obvious that in a full compartment of twenty persons, if one or more of the passengers in section or sub-division A, can smoke without regard to the assent or dissent of the passengers in section or sub-division B, then the provisions of s. 110 are a farce. We are not compelled so to read the statute. The case will accordingly go back to the Magistrate with the direction set out by the Chief Justice, *viz.*, that the order [300] of the Magistrate be reversed, and the case sent back for trial on the charge under s. 110 of the Railways Act of 1890. The finding of the Magistrate on the charges under ss. 504 and 298 of the Indian Penal Code in Application No. 169 of 1899, and under ss. 298 and 109 of the Indian Penal Code in Application No. 168 of 1899 is not disturbed.

24 B. 300=1 Bom. L. R. 821.

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24 B. 300=1 Bom. L.R. 821.

Before Mr. Justice Parsons and Mr. Jutice Ranade.

TANIRAM (*Original Plaintiff*), *Appellant*, *v.* GAJANAN (*Original Defendant* No. 3), *Respondent*.* [14th November, 1899.]

Transfer of Property Act (IV of 1882), ss. 87, 88, 89 and 93—Mortgage—Decree for sale of mortgaged property—Default in payment on the date fixed in the decree—Redemption—Power to enlarge the time.

In a suit brought by a mortgagee for sale of the mortgaged property, a decree was passed on 27th July, 1895, directing that the mortgagor should pay the mortgage debt within six months; and that in default his right of redemption should be foreclosed and the mortgagee should be at liberty to sell the property.

On the 27th July, 1898, the mortgagee applied for an order absolute for sale.

On the 11th October, 1898, the mortgagor applied for permission to pay into Court the amount of the decree.

Held, that the application could not be granted. The case fell within ss. 88 and 89, and not within s. 87 or 93, of the Transfer of Property Act (IV of 1882.) The money not having been paid within the appointed time, the Court was bound to pass an order absolute for sale; it had no power to enlarge the time for payment.

[Diss., 31 C. 373 (377).]

SECOND appeal from the decision of R. S. Tipnis, District Judge of Khandesh.

On the 7th July, 1893, one Taniram sued Dhaklu and Khandu to recover Rs. 706 as the amount due under a mortgage by sale of the mortgaged property.

Gajanan was made as a party defendant, on the ground that he had purchased the equity of redemption.

On 27th July, 1895, a decree was passed directing that Gajanan should pay to the (plaintiff) mortgagee Rs. 92 and interest at 12 per cent. per annum from the date of the mortgage till the date [301] of payment within six months from the date of the decree, and that, in default, the right of redemption should be foreclosed, and Taniram should be at liberty to sell the property.

On 27th July, 1898, the decree-holder applied for an order absolute for sale.

Pending this application Gajanan applied on 11th October, 1898, for permission to pay into Court the amount of the decree. The Subordinate Judge refused to take the amount tendered, on the ground that he had no power to enlarge the time fixed by the decree, and that the right to redeem was foreclosed.

On appeal this order was reversed by the District Judge for the following reasons :—

"It does not appear that Taniram has hitherto taken any steps to obtain an order under s. 93 of the (Transfer of Property) Act in the nature of a decree absolute. Taniram's *darkhast* for sale of the mortgaged property in pursuance of the decree *nisi* is obviously premature—I. L. R., 22 Bom. 771. Until the decree is made absolute, Gajanan has a right not only to pay up the decreed amount, but to apply for extension of time for payment. The lower Court was bound to receive the amount tendered by Gajanan."

* Second Appeal No. 500 of 1899.

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On these grounds, the District Judge directed that the amount offered by Gajanan should be received, and further steps be taken in the matter according to law.

Against this order, Taniram, the decree-holder, appealed to the High Court.

M. V. Bhat for appellant.

M. B. Chaubal for respondent.

JUDGMENT.

PARSONS, J.—The citation by the District Judge of s. 93 of the Transfer of Property Act and of the ruling in the case of *Nandram* v. *Babaji* (1) is in no way relevant to the present case, as they apply only to a suit for redemption. The suit in the present case was one for sale, and the decree ordered that Gajanan should pay to Taniram, within six months from its date, Rs. 92, and that, in default, Gajanan's right of redemption would be foreclosed and Taniram would be at liberty to sell the property. The decree was dated 27th July, 1895. No money was paid, and on the 27th July, 1898, Taniram asked for an order absolute for sale. **[302]** On the 11th October, 1898, Gajanan asked to be allowed to pay into Court the amount of the decree. The Subordinate Judge thought the payment too late, and refused to accept it. The District Judge thought that "until the decree was made absolute, Gajanan had a right not only to pay the decreed amount, but to apply for extension of time for payment." No doubt this would be so if either s. 87 or 93 of the Transfer of Property Act applied. We cannot, however, apply either of those sections, but must apply ss. 88 and 89 of the said Act. This being so, when the money was not paid within the appointed time and Taniram applied to the Court for an order absolute for sale, it was obligatory on the Court to pass an order that the property be sold; and it had no power to postpone the day appointed for the payment.

For this reason we reverse the order of the District Judge and restore that of the Court of first instance with costs on the respondent throughout.

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24 B. 302=2 Bom. L.R. 649.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice and Mr. Justice Tyabji.

JAMSETJI DADABHOY BARIA AND OTHERS (*Original Defendants*), *Appellants v.* DADABHOY DAJIBHOY BARIA (*Original Plaintiff*), *Respondent.** [23rd February and 2nd March, 1900.]

Appeal—Decree for account—Further directions—Time for appeal—Letters Patent, s. 15—Civil Procedure Code (Act XIV of 1882), s. 591.

A decree was passed in a partnership suit directing (*inter alia*) the taking of an account. The Commissioner having taken the account and made his report, an order was made, on further directions, varying it in certain respects. Subsequently a final decree was passed, founded in part on the order on further directions. An appeal was filed against the final decree, in which objection was taken to the order on further directions. It was contended that no appeal having been

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* Suit No. 617 of 1891. Appeal No. 1015.

(1) 22 B. 771.

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filed against the order on further directions, as might have been done under s. 15 of the Letters Patent, so much of the appeal as arose out of that order had been barred by lapse of time.

Held, that the order passed on further directions was not appealable under Chap. XLI of the Civil Procedure Code (Act XIV of 1882), and that it fell, therefore, under the concluding portion of s. 591 of the Civil Procedure [303] Code, and any error in it might subsequently be set forth as a ground of appeal against the final decree.

Per JENKINS, C.J.—Assuming that the order on further directions was a judgment within the meaning of s. 15 of the Letters Patent, and as such appealable, the contention of the respondent cannot prevail; as that would not deprive the appellants of their right to appeal under the Code.

[R., 9 O.C. 80 (85).]

APPEAL from Russell, J.

The plaintiff in this suit asked for a declaration that the defendants held certain liquor licenses as his nominees; that they were his partners in a liquor shop and tavern situate at Parel Road, Byculla; and that the plaintiff and defendants respectively were entitled to an equal half share of the profits. He prayed further that the partnership accounts might be taken, the rights under the said licenses sold, and the partnership declared dissolved. The suit came on for hearing before Mr. Justice Farran, who passed a decretal order dated 26th January, 1893, in favour of the plaintiff, and directed the Commissioner to take the ordinary partnership accounts and also to make a special report as to how the licenses could be most advantageously dealt with.

The Commissioner took the accounts as directed, and submitted his report dated the 26th November, 1896. To this report both the plaintiff and the defendants filed exceptions.

The suit having been called on on exceptions to the Commissioner's report, Mr. Justice Strachey on the 1st March, 1898, passed an order allowing three of the plaintiff's exceptions and disallowing the fourth, and disallowing all of the defendants' exceptions.

With these amendments the report of the Commissioner was confirmed. Further directions were reserved. At the instance of the defendants, the suit was again called on for further directions, and on the 15th of November, 1898, Mr. Justice Strachey by an order of that date refused to direct a further reference to the Commissioner.

On the 8th day of December, 1898, the final decree in the suit was passed by Mr. Justice Russell. This decree was based in part on the decretal order of Farran, J., and in part on the orders of Strachey, J., of the 1st March, 1893, and the 15th November, 1898, already mentioned.

[304] Against this decree the defendants filed an appeal. In their memorandum of appeal, the defendants took sixteen objections to the order of the 1st March, 1898, two objections to the order of the 15th November, 1898, and twelve to the decree dated the 8th December, 1898.

In the course of the argument of the appeal, the respondent's counsel contended that so far as the appeal impugned the part of the decree founded on the orders of the 1st March and 15th November, 1898, against which they might have appealed under s. 15 of the Letters Patent, it was barred by limitation, the memorandum of appeal not having been filed till the 9th of January, 1899.

Rivett-Carnac with *Raikes*, for the appellants.

Lang (Advocate General), *Macpherson* and *Inverarity*, for the respondents.

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JUDGMENT.

JENKINS, C.J.—This is an appeal from a decree of Mr. Justice Russell in part founded on an order of Strachey, J., of the 1st March, 1898, varying the Commissioner's report. It is urged that, so far as the appeal impugns the part of the decree founded on the order, it is barred by the lapse of time. It is conceded by the respondent that this order is not one of those indicated in s. 588 of the Civil Procedure Code (Act XIV of 1882), but it is argued that, having determined the rights of the parties, it is a judgment within the meaning of s. 15 of the Letters Patent—*Justices of the Peace for Calcutta* v. *The Oriental Gas Company*(1), and as such appealable, and that as no appeal was presented from that order within the limited time, it cannot now be questioned on the appeal from Mr. Justice Russell's decree.

For the present purpose I will assume that the order was a judgment; but even then, I think, the argument cannot prevail. Section 591 of the Civil Procedure Code (Act XIV of 1882) provides as follows:—"Except as provided in this chapter, no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction; but, if any decree be appealed against, any error, defect or irregularity in any such order **[305]** affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."

It is clear that inasmuch as the order of Strachey, J., was not appealable under Chap. XLI of the Civil Procedure Code, it falls within the concluding provision of s. 591, and consequently any error in it may be set forth as a ground of objection in the memorandum of appeal against Mr. Justice Russell's decree, and, in my opinion, this is so, though there may have been a right of appeal from the order under the Letters Patent, a point which for the purposes of my opinion I have assumed (but without deciding it) in the respondent's favour.

Attorneys for the appellants:—Messrs. *Ardesir, Hormusji and Dinsha.*

Attorneys for the respondents:—Messrs. *Little and Co.*

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24 B. 305 = 2 Bom. L.R. 18.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

SUKALAL AND OTHERS (*Plaintiffs*) *v.* BAPU SAKHARAM (*Defendant*).*

[21st November, 1899.]

Hindu law—Interest—Damdupat—*Bond purporting to be executed in adjustment of a past debt—Principal for the purpose of* damdupat *is the amount of the bond.*

In the case of a bond purporting to be executed in adjustment of a past debt, the principal for the purpose of the rule of *damdupat* is the amount of such bond, and not the balance of the unpaid principal actully advanced on an earlier bond.

Per JENKINS, C.J.—Neither the texts, the commentaries, usages or the cases forbid the conversion by subsequent agreement of interest into capital, nor is there any such prohibition involved in the rule of *damdupat* as it has been formulated.

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* Civil Reference No. 10 of 1899.

(1) 8 B. L. R. 433 = 17 W. R. 364.

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APPELLATE CIVIL.

24 B. 305 = 2 Bom. L.R. 18.

REFERENCE by Rao Sabeb R. T. Kirtane, Subordinate Judge of Malegaon in the Nasik District, in his Small Cause Jurisdiction under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was made in the following terms :—

Plaintiffs sue to recover Rs. 49-15-0 due on a bond passed by the defendant for Rs. 28-8-0. The bond purports to be executed in adjustment of a past debt, **[306]** though plaintiffs state that a fresh advance of 8 annas was made on the date of its execution. The rest of the consideration (Rs. 28) of the bond sued on is made up of interest (Rs. 14) and principal (Rs. 14) advanced to the defendant on an earlier bond executed on the 8th May, 1892. The sum claimed in the present suit exceeds the principal sum due from defendant on the earlier bond, and the well-known rule of *damdupat* lays down that no greater arrears of interest can at one time be recovered than the balance of principal due from a debtor.

The Subordinate Judge, therefore, submitted the following question :—

Whether, in the case of a bond purporting to be executed in adjustment of a past debt, the principal for the purposes of the rule of *damdupat* is the amount of such bond, or the balance of unpaid principal actually advanced to defendant on an earlier bond?

The opinion of the Subordinate Judge was that the principal for the purposes of the rule of *damdupat* was the principal or the balance of the principal actually advanced to a debtor.

Vasudev G. Bhandarkar (*amicus curiæ*), for the plaintiffs.

H. C. Koyaji (*amicus curiæ*), for the defendant.

JUDGMENT.

JENKINS, C. J.—This is a reference for our decision, under s. 617 of the Code of Civil Procedure, of the question whether in the case of a bond, purporting to be executed in adjustment of a past debt, the principal for the purpose of the rule of *damdupat* is the amount of such bond, or the balance of unpaid principal actually advanced to defendant on an earlier bond. The question thus referred is expressed in terms more general than the section contemplates: we will accordingly limit our decision to facts set out in the statement. In our opinion the rule of *damdupat* does not preclude the plaintiffs recovering Rs. 49-15-0.

In support of the opposite view, reliance has been placed by Mr. Koyaji principally on the text of Gautama, "The principal can only be doubled by length of time after which interest ceases," and a text of Manu, VIII, 151, "In money transactions interest paid at one time (not by instalments) shall never exceed the double (of the principal)." This has been interpreted by the commentators to mean that the whole sum payable at one time, *i.e.*, the interest together with the principal, shall not exceed the double of the sum lent.

[307] These texts do not, in so many words, forbid the capitalization of interest, but impose a limit on the amount of arrears recoverable. There are, however, texts which appear to deal precisely with this point. Thus Vrihaspati says: "After the time for payment has passed, and when the interest ceases on becoming equal to the principal, the creditor may either recover his debt or require a new writing in the form of *wheel-interest*." The words here rendered "wheel-interest" is *chakravriddhi*, which according to Wilson's Glossary has the meaning of compound interest or interest on interest.

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The commentary by Jagannatha Tarkapanchanana on the words "*or require a new writing*" is "that is a written contract in the form of wheel-interest. Making the doubled sum the principal and stipulating interest afresh, he may require a new writing after cancelling the former note." Then, again, there is a text of Katyayana "Twice the sum lent should always be received by the creditor if the debt be of long standing; but if the debtor do not pay twice the principal when interest has ceased, the creditor may again exact an agreement for interest." On this text Jagannatha says: "In that case the creditor may again exact interest; making the former debt together with interest his present principal, he may stipulate interest afresh; and this is the wheel-interest mentioned by Vrihaspati. Such wheel-interest is of three kinds as declared by Manu." Then, again, Manu, VIII, 154, 155, has a bearing on the point, for it is there said: "154. He who cannot pay the debt *at the fixed time*, and wishes to renew the contract, may renew it in writing, with the *creditor's* assent, if he pay all the interest then due;

"155. But if for some *unavoidable accident* he cannot pay the whole interest, he may insert as *principal* in the renewed contract so much of the interest accrued as he ought to pay." (See Colebrooke's Digest, Vol. I, Ch.VI, s. 257, p. 243.)

And then, again, there is a text of Vrihaspati as follows:—"As the original debt, together with the *arrear* of interest, becomes a *new* principal, when wheel-interest is received after the debt is doubled, so does the use of a pledge *forborne* become a *new* principal in a similar case." (Colebrooke, Vol. I, Ch. VI, s. 259, p. 245.)

[308] Other texts may be referred to as contemplating compound interest. Thus "special forms of interest are compound interest, periodical interest"—Gautama, XII, 34, (Sacred Books of the East, Vol. II, p. 239).

On the other hand, in Manu, VIII, 153, it is said: "Let him not take interest beyond the year, nor such as is unapproved, nor compound interest, periodical interest, stipulated interest, and corporal interest"—Sacred Books of the East, Vol. XXV, 153.

From the note to that text, however, it would seem that "according to '*some*' quoted by Medhatithi and Narada the last four kinds of interest are not forbidden."

It will thus be seen that according to these texts there is a preponderance of authority in favour of the view that interest can be capitalized.

We now pass on to consider the Mayukha.

In chap. V, s. I, para. 7, it is said in explanation of the previous discussion on loans: "Narada:—'of interest on loans this is the paramount (rule), but the rate customary in the country where the debt was contracted may be different.' *Sarvabhauma*, *i.e.*, paramount or universal. And this relates to a debt, doubled, or more than doubled by interest in a single transaction; for if at a different time, a fresh transaction be entered into with a different person or even with the same person with a less or greater amount and the like, in such a case, even the highest allowable interest may receive addition." This shows that the rule of *damdupat* does not interfere with a fresh transaction, and to that extent yields to an agreement between the parties.

This is made still clearer by a passage in the section on recovery of debts, Ch. V, s. IV, para. 5. "Bribaspati (says): The creditor may (either) recover a debt, the interest on which has ceased (owing to) the limit having been exceeded, or (he) may obtain a writing allowing compound interest.

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Purnavadhau (means) when doubling or the like has taken place. Hence the possibility of interest ceasing. *Udgrahayet* (means) should take. *Chakravriddhi* means the calculation of interest on the interest added to [309] the principal." Stopping here, then, it seems that capitalization of interest is supported by the texts of the codes, it is sanctioned by the Mayukha, and Jagannatha's opinion is in its favour. Turning to usage, a sanctioned source of law, Steele in his treatise on the Laws and Customs of Hindoo Castes at p. 265 says: "Compound interest is not usually specified, but from the custom of making up accounts at Deepoulee and entering the balance of principal and interest as a total sum bearing interest in a new account, it is in fact paid." From what follows, however, it would seem that it is liable to be struck off by panchaits if the circumstances of the debtor so demand.

It only now remains to be seen whether there is in the cases anything that would stand in the way of the plaintiff's claim.

Mr. Koyaji has relied on two cases for that purpose—*Dagdusa* v. *Ramchandra* (1) and *Narayan* v. *Satvaji* (2), but we find in neither of these cases any principle that supports his contention. On the other hand, in *Dhondu* v. *Narayan* (3) the rule of *damdupat* is expressed in terms which would not forbid the capitalization of interest, and it is on the rule so expressed that the two cases mentioned by Mr. Koyaji professes to proceed. In the case reported in the first Bombay High Court Reports there was an agreement for conversion of interest into principal, and though effect was not given to it, the ground of the decision was, not that the agreement contravened any rule of Hindu law, but that the agreement was not properly stamped. In *Ramconnoy* v. *Johur Lall Dutt* (4), Mr. Justice Wilson had both these cases brought to his attention, and the bent of his opinion seems to have been that the rule of *damdupat* has properly nothing to do with the legality or illegality of any contract, but is rather a rule of limitation. If this be the true view, it furnishes a complete answer to the question under consideration. It is, however, unnecessary to express any opinion on this: it is enough to say in no case does it ever seem to have been suggested that arrears of interest cannot by a subsequent adjustment be capitalized, nor is there any principle deducible from the cases brought to our notice which involves such a result. To sum up, neither the texts, the commentaries, [310] usage or the cases forbid the conversion by subsequent agreement of interest in arrear into capital, nor is any such prohibition involved in the rule of *damdupat* as it has been formulated. We do not overlook the text in Manu which condemns compound interest. It no doubt seems to be in conflict with other and more explicit texts, but the difference may be more apparent than real. We are not in a position to speculate on the full force of the original, but it may be that the text in Manu is directed against compound interest under an antecedent agreement and was not dealing, as the other texts are, with a subsequent agreement after the accrual of arrears. This distinction is not fanciful, and in proof of this we need only allude to the English rule of equity, which at one time prevailed, and according to which compound interest was allowed on a subsequent settlement of the balance of an account, though it was disallowed under an *a priori* agreement—*Eaton* v. *Bell* (5); *Ex parte Bevan* (6). We of course do not rely on this rule as any authority for the decision of the present

(1) 20 B. 611. (2) 9 B.H.C.R. 83. (3) 1 B. H.C R. 47 (49).
(4) 5 C. 867. (5) (1821) 5 B. and Ald., 34. (6) (1803) 9 Ves. 223.

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case, but as illustrating an apposite legal principle. It is for these reasons that we are of opinion that the rule of *damdupat* furnishes in this case no defence to the plaintiffs' claim, and we would so answer the question referred to us for decision.

Order accordingly.

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24 B. 310 = 1 Bom. L. R. 836.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

DIWALIBAI (*Plaintiff*) *v.* SADASHIVDAS (*Defendant*).*
[21st November, 1899.]

Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), ss. 27 and 33—Decree passed by a Subordinate Judge invested with the jurisdiction of a Small Cause Court—Finality of such decree—Appeal—Civil Procedure Code (Act XIV of 1882), ss. 622 and 646-A—Reference.

A Subordinate Judge, invested with the jurisdiction of a Court of Small Causes, tried a suit under his Small Cause Court powers, and passed a decree in plaintiff's favour. The defendant appealed against this decree, and the appellate Court, being of opinion that the suit was not of a nature cognizable [311] by a Court of Small Causes, reversed the decree and remanded the case to the Subordinate Judge for trial under his ordinary jurisdiction. Thereupon the Subordinate Judge made a reference to the High Court under s. 646-A of the Code of Civil Procedure (Act XIV of 1882).

Held, that the reference was not authorized by the provisions of s. 646-A of the Code, as it applied to a case before judgment The High Court could, however, deal with the matter under s. 622 of the Code.

Held, also, that the suit having been tried by the Subordinate Judge in the exercise of his jurisdiction as a Judge of a Court of Small Causes, the decree was final, and not appealable to the District Court. The only remedy open to the aggrieved party was to apply to the High Court under s. 25 of Act IX of 1887.

REFERENCE by Rao Saheb K. N. Dalal, Second Class Sudordinate Judge of Nandurbar, under s. 646-A of the Code of Civil Procedure (Act XIV of 1882).

The reference was as follows :—

"On the 29th of September, 1898, this Court decided suit No. 150 of 1898 as a suit cognizable by it as the Provincial Small Cause Court.

"An appeal had been preferred against its judgment to the District Court.

"In obedience to the requisition of the appellate Court, the record and proceedings of this Small Cause Court suit had been sent to it.

"On the 10th August last the Joint First Class Subordinate Judge, without submitting the record under s. 646-B., para. 1, to the High Court, decided the appeal No. 208 of 1898, the judgment of which is with the record of this case.

"On the 31st August last this Court had taken up this case for consideration in obedience to the order of the appellate Court in its judgment.

"On account of certain preliminary objections of the pleader of the original plaintiff, this Court doubted whether it had before it the judgment of a properly constituted appellate Court which has set aside the decree of this Provincial Small Cause Court.

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* Civil Reference No. 12 of 1899.

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"After hearing the arguments of the pleaders on either side this Court as a Provincial Small Cause Court thought it expedient for the ends of justice to solicit the opinion of the Honourable [312] Judges of the Bombay High Court, to which this Provincial Small Cause Court is subordinate, with respect to its decision in the Small Cause Court Suit No. 150.

"The points upon which the opinion of the Honourable High Court is solicited are two in all, *viz.*:—

A. Whether the judgment of the appellate Court in appeal No. 208 of 1898 against the judgment of this Provincial Small Cause Court in suit No. 150 of 1898, is the judgment of a legally constituted appellate Court within the purview of the Provincial Small Cause Courts Act or any other Act in force in British India.

B. In case their Lordships' opinion be in the negative, whether this Provincial Small Cause Court is bound to act according to it as directed by the said appellate Court.

"My individual opinion about the questions involved in A and B is in the negative, for the reasons given below.

"According to s. 27 of the Provincial Small Cause Court Act all its decrees and orders but those referred to in s. 24 of the said Act are final. The only order which can be made the subject-matter of appeal before the District Court is the order referred to in s. 588 (29) of the Civil Procedure Code. According to s. 25 the High Court is the only tribunal which is empowered to pass the order of the kind embodied in the judgment of the appellate Court (District Court). Under s. 646-B the District Court is at the instance of the party required to submit such a case to the High Court instead of itself deciding it. It is for the purposes of 'this section' that a Court subordinate to it is bound to comply with any of its requisitions touching the record or information. I do not think that the Provincial Small Cause Court is, with the exception noted above, subordinate to it in its judicial capacity in the sense in which it is to the Honourable High Court.

"The very authority—*Bhagvantrao* v. *Ganpatrao*, I.L.R., 16 Bom., 267—which is cited in the appellate judgment shows that it was the Honourable High Court and not the District Court which had set aside the judgment of the Provincial Small Cause Court. I do fully admit that, in respect to administrative control, [313] this Provincial Small Cause Court is subordinate to the District Court. If the District Court had the jurisdiction to hear and dispose of the appeals against the decision of the Provincial Small Cause Court on other subjects than those referred to in s. 588 (29), s. 27 as well as s. 25 of the said Act are entirely futile, and there remains no distinction between the jurisdictions of the two Courts under the Indian Act XIV of 1869 (the Bombay Civil Courts Act) and Act IX of 1887 (Provincial Small Cause Courts Act).

"For these reasons I feel that the judgment of the District Court in appeal No. 208 is not legal. As it is not legal I feel that this Provincial Small Cause Court is not legally bound to act according to it. It cannot affect the original decree in suit No. 150. So long as it is not disturbed by the judgment of the properly constituted appellate Court, I shall not be acting legally if I was to hear the contention which is *res judicata*."

The reference was argued before a Division Bench (Jenkins, C.J., and Candy, J.).

Ganpat S. Rao, *amicus curiæ*, for plaintiff.—The Subordinate Judge was competent to make this reference under s. 646-A of the Civil Procedure

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Code, after his decree had been reversed and the case remanded for retrial. Assuming that the reference was not properly made, this Court can interfere under s. 622 of the Code. The District Court had no jurisdiction to interfere with the decree in appeal. The suit having been tried as a Small Cause Suit, the decree is final under s. 27 of Act IX of 1887. Under s. 33 of the Act the same Court, when invested with two jurisdictions, is to be treated as two different Courts. That being so, the decree is the decree of a Court of Small Causes; no appeal lay to the District Court. The appellate Court has, therefore, acted illegally in setting aside the decree.

N. V. Gokhale for defendant.—Section 646-A of the Code of Civil Procedure would not authorize a reference to this Court if it were held that the decree was final. It is only when the case has not proceeded to judgment, and the Court entertains a **[314]** doubt as to its jurisdiction to take cognizance of the case, that a reference can be made under the section.

JUDGMENT.

JENKINS, C.J.—We cannot deal with this under s. 646-A, which applies to a case before judgment. We cannot, therefore, deal with the reference. But we can under s. 622 deal with the order of the Subordinate Judge, A. P. His order was clearly wrong. The case having been tried by the Subordinate Judge with Small Cause Court powers, which is a different Court from that of the Subordinate Judge exercising his ordinary powers (s. 33 of Provincial Small Cause Courts Act), no appeal lay to the District Court. The defendant, who wished to appeal to the District Court, should have been told to apply to the High Court under s. 25 of the Provincial Small Cause Courts Act. This is the course which should now be taken by the party aggrieved by the decision of the Subordinate Judge with Small Cause Court powers.

We set aside the order of the Subordinate Judge, A. P., dated 10th August, 1899.

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24 B. 314=1 Bom. L R. 837.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

DAGDU JAITRAM, DECEASED, BY HIS HEIR HIS SON KHUSHAL (*Original Defendant*), *Appellant v.* CHANDRABHAN BIN SHIVRAM MARWADI AND OTHERS (*Original Plaintiffs*), *Respondents.** [23rd November, 1899.]

Civil Procedure Code (Act XIV of 1882), ss. 244, 549 and 647, explanation—Execution—Appeal by defendant against the order granting execution—Appellant required to give security for the costs of the appeal and of the original suit.

The Court can require an appellant from an order made under s. 244 of the Civil Procedure Code (Act XIV of 1882) in execution of a decree to give security for the costs of the appeal and of the original suit.

SECOND appeal from the decision of J. B. Alcock, District Judge of Nasik, dismissing an appeal against an order passed by Rao Bahadur D. G. Gharpure, First Class Subordinate Judge, in execution of a decree.

[315] The plaintiffs obtained a decree against the defendant for possession of certain immoveable property and applied for execution. The

* Second Appeal No. 563 of 1899.

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24 B. 314 = 1 Bom. L.R. 837.

defendant objected to the execution on the ground of fraud on plaintiffs' part in getting the decree. The Court overruled the defendant's objection and granted execution. The defendant appealed, and the appellate Court, on the application of the plaintiffs (respondents) under s. 549 of the Civil Procedure Code (Act XIV of 1882), called upon the appellant (defendant) to furnish due security for the costs of the appeal and the original suit before proceeding with the appeal. Two months' time was granted for furnishing the security. Against the said order requiring the defendant to furnish security, he presented an application to the High Court for revision under s. 622 of the Civil Procedure Code (Act XIV of 1882). Before the disposal of the application by the High Court, the Judge dismissed the defendant's appeal which was pending before him, as no security was furnished within two months. Against the order dismissing the appeal the defendant preferred the present second appeal.

N. P. Patankar for the appellant (defendant).—The appeal before the Judge was not an appeal from a decree in a suit, but from an order in the matter of an application. The order was a decree in an application and not in a suit. The expression 'of the original suit' in s. 549 of the Civil Procedure Code has, therefore, no application in the present case. The order, therefore, should have been confined to the costs of the appeal, or, at the most, to the costs of the appeal in addition to the costs of the original application for execution. We submit that the word "suit" should, in this case, be interpreted to refer to the application made before the Subordinate Judge. Suit should be understood to mean such proceedings in which an order has been made by the Court of first instance and an appeal against that order. Under the circumstances of the present case the term "suit" cannot be taken to refer to the original suit the decree in which is sought to be executed. For the purposes of appeals under s. 244 of the Civil Procedure Code, the words 'of the original suit' must be taken to mean 'of the original application' also.

[316] The next point is that s. 549 of the Civil Procedure Code does not apply to applications in an execution proceeding. The explanation added to s. 647 expressly excludes such applications.

Rao Bahadur *Ghanasham N. Nadkarni*, for the respondents (plaintiffs).—The explanation to s. 647 of the Civil Procedure Code lays down that applications for execution of decrees are proceedings in suits. Section 549 is, therefore, applicable. The explanation to s. 647 also shows that execution proceedings are simply the continuation of the original suit. Therefore the costs of the original suit would include the costs of the execution proceedings.

The application under s. 622 cannot be maintained, because an order of dismissal under s. 549 is appealable.

JUDGMENT.

JENKINS, C. J.—The only point in this case is, whether the Court can require an appellant from an order under s. 244 of the Civil Procedure Code, to give security for the costs of the appeal and of the original suit. It is contended that the Court has no such power, on two grounds. First, it is said that proceedings in execution are excluded from the operation of s. 647 by the explanation to it, and that as a result neither s. 549 nor Ch. XLI, of which it forms part, is applicable to an appeal from an order in execution. But the answer to this is clear; there is no necessity to have recourse to s. 647. Chapter XLI deals with appeals from decrees, and by s. 2 of the Code decree means (among other things) an order determining

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any question mentioned or referred to in s. 244, so that it is clear that Ch. XLI and s. 549 (of which it forms part) is applicable to an appeal from an order under s. 244. The other ground on which the appellant relies is that security for costs of the original suit cannot be ordered except on an appeal from a decree in the original suit, and in any case not in an appeal from an order in execution. But I fail to see, in the arguments that have been advanced, any reason to withhold from the words of the section their clear and manifest meaning.

It has been argued for the respondents that the costs of the original suit include costs of execution, and there is much to be said [317] in favour of that view. As, however, the point does not, under the circumstances of the case, arise for decision, I refrain from expressing any opinion on it. From the conclusion at which I have arrived, it follows that the order of the lower appellate Court must be confirmed and the appeal dismissed with costs. The appellant will have liberty to apply to the lower appellate Court for re-admission of the appeal on furnishing the necessary security for costs.

CANDY, J.—I am of opinion that s. 647 does not apply; these execution proceedings are proceedings in the suit, the order refusing stay of execution was a "decree," and, therefore, an appeal lay, and s. 549 applies without any reference to s. 647 or any other section. I am also of opinion that the words in s. 549 "or of the original suit" must refer primarily to the original suit in which the decree was passed, in execution of which the order appealed against was passed. They may also refer to the costs recited in the order in the execution proceedings, which are proceedings in the suit. In the present case the order appealed against was without mention of costs, but this fact did not prevent the District Judge from demanding costs of the original suit. This is the only point which has been raised. I would, therefore, dismiss with costs both the appeal and the application for the exercise of extraordinary jurisdiction.

Appeal dismissed.

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24 B. 317 = 2 Bom. L. R. 139.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice and Mr. Justice Ranade.

VITHALRAO KRISHNA VINCHURKAR (*Original Plaintiff*), *Appellant v.* RAMRAO KRISHNA VINCHURKAR (*Original Defendant*), *Respondent*; AND RAMRAO KRISHNA VINCHURKAR (*Original Defendant*), *Appellant v.* VITHALRAO KRISHNA VINCHURKAR (*Original Plaintiff*), *Respondent.**

[27th November, 1899.]

Hindu law—Deceased nephew—Inheritance—Uncles of whole blood and half blood—Preference—Manu—Mitakshara—Mayukha—Viramitrodaya—Smriti Chandrika—Madanpariijat—Dayabhag.

For the purpose of inheritance, an uncle of the whole blood is not entitled to preference over one of the half blood.

[318] One Bhagwantrao, a minor, died leaving him surviving two paternal uncles, one of whom was an uncle of the whole blood and the other of the half blood. The nephew and the uncles were found to be divided from each other.

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* Cross Appeals Nos. 81 and 106 of 1898.

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Held, that the two uncles were entitled to inherit the property of their deceased nephew in equal shares.

Samat v. *Amra* (1) considered. *Suba Singh* v. *Sarafraz Kunwar* (2) not followed.

[Cons., 28 M.L.J. 1=1915 M.W.N. 53=17 M.L.T. 87=26 Ind. Cas. 757; R., 24 B. 563 (586)=2 Bom.L.R. 721; 26 B. 710 (715)=4 Bom. L.R. 527; 20 Ind.Cas. 304 =25 M.L J. 8=13 M L.T. 445=(1913) M.W.N. 448; D., 17 Bom. L R. 315.]

24 B. 317=2 Bom. L.R. 139.

CROSS appeals from the decision of Rao Bahadur Chandulal Mathuradas, First Class Subordinate Judge of Nasik, in Suit No. 270 of 1896.

The plaintiff sued for a declaration that he was the sole heir of his deceased nephew Bhagwantrao Narsingrao in respect of his moveable and immoveable property, and that the defendant had no claim whatever to it, or, in the alternative, to have it declared that the plaintiff was his deceased nephew's heir in respect of such part of his property as he was entitled to, alleging that the nephew died a minor on the 21st March, 1896; that his estate, both moveable and immoveable, was in the possession of the guardian of his person and the administrator of his property; that the plaintiff being an uncle of the full blood of the deceased, he was his sole heir in respect of his property; and that the defendant was a step-uncle of the deceased, and had, therefore, no right to his estate, yet he objected to the plaintiff's recovering possession of the estate from the administrator, who was ready to hand it over to the party really entitled to it.

The defendant answered, in substance, that the plaintiff could not ask for a mere declaratory decree without suing for possession of the property; that he (defendant) and his deceased nephew Bhagwantrao being undivided, he alone was entitled to succeed to the property of the deceased by right of survivorship; that though the plaintiff was uncle of full blood and the defendant uncle of half blood of the deceased, still as the Hindu law made no difference between the rights of a full and a step paternal uncle, the plaintiff could under no circumstances be the sole heir of the deceased; that a half of the property in dispute belonged to the defendant alone; that if the plaintiff was entitled to any share in it as the heir of Bhagwantrao he could claim [319] only a fourth part and the remaining three parts belonged to him; that if the plaintiff were to be declared the sole heir of the deceased, still as the defendant had a share in the property of the deceased as it stood at the time of his death, the plaintiff could not be declared to be the sole owner of it; and that the estate of the deceased, both moveable and immoveable, being in the possession of the administrator, he was a necessary party.

The Subordinate Judge found that the plaintiff was entitled to sue for a declaration of title to the property without asking for consequential relief; that he was not the sole heir of the deceased Bhagwantrao on the ground of his being paternal uncle of the whole blood; that the defendant was the sole heir of the deceased in respect of a part of his property only; that the defendant had no separate share in his own personal right to the property in dispute; and that the administrator was not a necessary party. A decree was, therefore, made in the following terms:—

For these reasons I declare that the plaintiff and the defendant are entitled jointly to succeed as his heirs to the deceased Bhagwantrao's immoveable property consisting of inami village lands and cash allowances in question, other inami and mirasi lands, and the five houses and the two

(1) 6 B. 394.

(2) 19 A. 215.

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outstanding debts left joint by the partition deed of June, 1884; and that the plaintiff is also entitled to succeed as his heir to a half share in the deceased minor's private property consisting of houses (including open grounds), his separate share in the Vinchur Bag, and his moveable property of every description, including his private outstandings, ornaments and other articles, and excluding the ancestral outstanding debts which were left joint between the deceased minor's father and the defendant at the partition of 1884 already referred to; and order that the rest of the plaintiff's claim is rejected hereby. As the plaintff's claim is partly allowed and partly disallowed, I direct that the costs of the suit, including those incurred by the plaintiff as well as those incurred by the defendant, be borne equally by the parties.

Both parties preferred cross appeals.

Macpherson with *Setlur* and *Daji A. Khare*, for the plaintiff Vithalrao.

Branson with *Narayan G. Chandavarkar* and *N. B. Pendse*, for the defendant Ramrao.

A summary of the arguments is given in the judgment of Ranade, J.

JUDGMENT.

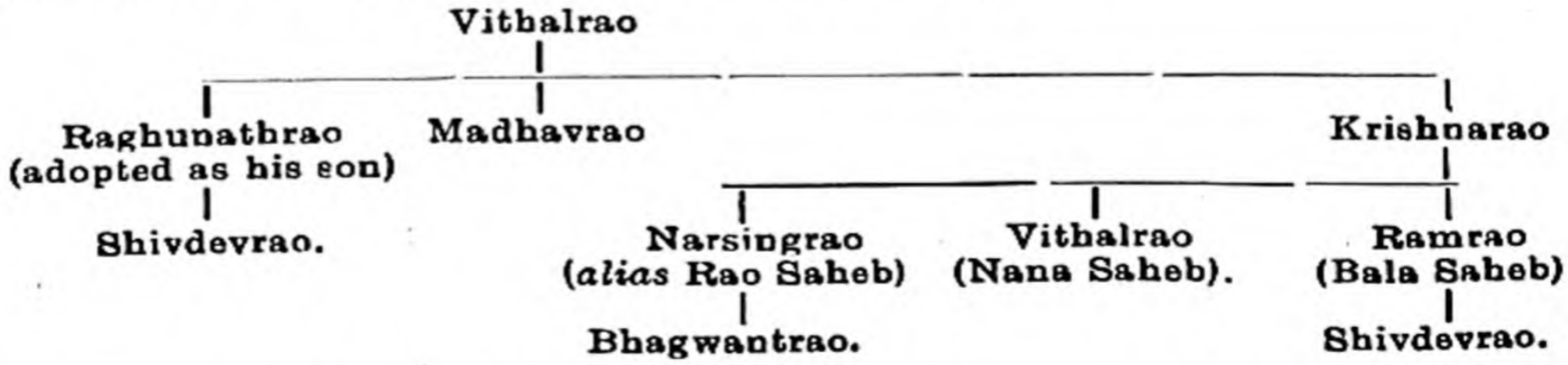
[320] JENKINS, C. J.—The plaintiff is the half-brother of the defendant, and by this suit he seeks a declaration (1) that he alone is entitled to claim the right of inheritance to the moveable and immoveable estate of his nephew Bhagwantro Narsingrao, his uterine brother's son; (2) that the defendant has no manner of right whatever to it; (3) alternatively he asked that the plaintiff's right of inheritance, to whatever extent he may have it, may be declared.

The case was heard by the First Class Subordinate Judge of Nasik, who declared that, as to the bulk of the property, the plaintiff and defendant were entitled jointly to succeed as heirs, while as to the rest he rejected the plaintiff's claim.

From this decree both parties have presented these present appeals.

The two points urged before us by the plaintiff are, (1) that the defendant and Bhagwantrao were divided as to the whole of the property, and (2) that the plaintiff Vithalrao, as an uncle of the whole blood, succeeds to the exclusion of Ramrao, the uncle of the half blood. The defendant, on the other hand, combats both these points and maintains that, if there was a division, he did not receive his share.

I will take these points in order, and to elucidate the case I will adopt and utilize the tabular statement of the family contained in the judgment of the First Class Subordinate Judge:



Krishnarao, it will thus be seen, had three sons: of these Narsingrao (the father of Bhagwantrao) and Vithalrao, the present plaintiff, were uterine brothers. Ramrao, the present defendant, was their half brother.

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[321] Vithalrao admittedly separated from Narasingrao and Ramrao in 1884, and he further maintains that either then or subsequently the other two also separated. In support of the rival claims, both sides have called oral as well as documentary evidence, but before us it has practically been common ground that the oral testimony is of such a character that the case must in the end be decided on the documentary evidence. The property is described in the judgment of the lower Court as (1) $\frac{1}{9}$th share of certain villages and a ninth share of cash allowances, (2) inam and miras lands, (3) houses and open grounds, (4) ancestral trade including money dealings and outstandings, and (5) moveables including ornaments, cattle, carts, and other articles. With respect to this property the First Class Subordinate Judge has expressed his conclusion as follows :—" For these reasons I declare that the plaintiff and the defendant are entitled jointly to succeed as his heirs to the deceased Bhagwantrao's immoveable property consisting of inami village lands and cash allowances in question, other inami and mirasi lands, and the five houses and the two outstanding debts, left joint by the partition deed of June, 1884, and that the plaintiff is also entitled to succeed as his heir to a half-share in the deceased minor's private property consisting of houses (including open grounds), his separate share in the Vinchur Bag and his moveable property of every description, including his private outstandings, ornaments and other articles and excluding the ancestral outstanding debts, which were left joint between the deceased minor's father and defendant at the partition of 1884 already referred to; and order that the rest of the plaintiff's claim be rejected hereby. As the plaintiff's claim is partly allowed and party disallowed, I direct that the costs of the suit, including those incurred by the plaintiff as well as those incurred by the defendant, be borne equally by the parties."

It will be seen, then, that the judgment practically classifies the property in respect of which the plaintiff has succeeded under two heads : in the first class he places that the property which he held had not been partitioned at all, and as to this he holds that " the plaintiff and the defendant are entitled to succeed as his heirs to the deceased Bhagwantrao's immoveable property," [322] &c., &c. The phraseology is not precisely accurate, for the succession was not by heirship, but by survivorship; the meaning, however, is clear.

In the second class he places Bhagwantrao's "private property," *i.e.*, the share which had been allotted to him of the partitioned property, and as to this he holds that the plaintiff and the defendant succeeded in equal shares as heirs of Bhagwantrao. The rest of the plaintiff's claim he rejects.

The first document which calls for attention is the yadi of 1884. Mr. Branson, however, for Ramrao has contended that we are not entitled to look at this document, first, because it is not stamped and, next, because it is not registered, but in answer to this Mr. Macpherson for Vithalrao has pointed out that, so far as the objection founded on the want of a stamp goes, it cannot prevail before us, since the document has in fact been admitted and is on the record; while the objection as to registration has no application, because it was only with moveables that it actually dealt; it merely referred to immoveables. Further, it has been said that partition can be effected without any instrument in writing, and that at any rate this document may be looked at as a link in the history of the case. In my opinion the document is admissible and may be looked at.

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The document purports, and is expressed, to be a "memorandum relating to the amicable partition made by themselves of wadas (*i.e.*, mansion houses) and houses out of the ancestral immoveable property and the moveable property consisting of jewellery, gold, pearl, silver, copper, brass, iron, glass and wooden articles, articles of wearing apparel, &c."

The preamble to the document specifies in detail, first, the mansion houses and houses putting down their value at Rs. 27,000, and secondly, the moveables which are estimated at Rs. 22,946-13-0. These are massed into an aggregate sum of Rs. 49,946-13-0, which is then divided between the parties.

The instrument proceeds to determine first Narsingrao's share (*a*) of the houses and wadas and (*b*) of the moveables, secondly Vithalrao's share, and thirdly Ramrao's. Provision is later made that the other two brothers were not to share in Narsingrao's [323] self-acquired property, and it is declared "as to the houses, wadas and moveable property, which are ancestral, the same are divided into three equal parts and the share of the minor Ramrao is taken by Narsingrao Krishna as his guardian. Therefore, to that extent, the responsibility in respect of the minor is taken upon himself by Narsingrao."

This document is signed by Narsingrao, Vithalrao and Ramrao Krishna "minor by his guardian Narsingrao."

It is agreed that on the basis of this yadi Vithalrao separated from Narsingrao and Ramrao, and thenceforth lived apart from them, nor is it disputed, on the contrary, it is Ramrao's case that it was the occasion of a partition so far as Vithalrao was concerned. Narsingrao, however, and his half-brother Ramrao continued to live together; but to appreciate the value of that fact, it has to be borne in mind that Ramrao was a minor and Narsingrao was his guardian, so that there was nothing in this arrangement inconsistent with a complete partition between the three brothers in 1884; what happened was practically a necessary result of the relative position of Narsingrao and Ramrao.

In the view I take of the facts, it is unnecessary to consider whether a partition as to some only of the members of a joint Hindu family is possible in view of the general notions of Hindu law, and whether the true view is not that there is a complete partition followed by re-union. This, at any rate, I take to be clear that the presumption, such as it is, favours the completeness of partition both as to parties and property, and that there is nothing in the minority of one of the parties *per se* to prevent a complete partition.

This brings me to Ex. 169, which is a memorandum supplementary to Ex. 85. It is dated the 2nd August, 1884, and, according to its preamble, it relates to "property other than the ancestral moveable property partition whereof was amicably made and a memorandum drawn up on the 30th day of June in the Christian year 1884."

Mr. Branson has objected that we may not look at this document, because it is not properly stamped: the answer is that it has been admitted by the lower Court and is on the record.

[324] This document enumerates the property to be dealt with, which aggregates in value Rs. 1,263-13-0, and then it proceeds to effect a division between the three brothers, giving to each a share valued at Rs. 421-4-4 or one-third of the whole. When we come to Ramrao's share, we find it is in part made up of a sum of Rs. 51-2-4 receivable in cash as to Rs. 40-4-8 from Narsingrao and Rs. 10-13-8 from Vithalrao.

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Then there follows this declaration: "In all rupees twelve hundred and sixty-three and annas thirteen have been divided and taken in equal shares." An Additional clause provides that certain bricks "should be divided and taken by the three persons in equal shares."

This brings me to Ex. 145, a document to which Narsingrao and Ramrao were parties. It is dated the 10th of March, 1889, when apparently Ramrao had attained his majority. The character of this document is disclosed by the opening words, where it is said: "The following is a memorandum of the houses which we, Rajashri Narsingrao, Krishna Vinchurkar, and Ramrao Krishna Vinchurkar, amicably and by mutual understanding took according to convenience on an amicable partition of the undermentioned houses out of our joint property" The value of these houses is expressed to be Rs. 24,250. It will be remembered that the value attributed to this property in the yadi of 1884 was was Rs. 18,000; the explanation of the difference is furnished by Ramrao's deposition, Ex. 63.

The instrument goes on to enumerate the items of property ascribing to each its individual value, and then it provides as follows:—"In buildings of the aforesaid value each one of the two has a half and half share of the value of Rs. 12,125, twelve thousand, one hundred and twenty-five rupees. Out of the same the following are the houses which each has this day kept to himself with the other's consent after consulting the other's convenience and with the consent of both." Then there follows an enumeration of the items each is to take and the arrangement made for securing an equality of division, and it is stated that the partition has been completed.

Mr. Branson has relied on this document as showing that there was no partition in 1884, for he maintains that it treats **[325]** the property as still being joint. He has for the same purpose relied on other documents. There is the document of the 12th of April, 1889, in which it is stated that there had arisen a dispute with regard to partition, and that Bala Saheb (*i.e.*, Ramrao) "wishes to become separate." In the same way, he claims as favouring his contention the accounts which are exhibits in this case, and from which he argues that the inference arises that no separate account of Ramrao's share ever was kept and no partition ever effected between Narsingrao and Ramrao. Exhibits 138, 131 and 132, he also urges, tend in the same direction. It appears to me, however, that the words or phrases relied on must not be pushed too far, more especially when it is borne in mind that in several instances they occur in documents in which one cannot expect to find legal precision. It may be that there was not from the first a complete division by metes and bounds; but that is not necessary to constitute such a partition as would entitle each member of the joint family to predicate of himself that he had a separate share in that which once was joint family property. It is sufficient for the present purpose that there should be a division of interest, and it appears to me that the fair inference to be drawn from the evidence in this case is that there was a division of interest, and, therefore, such a partition as entitled Narsingrao and his successor Bhagwantrao to a separate share, the right to which on Bhagwantrao's death must be determined, not by survivorship, but by inheritance. I feel the further fortified in this view by Exs. 53, 54, 55, 56, 58, 59, 146 and 152, translations of which have been added to the record on this appeal. I now proceed to consider what property (if any) did not come within the operation of the partition, or, in other words, whether the learned Judge was right in holding that there was no partition

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of the lands, for, to the extent to which he considered there was a partition of property, I fully agree with him.

In the judgment of the lower Court it is stated that both parties admit that the lands are joint and undivided; there seems to have been some misapprehension on this point, as neither party before us has accepted that position in its integrity, and probably it means no more than that both parties admitted there had been no division by metes and bounds, and that is in keeping [326] with the reasoning of the judgment on this point. It is true, as the Subordinate Judge remarks, that a mere division of profits does not, *per se*, establish a division of the lands from which they are derived, but there are other circumstances to be taken into consideration.

The admitted or determined facts in the light of which we have to view this part of the case are; (i) that there was a separation as to the rest of the property, and (ii) that the lands were of such a character that a division by metes and bounds was not the most convenient mode of enjoyment.

Looking, then, at the whole of the evidence, I am of opinion that there was such a division of interest in the land as to destroy its joint character.

Having then determined that there has been a partition as between all three brothers, it follows that the title to Bhagwantrao's property must be determined by the rules of inheritance, so that the question arises whether Vithalrao, as an uncle of the whole blood, is entitled to succeed to the exclusion of Ramrao, the uncle of the half blood.

The right of inheritance, as between uncles of the whole and the half blood, has been the subject of decision in this Court, for it was held by Sir Michael Westrop and Mr. Justice Pinhey in *Samat* v. *Amra* (1) that priority of the whole over the half blood is limited to bothers and their sons. This decision has since been twice considered, first by the Punjab Court (Punjab Record, 1894, p. 83) where it was followed notwithstanding an earlier decision to the contrary, and secondly, by a Full Bench of the Allahabad High Court in *Suba Singh* v. *Sarafraz Kunwar* (2), where it was dissented from. Though it was suggested in the course of the Allahabad case and again before us that Sir Michael Westropp's expression of opinion was not necessary for the decision of the case heard by him, that clearly was not his view, for that opinion, according to the reasoning of his judgment, was made the essential basis of his decision. Nor can it be said that this was a hasty or ill-considered expression of opinion; on the contrary, it was expressed in the course of a considered judgment, [327] not delivered till February, 1882, though the arguments were heard in the previous November. Here, then, we have a rule of property law enunciated in a considered judgment by Sir M. Westropp and concurred in by Pinhey, J., close on eighteen years ago; that decision was followed by the Punjab Court in 1894, and it is not until the decision of the Allahabad Court, that it has been called in question.

The decision of the Allahabad High Court proceeds on an examination of Sanskrit texts. These and other texts have been fully discussed before us in the argument at the bar, and they are exhaustively treated in the judgment of my learned colleague, which I have had the advantage of reading. It is no disrespect to the judgment of the Allahabad Full Bench to say that the arguments, by which my learned colleague, after a careful

(1) 6 B. 394.

(2) 19 A. 215.

examination of the Sanskrit texts, supports the opposite conclusion, point to the view that the rule, so far as it is to be deduced from those sources, is at least open to doubt. For this reason it seems to me to be eminently a case where we should apply and act on the principle *stare decisis*. If the decision of Sir M. Westropp is wrong, then, I think, it should be left to the Privy Council to correct it. I come, too, the more readily to this conclusion, because I learn from my learned colleague, who is eminently qualified to speak on this point with authority, that the rule expressed by Sir M. Westropp as applied to relationships such as we are dealing with here, does not run in any way counter to the notions and feelings of the Hindu community, or, as it has been termed, "the conscience of the people." I, therefore, agree with my learned colleague in holding that, for the purpose of inheritance, an uncle of the whole blood is not entitled to preference over one of the half blood. It follows from this that in my opinion the plaintiff and defendant succeed in equal shares.

It only remains for me to consider one further point. It has been suggested that the lower Court should have determined whether the defendant had received the share allotted to him on partition, and that, for this purpose, we should send the case back, that an issue appropriate to this point may be raised and **[328]** decided. Having regard to the frame of the suit and the way in which it was conducted, I do not think we should accede to this request. If the defendant desires to raise this question, then it will be open to him to bring a suit for the purpose. The result, then, is that in my opinion the decree should be confirmed and both appeals dismissed. Each party to bear his own costs.

RANADE, J.—These were cross appeals from the decision of the First Class Subordinate Judge of Nasik in original suit No. 270 of 1896 The parties to the suit are step brothers, being the sons of Krishnarao Vithal Vinchurkar. Krishnarao had two wives. By his first wife Krishnarao had two sons, Narsingrao and Vithalrao (plaintiffs), and by his second wife he had one son named Ramrao (defendant) in this suit. Narsingrao died in 1889 leaving a son named Bhagwantrao, who died a minor in 1896. Vithalrao and Ramrao are both uncles of the deceased Bhagwantrao, Vithalrao being an uncle of the full blood, and Ramrao an uncle of the half blood. The original suit was brought by Vithalrao against Ramrao for a declaration that, as the full uncle of the deceased, he was the sole heir to the moveable and immoveable property of Bhagwantrao, and defendant, who was the half uncle of Bhagawantrao, had no right to the estate. It was stated in the plaint that the deceased Bhagwantrao was a minor at the time of his death, and his estate was in the possession of Sadashiv Madhavrao Purandare, the administrator of the minor, and the administrator had remained in possession of the property after the minor's death, but was willing to hand it over to the plaintiff Vithalrao, if his right to the same was established, and the objection of the defendant, who claimed to be sole heir, was removed. The declaratory relief sought was for the establishment of plaintiff's right as sole heir to the exclusion of the defendant. The plaint contained an alternative prayer that in case the plaintiff's exclusive right was not established, his right may be declared to such a partial extent as he may be found entitled to under Hindu law.

The defendant Ramrao answered (1) that the suit for a simple declaration of right would not lie without a claim for possession ; (2) that the deceased Bhagwantrao was a co-parcener and member **[329]** of a joint family with the defendant, and as such he (defendant) succeeded as sole owner to the estate of Bhagwantrao by right of survivorship ;

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(3) that though plaintiff was full uncle and himself half uncle of the deceased, the Hindu law recognised no distinction between the full and half uncle as heirs to their nephew Bhagwantrao, that, therefore, the plaintiff was not alone entitled to any right in Bhagwantrao's estate; (4) even if plaintiff was entitled to any share, his share could only be one-fourth, while the defendant's share would be one-half in his own right and one-fourth as heir to Bhagwantrao's estate. The Subordinate Judge held (1) that the declaratory suit could lie without claiming consequential relief; (2) that plaintiff was not the sole heir of the deceased Bhagwantrao on the ground of his being full uncle of the deceased; (3) that the defendant was the sole heir of the deceased Bhagwantrao in respect of a part of his property only, *viz.*, the ancestral outstandings and debts which were left undivided as between him and Narsingrao; and (4) that, in other respects, there was a complete division between the parties and Narsingrao their third brother. There was, as between Narsingrao and defendant, no actual division at the time of partition, but the joint tenancy was converted into a tenancy in-common, and Bhagwantrao owned a $\frac{1}{3}$rd separate share in the houses and Vinchur Bag and the ornaments and other moveables. The lands were not divided between the three brothers, but their profits were shared. They were joint tenants of the immoveable property in regard to the inam villages and miras lands, and the defendant had no share in his own personal right in the deceased Bhagwantrao's property now in dispute.

The final decree declared that both plaintiff and defendant were equally entitled jointly to succeed as heirs to the deceased Bhagwantrao's immoveable property, the inam village lands, cash allowances, other inam and miras lands and five houses, and two outstanding debts left joint, and that each had a half-share in the deceased minor's private property, houses, bag, and moveables, excluding the ancestral outstanding debts left joint between Narsingrao and the defendant. The rest of the claim was disallowed.

[330] Both parties appealed from this decree. Vithalrao, in appeal No. 81, contended (1) that he was the sole heir of the deceased as being his full uncle in preference to defendant who was his half uncle; (2) that defendant had no right to succeed as sole heir to the ancestral outstandings; (3) that the lower Court was in error in holding that Bhagwantrao and defendant were in union as regards the villages and cash allowance and their profits, and that these properties were held as tenants-in-common and not as joint tenants.

In appeal No. 106 Ramrao contended (1) that there was no division of interest as between himself and Bhagwantrao; (2) that as surviving coparcener, of the undivided family he alone was entitled to succeed and plaintiff had no share in the same; (3) that the lower Court was wrong in holding that the joint tenancy was changed into a tenancy-in-common; and (4) that, at the most, plaintiff's share was only $\frac{1}{4}$, and his own share $\frac{3}{4}$ of the joint property of himself and Bhagwant.

It will be seen from these pleadings and contentions of the appellants that only two points arise in this case—one of law and the other of fact.

The point of law relates to the question raised by the appellant in appeal No. 81 as it was decided against him in the lower Court. The plaintiff-appellant's contention is that as the full uncle of the deceased Bhagwantrao, he was solely entitled to succeed to the whole of Bhagwantrao's property as his heir to the exclusion of his half-brother, who had no claim to the estate of his step-nephew. The question of fact was raised by the appellant in appeal No. 106, who contended that there was no

separation of interest as between him and the deceased, and that, therefore, by right of survivorship, he alone was entitled to succeed as heir to the exclusion of Vithalrao, who was separated by partition in 1884. These were the only two points which were argued before us by counsel on both sides, and the decision of the case depends entirely upon the view we take of the points of law and fact noted above.

Taking the point of law first for consideration, it is admitted that there is a conflict of decisions between this Court and the **[331]** Allahabad High Court as regards the preferential rights of whole and half-blood paternal relations claiming to succeed as heirs to a separated Hindu. In this Presidency, this preference is restricted to the case of brothers and sons of brothers only, while the Allahabad High Court has ruled that the preference applies to other paternal relations also. The Subordinate Judge has noticed this conflict, but has preferred after consideration to follow the law as interpreted in *Samat* v. *Amra* (1) by Sir Michael Westropp and Justice Pinhey.

Mr. Macpherson in his argument contended that the remark made by Sir Michael Westropp in this case—to the effect "that neither Mitakshara nor the Mayukha made any distinction between persons of the whole blood and those of the half blood except in the case of brothers and sons of brothers, and that the distinction does not extend beyond those relationships"—was an observation not necessary for the decision of the case, and was in fact an *obiter dictum*, and that as the Allahabad decision was based on a fuller consideration of the Mitakshara law (which governs the parties to the present suit) by a Full Bench, it should be followed in preference to the Bombay ruling. Sir Michael Westropp's remark was no doubt quoted with approval in West and Bühler's Digest and also by Mr. Mayne, but it was urged that the view taken by the Bombay authorities was inconsistent with the general position laid down in the Mitakshara about the doctrine of propinquity. That doctrine rests on nearness of blood relationship, and not, as in the Bengal school, on spiritual benefits by obligations. Nearness of blood relationship was the test and foundation of the Mitakshara law in matters of inheritance.

Mr. Macpherson further went on to say :

1. That the restricted view taken by Sir Michael Westropp was opposed to the general principles of propinquity as the rule laid down by the Mitakshara, and accepted by this Court and the Privy Council, and that accepting this principle, relations of whole blood must be preferred to those of half blood.

2. The principle of propinquity was the same as that laid down by the Mitakshara for giving preference to the mother over the father, and to the full over the half-brother.

[332] 3. The Mitakshara expressly extended this principle to all sapinda and samanodaka relations.

4. There are no special texts for giving preference to the whole over the half-brothers and nephews, and the preference is really deduced by an application of the general principle which must govern other cases of sapinda relations by applying the same principle of propinquity.

5. The omission to mention the same rule, specially in the case of gotraja relations, is, therefore, of no moment, and was due to Mitakshara's love of brevity.

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6. Some of the reasons given by the Mitakshara for preferring mother to father, might be rejected, but his principal reason of *matri-sannikarshat* and *viprakarshat* or nearness and difference of mothers, is his principal reason which is not affected by rejecting the others, and that reason applies to all gotraja relations.

7. The Mayukha does not contradict the principle of the Mitakshara in regard to propinquity, but only more rigidly adheres to it, by putting the half-brothers still further down in the list of heirs.

8. The other authorities take the same view, especially Maden Parijat, who includes uncles, &c., as coming under the rule of full and half-brothers.

9. The analogy of *shradha* rites suggests the same conclusions.

I have deemed it necessary to set forth Mr. Macpherson's arguments at some length. Mr. Chandavarkar's reply on the other side need not be stated with equal fullness. I shall only state the points principally urged by him.

1. No distinction was made by any text-writers between full and half blood, as regards other gotraja relations, except Madan Parijat.

2. As regards Mitakshara, the conclusions drawn by Vijnyaneshwar are of value as setting forth established usage, but the reasons given by him are more or less fanciful and not consistently adhered to by him nor approved by the other writers of law texts and by the Courts.

[333] 3. The preference of full to half brother depends on special Smriti texts, which is not the case as regards uncles and other relations, and Mitakshara gave recognition to these texts, and did not deduce the preference from general principles.

4. Propinquity is no doubt the general, but not the universal rule under Mitakshara. Propinquity is differently understood by Vijnyaneshwar in different places, and the reason of propinquity given for brothers is not the same as the reason of propinquity laid down by him for the case of gotraja relations generally.

5. The enlargement of the preference of brothers so as to include other relations cannot be made without extending the application of the word *mata* (mother) so as to include grandmother, &c., which could not properly be done in the absence of special texts.

6. Inheritance through sapinda relationship has to be traced through the common ancestor, who is mentioned by all texts as the male ancestor, father, grandfather, &c., and so traced there is no distinction between full and half-blood. The case of brothers and nephews tracing their descent through female ancestors is an exception and not the rule.

7. The Mayukha recognises no separate position for half after full brother, but treats the latter only as a gotraj sapinda.

8. The provisions relating to *shradha* rites do not determine questions of succession in all cases.

These were the principal points urged by Mr. Chandavarkar.

I have thus tried to summarize the arguments on both sides which, as will be seen, cover a larger ground than was noticed in *Suba Singh* v. *Sarafraz Kunwar* (1).

I have now to consider how far the balance inclines one way or the other. The question is to be decided by special reference to the Bombay authorities, the Mitakshara and the Mayukha. On the Bengal side, the distinction between whole and half blood obtains in the case of brothers and nephews as also grandnephews and uncles and grand-uncles and their

(1) 19 A. 215.

two descendants. **[334]** The test adopted there is of spiritual benefit, and not of propinquity through possession of common particles or blood relationship. (1) It is admitted that, as far as the Mitakshara and Mayukha are concerned, only the brothers and their nephews are expressly mentioned as relations among whom preference of the whole to the half blood obtains. The Allahabad High Court, however, were of opinion that under the joint effect of (1) Manu's rule that "to the nearest sapinda the inheritance next belongs" and (2) the special preference given to the brother of the full blood over the brother of the half blood, by reason of nearness or remoteness through the mother laid down by Mitakshara in chap. II, s. 4, placitum 5, as also in chap. II, s. 3, placita 3 and 5, and (3) finally the extension of the principle of propinquity by Mitakshara from sapinda to samanodaka relation without exception as laid down in chap. II, s. 3, placitum 4, that under the effect of these three principles the rule, expressly applied to brothers and nephews, embraces equally all gotraja relations so as to make those of the whole blood preferable to those of the half blood. This view of the Allahabad High Court presupposes that the doctrine of propinquity or *pratyasatti* is common throughout as the guiding principle in all cases of preference not only between mother and father, and brother of full and half blood, but also paternal relations in the series of gotraja heirs. In other words, that the propinquity or *pratyasatti* is of the same kind in all these cases. The Bombay view, under which the case of *Samat* v. *Amra* (1) appears to have been decided, is that the doctrine of propinquity is not the same in all these cases, and that the word "propinquity" is not used by the author of Mitakshara himself in one and the same sense. Propinquity may be understood (1) as being either propinquity by descent in line or degree through common male ancestor, or (2) propinquity may be by descent through common mother, (3) propinquity may also be by identity of caste, or (4) it may be by spiritual benefit. This last may be left out for the present. But the first three are important. The view, on this side, of text-writers has been that the Mitakshara's preference of the mother to the father was due to her being common in class with her son, **[335]** which was not always the case of the father when he could marry women of other caste. It is in this sense of propinquity that both Subodhini and Balambhatta have understood the Mitakshara passage in chap. II, s. 3, para. 3, which refers to the *sadharan* and *asadharan* doctrine criticized by Mayukha; and Balambhatta, one of the commentators noted above, does not accept the force of the arguments. As between brothers of the whole and half blood referred to in chap. II, s. 4, paras. 5 and 6, the propinquity is by descent from the same mother. As regards gotraja relations, the propinquity is through descent from a common male ancestor in line and degree, (chap. II, s. 5, paras. 1 to 6). The whole question thus turns upon the correctness of the view held by the Allahabad High Court that propinquity is used in the same sense throughout, or of the Bombay view that propinquity is used in different senses. Manu's own text gives no clue to the nature of the propinquity or *pratyasatti*. He only mentions the words *anantarah sapindadyah* "he who is the nearest sapinda to him the inheritance next belongs," or, as Sarwadhikari translates, "whoever is near to a sapinda, his property shall belong to him." Yajnyavalkaya's principal text does not mention the word sapinda. Etymologically sapinda relationship would extend to any degrees, but

(1) 6 B. 394.

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Manu and the other texts, including Mitakshara, limited sapindas to the seventh degree. The next seven are called samanodakas. As Manu's text only spoke of sapinda, Mitakshara inserted para. 4, chap. II, s. 3, to extend the rule to samanodakas also. Mitakshara in the chapter on *shradha* rites distinctly defined sapinda to be blood relationship. But even this is not sufficient, for blood relationship may be through male ancestors or through female, *i. e.*, mother.

Taking the Mitakshara as its own interpreter, it is, however, clear that Vijnyaneshwar did not understand propinquity in the same sense in all these cases. In the case where preference is given to a mother over the father, the propinquity is obviously of a different kind from what obtains in the case of full and half brothers born of different mothers. When gotraja relations of nearer degree succeed those who are remote in descent from the common male ancestor, the propinquity is obviously different [336] from either of the two noted above. The author of Mitakshara himself, when he had to apply his principle to the case of the grandmother, did not follow the principle of propinquity by community of class laid down by him for preferring mother to father—chap. II, s. 4. paras. 2 to 4. He actually tried to refute Dhareshwar, who used the Mitakshara's own arguments against him in favour of the grandmother. Then, again, when he has to discuss the rights of the bandhus, he relies upon the argument of near affinity (chap. II, s. 6, paras. 1 and 3). Similarly the claim of daughter's son is accepted as he performs the obsequies like the son's son (chap. II, s. 2, para. 6). In the case of the mother's peculium, the daughter's claim is accepted, because the mother contributes much to the procreation of females, while the male child is procreated if the seed predominates (chap. I, s. 3, para. 10). This position contradicts the reasons of the preference given to the mother over the father in chap. 2, s. 3, para. 3. Propinquity, therefore, though it is a sufficiently safe guiding principle in a large number of cases, does not cover all cases of inheritance, and even where propinquity is the guide, the propinquity is not of the same kind. The fact appears to be that the reasons stated by the author of the Mitakshara are not to be too logically interpreted and applied rigidly in all cases. The reasons vary with the exigencies. The commentators on Mitakshara, as also writers of the Smriti Chandrika, Virmitrodaya, Saraswati Vilas and Mayukha, have taken objections to these reasons, and their artificial character has been recognised by the Courts in several cases. The conclusions laid down derive their efficacy chiefly because they correctly state the accepted usage. There was this usage of preference of full to half brothers laid down in the text of Vrihaspati, Deval and Manu in certain parts of India (Colebrooke, Book V, chap. 8, s. 1, placita 404, 422, 437, ss. 2, 513), and the author of the Mitakshara had to recognise it and did his best to harmonize the usage with previous texts, and to much stress, therefore, should not be laid on the reasons given, and certainly, in the absence of similar express texts in favour of uncles or other relations, no extension of such usage in opposition to general principles should be permitted merely on the strength of [337] the reasons given by the Mitakshara. The doctrine of propinquity applies in different forms to different circumstances, and it was so variously applied by the author of Mitakshara himself. It is, therefore, not a valid argument to infer from the case of brothers and nephews that the preference there given should prevail in the case of other gotraja relations. The judgments of the Allahabad High Court appear to lay much stress on the fact of the Mitakshara asserting that the principle of propinquity applies, not only

to sapindas, but to samanodakas without any exception. This is no doubt true, but the question still remains, which kind of propinquity applies to sapindas and samanodakas. The text only lays down that the governing principle is to be *pratyasatti*, and spiritual ablutions, but the particular kind of *pratyasatti* (propinquity) applicable is not laid down. It cannot be the propinquity which prefers mother to the father mentioned in paras. 3 and 5, chap. II, s. 3. It cannot also be the propinquity mentioned in the 4th section, chap. II, about whole and half brothers. This sort of propinquity cannot apply to the case of gotraja relations, such as the uncle, &c., without the use of *upalakshana*, *i. e.*, extended application of what is laid down in the case of mothers so as to include grandmother, &c. It must, therefore, be the propinquity generally applicable to sapinda heirs, which is descent through the common male ancestor (chap. II, s. 5, paras. 1 to 6). The tracing of propinquity by descent through females is an exception and not the general rule. Where that exception had been grafted by usage, it was recognised specially in another section by Mitakshara in giving preference to the whole over the half brothers (chap. II, s. 4, para. 5). If such general preference among all gotraja relatious had been a common usage, it would have been so stated in express terms. This was not done in the place where one would have expected it (chap. II, s. 5, paras. 1 to 6). And, therefore, the view laid down in *Samat* v. *Amra* (1), as far as the Mitakshara is concerned, seems to be in every way more consistent with the correct interpretation of the Mitakshara texts than what was adopted by the Allahabad High Court.

[338] 2. As regards the Mayukha, its position is still more clear. The Mayukha interprets the word of the Yajnyavalkya text *bhratarah* as meaning full brothers only, and there is no place in it for any conflict between half and full brothers. The half brother comes in only after brother, brother's son, grandmother and sister as a gotraja sapinda along with the grandfather. The uncles, both full and half, would come as heirs of the grandfather, and there is thus no room for any conflict between the full and the step uncle or any other full and step relations. The Mayukha expressly contradicts the Mitakshara position of full and half brothers coming after one another, and for all practical purposes there is no room for conflict between full and half relations according to Mayukha. The Mayukha theory of propinquity is of decent in line and degree from the common ancestor, and inheritance through a common female ancestor is unknown.

3 Looking at the other authorities, the uncle, according to Manu, comes after the grandfather as an heir, and no distinction can arise between full and step uncles.

Apararka, Kamalakar, Madhawa and Virmitrodaya, like Manu, only recognise a distinction between full and half brothers not between uncles or other gotraja relations. The same principle obtains in Smriti Chandrika. Vivadaratnakar does not mention brothers of half blood at all as separate heirs after full brothers, and agrees with Mayukha.

The Bengal authorities, such as the Dayabhag, Raghunandan, and Jagannath, lay down special rules based on spiritual benefit and not on propinquity, and the author of Madan Parijat appears to have taken the view from the same source. He has also written a commentary on Mitakshara, where, however, he makes no mention of full and half

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relationship in the case of uncles. It will thus be seen that all the writers noted above make no mention of collateral gotraja relations of uncles and the rest, following any other rule of propinquity save of descent in line and degree from the common male ancestor.

4. On general principles also there is an obvious distinction which has some reason in human nature for its existence in the [339] case of full and step brothers and their sons. Dissensions between sons by different mothers are a normal feature of Hindu family life. As the chain grows longer, the occasions and reasons for this discord grow less with every remove. Therefore, the preference of full to half blood is with good reason confined to brothers and nephews. There may be room for similar distinctions in the case of grand-nephews, but when we go to the ascending line, the reason for apprehending absence of love ceases to exist, and it was, therefore, natural that in the case of the ascendant grotrajas the text writers and commentators did not distinguish the claims of the full and half relations. Mr. Justice Knox, in his judgment in the Allahabad High Court, was fully aware of this distinction between ascendants and immediate descendants, and, therefore, expressly declined to discuss the question in regard to the ascendants, though the reference included both ascendants and descendants.

5. In the case of ascendants, such as the uncles in the present dispute, a further difficulty is created by the fact that we have to substitute the grandmother, &c., as the common female ancestor in place of the mother, to justify a distinction between whole and half-blood. In the case of a mother, there are special texts, but in the case of the grandmother, no such texts are found on which such position can be assigned to her. The propinquity must be traced by descent in line and degree from the common male ancestor, and when so traced, the uncle comes in only as a gotraja descendant of the grandfather, and the grandmother holds no place. Propinquity through the mother cannot, under these circumstances, be taken as a rule of universal application for all sapinda and samanodaka relations, but must be confined to brothers and nephews only. The principle of *matri-sannikarshat* and *viprakarashat* could only be extended to uncles by understanding *mata* by *upalakshana*, (*i.e.*, extended application) of the word to include grandmother. This cannot be done in accordance with the rules of legal interpretations as understood by Hindu lawyers. Even the author of Madan Parijat, who otherwise favours the distinction between half and whole blood in case of uncles, is not prepared to extend the law of reunited brothers to uncles when similarly reunited, the reason given being that such extension [340] was wholly inconsistent with the practice among the people. The case of uncles is thus not identical in all respects with those of brothers.

It is not necessary, under these circumstances, to notice the other minor points raised in the arguments before us, such as the analogies furnished by the shradha-ritual, &c., which cannot be made to govern questions of inheritance in all cases. On the whole, therefore, I am inclined to hold that, though the rule of propinquity governs the succession of gotraja relations as well as that of preference between brothers of whole and half blood, the propinquity or nearness of blood in the one case is different from that of the other, and that Sir Michael Westropp's decision in *Samat* v. *Amra* (1) represents correctly the true meaning of the authors of the Mitakshara and the Mayukha, when he understood them to restrict the preference of full to half,

(1) 6 B. 394.

blood, to the case of brothers and nephews only. Under any circumstances, the Allahabad decision did not settle the question as regards the ascending line of collateral relations, with which class of heirs only the present case is directly concerned. Following the Bombay ruling, I would confirm the finding of the lower Court on this question of law.

Turning next to the question of fact, the contention of the defendant is that he was joint in interest with Bhagwantrao and his father Narsingrao and that on the death of Bhagwantrao in 1896 he became entitled to the whole property by right of survivorship, and that, at the most, Vithalrao could only claim one-fourth share, while his own share was three-fourths. Vithalrao, on the other hand, claims that defendant was, like himself, separated in interest from Bhagwantrao's father by the partition of 1884, and that, if he was not entitled to the whole of Bhagwantrao's one-third share by right of his being full uncle, he was at least entitled to share Bhagwantrao's estate equally with the defendant. The lower Court, after holding that Vithalrao had not exclusive right to succeed as sole heir to Bhagwantrao's estate, came to the conclusion that defendant, like plaintiff, was separated in interest from Bhagwantrao's father Narsingrao by a complete partition except in regard to certain debts, and that defendant **[341]** could claim no right by survivorship except, as to these debts. It accordingly declared Vithalrao's right to share in Bhagwantrao's estate equally with the defendant except as regards debts kept joint between Bhagwantrao's father and defendant in 1884. On a careful consideration of the whole evidence, I feel satisfied that the lower Court's decision on this point is correct. It is not necessary to discuss the evidence bearing on this point at any great length, because the contention whether there was a separation or not between Bhagwantrao's father Narsingrao and defendant, formed the subject of contested litigation in the suit brought by Bhagwantrao against the defendant in 1892 in respect of the Poona wada, and separation was held proved in that case by the Poona Subordinate Judge's Court, and the decree was confirmed in appeal by this Court, Exs. 47, 48. The partition deed of June, 1884, Ex. 85, followed shortly after by a supplementary partition in August, 1884, Ex. 169, admittedly professed to effect a division of the whole of the immoveable and moveable property belonging to Narsingrao and his two brothers, the parties to the present suit. The details of the shares in every item of property of each brother were set forth separately. It is true that defendant was a minor at the time of this partition of 1884, and Narsingrao was his certificated guardian. Vithalrao took his share and began to live separately, but Ramrao, being a minor, lived with Narsingrao. This minor brother became major in 1889, a few months before Narsingrao's death, and also began to live separate. No actual division had been effected between Narsingrao and defendant as stated in the partition of 1884. In 1889, disputes between the two brothers commenced about the actual division of the houses, Exs. 104, 129, 139, 142. The division of houses was effected in 1889, Ex 146, and the cattle and other property was shared about the same time, Exs. 185, 186. It is on the strength of this deferred division of the property that the defendant rests his contention that he continued to be united in interest with Narsingrao and his son Bhagwantrao. Great stress was laid on the somewhat doubtful words of the letter, Ex. 104, written to one of the proposed arbitrators in 1889. The Marathi word *watani* admits of being used as **[342]** equivalent of a formally effected separation of interest as also an actual division of a predetermined

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partition. The direct purpose of the reference was to carry out division of particular properties. It expressly refers to the division of the houses as already effected, and it is inconsistent with the whole evidence of the partition of 1884 to suppose that the two brothers remained united in interest till 1889. The legal partition, as far as it depended on the intention of the parties, was effected in 1884 between the three brothers. This intention was actually carried out into effect by division in 1884, so far as Vithalrao was concerned, but as regards defendant Ramrao, effect was given by actual division in 1889, though from 1884 to 1889 the intention to treat the two brothers as separated in interest was as complete as in the case of Vithalrao. The accounts of all the parties leave no room for doubt on this point. Defendant's own account shows that defendant received from Bhagwantrao his one-third share of the income, and he was charged similarly with his share of the expenses from 1889—1895, Exs. 53—59. While defendant Ramrao was a minor and lived with Narsingrao, the latter received the income of his own and defendant's share, but this income was shown as the income of two shares and not of one joint double share—Exs. 66, 92, 95, 156, 158. After Narsingrao's death, when defendant began to live separately, the accounts of Bhagwant speak only of the income of his one-third share—Exs. 87, 88, 89, 90, 93, 96, 97, 98, 99, 146, 155, 157. Ancestral debt recovered from Hari was shared, Ex. 94, by the three brothers separately—Ex. 137. The notice, Ex. 138, given by defendant makes a similar claim of separated interest as between him and Narsingrao. Narsingrao in his will recognised Bhagwant as also heir of his one-third share, Ex. 107.

The minor Bhagwantrao's certificate given to Purandare by the District Court in Ex. 123 recites the same exclusive ownership of the minor to his share. Defendant Ramrao is shown as a creditor of Narsingrao in his accounts since 1889, and the debt shown as due to him is in respect of the division of houses made in 1889—Exs. 109, 145, 147, 161. Lastly, defendant Ramrao, so late as 1896 in his application to the Collector, distinctly asserted Bhagwantrao's separate ownership in **[343]** his one-third share, and claimed to succeed as heir to the moveable property of Bhagwantrao and the arrears due to him—Ex. 80. This consistent conduct and declaration of the defendant makes it clear that his contention about his having been joint in interest with Bhagwantrao is without any foundation. The partitions of 1884 were all accepted and acted upon by all the parties as final. The mere postponement of the actual division till 1889 did not alter the status of the parties, and did not convert what was intended and treated by the parties to be a tenancy in common into a joint tenancy. The parties treated each other and the deceased Bhagwantrao as divided in status throughout. If defendant has any claim for arrears not paid to him or the price of moveables not made over to him by Bhagwantrao, he must resort to any remedy the law allows him, but he cannot set up the plea of union of interest, and claim to be heir on the ground of survivorship. The contention was, therefore, very properly disallowed by the lower Courts. Both the issues in appeal must be thus decided against the parties raising them, and I would accordingly dismiss both the appeals and confirm the decree.

Decree confirmed.

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Before Mr. Justice Parsons and Mr. Justice Ranade.

JOHARMAL (*Original Plaintiff*), *Appellant v.* EKNATH AND ANOTHER (*Original Defendants*), *Respondents.** [27th November, 1899.]

24 B. 343 = 1 Bom. L.R. 839.

Hindu law—Son's liability for father's debt—Decree against father—Execution sale—Son's interests when not affected by such sale.

When ancestral property is sold in execution of a decree against a Hindu father, there are only two cases in which the son's interests do not pass under the sale: *first*, when they are not sold; *second*, when the debt is not binding upon the sons by reason of its having been contracted for an illegal or immoral purpose.

[R., 4 Bom.L.R. 587 (597); 11 C.L.J. 61 (67) = 14 C.W.N. 298 = 5 Ind. Cas. 298.]

APPEAL from the decision of Rao Bahadur Jaysatyabodhrao Tirmalrao, Subordinate Judge, First Class, at Nasik.

One Nana was the owner of a house at Yeola.

[344] Nana died leaving two sons, Gopal and Govind.

In accordance with a decree for partition, a moiety of the house fell to Gopal's share, and the other moiety to Govind's share.

The plaintiff obtained a money-decree against Govind and in execution put up to sale Govind's share of the house in dispute. At the Court-sale plaintiff himself purchased Govind's share.

Plaintiff was obstructed in taking possession by Govind's sons Eknath and Rangnath.

Thereupon plaintiff filed the present suit to have the obstruction removed.

Defendants Eknath and Rangnath pleaded (*inter alia*) that the house in dispute was their ancestral property; that they were not bound by the decree passed against their father; that their father's interest alone passed to the plaintiff at the execution sale; and that the plaintiff had no right to oust the defendants from their share of the ancestral property.

The Subordinate Judge held that the decree against Govind did not bind his sons Eknath and Rangnath; that their interests in the property did not pass at the auction sale; and that the plaintiff acquired only Govind's one-third share in the moiety of the house. He, therefore, passed a decree awarding to the plaintiff one-sixth share of the house in dispute.

Against this decision plaintiff appealed to the High Court.

D. A. Khare, for appellant.

N. G. Chandavarkar, for respondent.

JUDGMENT.

PARSONS, J.—It is difficult to understand from the judgment of the Subordinate Judge the ground on which he decided that the son's interests in the ancestral property did not pass under the sale. There are only two cases in which these interests would not pass. First when they were not sold, illustrations of which will be found in the cases of *Bhikaji* v. *Yashvantrav* (1), *Maruti* v. *Babaji* (2), and *Pandu* v. *Maniklal* (3). Second,

* Appeal No. 17 of 1898.

(1) 8 B. 489. (2) 15 B. 87. (3) P. J. (1898), p. 124.

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when the debt was not binding upon the sons by reason of its having been contracted for an illegal or immoral purpose, illustrations of which [345] will be found in the cases of *Narayanacharya* v. *Narso*(1) and *Chintamanrav* v. *Kashinath* (2). It does not appear under which of these the Subordinate Judge placed the present case. Moreover, he has not alluded to a circumstance now mentioned before us that the sons were not in existence at the time of the suit and decree. We do not know whether this is so or not, but it can easily be ascertained in the further enquiry we are obliged to order. We ask the Subordinate Judge to take evidence and find on the following issue :—

Whether the interests that Eknath and Rangnath now claim in the ancestral property passed to the plaintiff under the execution sale or not ?

and certify his finding to this Court within two months.

Issue sent down.

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24 B. 345 = 1 Bom.L.R. 846.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

NARAYAN GOVIND MANIK (*Original Defendant No.* 1), *Appellant v.* SONO SADASHIV, DECEASED, BY HIS HEIRS AND SONS VINAYAK AND OTHERS (*Original Plaintiffs*), *Respondents.** [30th November, 1899.]

Civil Procedure Code (Act XIV of 1882), *ss.* 211 *and* 331—*Limitation Act (XV of* 1877), *sch. II, art.* 178—*Decree for possession with mesne profits till delivery of possession—Darkhast for execution—Obstruction—Application for removal of obstruction—Application registered as a suit—Disposal of the Darkhast—Decree in the suit—Execution—Limitation—Mesne profits for three years subsequent to the suit.*

The plaintiffs having obtained a decree for possession of certain lands with mesne profits till delivery of possession, applied for execution. An obstruction having been caused to the execution, plaintiffs applied for the removal of the obstruction, and their application was registered as a suit under s 331 of the Civil Procedure Code (Act XIV of 1882), and their darkhast for execution was disposed of by the Court. The suit was decided in plaintiffs' favour, and they having applied for execution it was contended that the application was [346] time-barred, as it was presented after the expiration of three years from the time of the disposal of the original darkhast and it was wrong to grant mesne profits for more than three years from the date of the decree though possession was not delivered during that period.

Held, that when litigation under s. 331 of the Civil Procedure Code (Act XIV of 1892) is pending, the proceedings in execution are suspended during that litigation.

Where a decree directed that plaintiffs should get mesne profits from a certain date till delivery of possession, the amount is to be fixed in execution—

Held, that the decree was necessarily subject to the limitation laid down in s. 211 of the Civil Procedure Code (Act XIV of 1882), and that mesne profits for more than three years from the date of the decree should not be awarded even though possession was not delivered during that period.

[R., 35 C. 1017 (1020) ; 37 C. 796 = 12 C.L.J. 328 = 15 C.W.N. 337 = 6 Ind. Cas. 537 (539); 28 M. 50 = 14 M.L.J. 401 (403) (F.B.); 31 M. 71 (74) = 18 M.L.J. 46 = 3 M.L.T. 328 ; 7 Bom.L.R. 819 (821) ; 7 Ind. Cas. 707 (708).]

SECOND appeal from the decision of M. P. Khareghat, District Judge of Ratnagiri, confirming the order of Rao Saheb S. V. Joshi, Subordinate Judge of Rajapur in an execution proceeding.

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* Second Appeal No. 547 of 1899.

(1) 1 B. 262.

(2) 14 B. 320.

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The plaintiffs sued the defendants in suit No. 348 of 1883 to recover possession of certain lands with mesne profits. The decree awarded possession of the lands and mesne profits of the same till delivery of possession, and directed that the amount of the mesne profits should be determined in execution. The said decree was confirmed, in appeal, by the District Court and in second appeal by the High Court on the 12th January, 1887—with the modification that the plaintiff should recover mesne profits for three years before date of suit. The plaintiffs then gave darkhast No. 69 of 1888 to execute the above decree on the 10th January, 1888, but they were obstructed in taking possession of the land by an undivided son of one of the defendants on the 20th January, 1888. The plaintiffs, therefore, applied for the removal of the obstruction, and their application being registered as suit No. 620 of 1888 under s. 331 of the Civil Procedure Code (Act XIV of 1882), the Court disposed of the darkhast on the 18th August, 1888. The minor brothers of the defendant in the latter suit were joined as co-defendants. The Court decided the suit against the defendants, and the decree was finally confirmed by the High Court in second appeal No. 133 of 1892 on the 11th October, 1894. On the 7th October, 1897, the plaintiffs presented a darkhast for the execution of their **[347]** decrees, No. 348 of 1883 and No. 620 of 1888, and to recover possession of the lands with costs of the suits and mesne profits from the 1st September, 1880, till delivery of possession.

The defendants contended (*inter alia*) that the darkhast was time-barred, as it was not presented within three years from the 18th August, 1888, when darkhast No. 69 of 1888 was disposed of, and that mesne profits for more than three years after the date of the decree could not be claimed.

The Subordinate Judge having granted the darkhast, defendant No. 1 appealed to the Judge, who confirmed the order. The defendant, therefore, preferred the present second appeal.

S. S. Patkar, for the appellant (defendant No. 1).—The Judge has based his decision on the ruling in *Chintaman* v. *Balshastri* (1), but the Madras High Court has come to a contrary conclusion in *Narayana* v. *Pappi* (2). Even if the ruling in *Chintaman* v. *Balshastri* (1) be held to be applicable, the Judge has ignored Ex. 24, which shows that darkhast No. 69 of 1888 was cancelled on the 18th August, 1888. The darkhast was, therefore, not capable of being continued or revived. Further, the order that costs of the darkhast were to be paid by the applicant and not by the judgment-debtor shows that the darkhast was disposed of by the Court on that day.

[JENKINS, C.J.—Did the applicant know that such an order was passed ?]

We submit that he knew of it, because the order was passed on his application. Thus the present darkhast, being presented after more than three years from the disposal of the previous darkhast, is time-barred. Granting that the previous darkhast was not disposed of, still the present darkhast is beyond time. If the suit under s. 331 had been unsuccessful, the time spent in carrying on the suit would not be excluded in computing the period of limitation—*Shivram* v. *Sarasvatibai* (3). Though the present darkhast is within three years from the 11th October, 1894, when the High Court passed its decree in **[348]** Second appeal

(1) 16 B. 294. (2) 10 M. 22. (3) 20 B. 175.

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24 B. 345 = 1 Bom. L.R. 846.

No. 133 of 1892, yet even deducting the time occupied by the obstruction and its removal, that is, from the 20th February, 1888, to 11th October, 1894, the present darkhast would be more than three years after the previous darkhast. In *Chintaman* v. *Balshastri* (1) this point was not raised and decided.

As regards mesne profits, the order is clearly wrong. At the most, three years' mesne profits should have been allowed. In awarding mesne profits till delivery of possession the Judge has given the go-by to the provisions of s. 211 of the Civil Procedure Code—*Prayag Singh* v. *Raju Singh* (2); *Uttamram* v. *Kishordas* (3).

Manekshah J. Taleyarkhan, for the respondents (plaintiffs):—The present darkhast is a revival or continuation of the previous darkhast and, therefore, it is not time-barred—*Chintaman* v. *Balshastri* (1). This ruling shows that the time should be computed from the date of the removal of the obstruction, that is, from the 11th October, 1894.

As regards mesne profits, we contend that, according to the terms of the original decree as passed by the High Court, we are entitled to the mesne profits from the 1st September, 1880, to the delivery of possession. It is the judgment-debtor and afterwards his brother who kept us off from the property, and we should not be put to loss on their account. The decree directs that mesne profits should be determined in execution. The limitation laid down in s. 211 of the Civil Procedure Code cannot govern such a decree—*Bai Jasoda* v. *Kishordas* (4). The Court executing the decree cannot go behind the decree and cannot consequently interfere with that part of it which relates to mesne profits.

JUDGMENT.

JENKINS, C. J.—Two points have been taken in this appeal: first, that the application for execution is barred by limitation. We think that there is no such bar. The original application was in January, 1888. Resistance to execution occurred in [349] February, 1888. This led to a suit under the 2nd clause of s. 331 which was finally decided by the High Court decree dated 11th October, 1894. The present application is within three years of that date.

It appears that the original application of January, 1888, was "disposed of" by the Subordinate Judge on 18th August, 1888. This order was apparently passed in the absence of the parties, and there is nothing to show that the decree-holder knew of it. It is perfectly clear that the order was irregular, and is directly opposed to Circular No. 79, p. 46 of the Circular Book. We cannot agree with the contention of the pleader for the judgment-debtor before us that the application of January, 1888, was entirely at an end, and that the decree-holder was bound, in order to keep his decree alive, to make applications for execution within the period of limitation, even though such an application must have been refused on the ground that the litigation under s. 331 was still pending. The fact is that the proceedings in execution were suspended during that litigation. The authorities for such a proposition are numerous and need not be quoted in detail.

It is contended that there is a further bar of limitation even under art. 178, but this is clearly not so; for this is not a fresh application for

(1) 16 B. 294.
(2) 25 C. 203 (206).
(3) P.J. (1899), p. 340.
(4) P. J. (1889), p. 143.

execution. It is an application to revive the prior application which had been suspended pending the litigation.

The second point is that no more than three years' mesne profits can be awarded, the decretal order dated 19th September, 1884, directing "the plaintiff to get mesne profits from 1st September. 1880, to the delivery of possession, the amount to be fixed in execution of the decree" being necessarily subject to the limitation laid down in s. 211, Civil Procedure Code. The District Judge held that he could not go behind the decree. But we may point out that, as held by the Full Bench in *Puran Chand* v. *Roy Radha Kishen* (1), the proceedings for the purpose of ascertaining the amount of mesne profits are a continuance of the original suit, and the Court in so ascertaining the amount is [350] bound by the provisions of s. 211. It is true that possession has not yet been delivered to the decree-holder. But this fact does not prevent the clear provisions of the law being followed.

We must vary the decree of the lower appellate Court by limiting the mesne profits to three years subsequent to 12th January, 1887, the date of the High Court decree. Appellant must pay his own costs and half respondents'.

Decree varied.

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24 B. 350=2 Bom.L.R. 467.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

BANK OF BOMBAY (*Original Defendants*), *Appellants* v. AMBALAL SARABHAI (*Original Plaintiff*), *Respondent.** [9th March, 1900.]

Bank of Bombay—Shares—Registration and transfer of shares—Rights of surviving co-parceners—Necessity of probate or letters of administration—Presidency Banks Act (XI of 1876), ss. 20, 22 and 23.

Thirteen shares of the Bank of Bombay stood in the name of one Sarabhai, who died in March, 1895. The plaintiff, who was the minor son of Sarabhai and joint and undivided with him, applied to the Bank to have the shares transferred to his name as the sole surviving co-parcener. The Bank contended they were not bound to do so without production of the probate of the will of Sarabhai or letters of administration to his estate.

Held, (reversing RUSSELL, J.) that having regard to the terms of the Presidency Banks Act (XI of 1876) the Bank were right in their contention. For a share in the Bank, for the purpose of devolution or survivorship, must be deemed, as far as the Bank was concerned, the exclusive property of its registered holder, and that, therefore, the sole surviving co-parcener of a deceased Hindu cannot demand that the Bank of Bombay should by reason of his survivorship register him as a shareholder in respect of shares in the Bank which stand in the name of his deceased co-parcener.

THIS was an appeal from the decision of Russell, J., who directed the defendant Bank to issue fresh certificates in the name of the plaintiff in respect of the shares standing in the name of the deceased Sarabhai.

The facts sufficiently appear from the judgment of Russell, J., which was as follows:—

[351] RUSSELL, J.—By his plaint in this suit, which was filed on the 19th of December, 1899, the plaintiff says that he and his father, the

* Suit No. 798 of 1899 ; Appeal No. 1094.

(1) 19 C. 132.

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late Sarabhai Maganbhai, were members of a joint Hindu family and continued joint and undivided until the death of the latter in March, 1895, on which event the property of the family came to the plaintiff as sole surviving member by right of survivorship. The said family property comprised 13 shares of the defendant Bank bearing Nos. 1081—1085, 14530, 14531, 5835, 8674, 11306, 12588, 17065, 19243 purchased out of the family funds in the name of the said Sarabhai as the head male member and manager of the family and now standing in his name in the Bank's Register. The plaintiff applied to the defendant Bank for transfer of the shares and payment of the dividends thereon in his own right, but the Bank refused to do so without production of the probate of the will of the said Sarabhai or letters of administration to his estate. The plaintiff submits that the shares did not form part of the estate of the said Sarabhai and could not vest in his executors and administrators as such, and that the same came to him by survivorship and ought to be transferred to his name without probate or letters of administration. The plaintiff offered to make a declaration of the co-parcenary and the plaintiff's right to the shares, and to give an indemnity to the Bank, which, however, refused to comply with the plaintiff's demand. The plaintiff submits that the Bank is not justified in insisting on its requisition for probate or letters of administration, and that its refusal to comply with the plaintiff's demand is wrongful. The plaintiff prays that he is entitled to the shares and dividends thereon as sole surviving member of the joint family and to deal with the same as his own; that the defendant Bank may be decreed to transfer the said shares to the name of the plaintiff or to the name of his guardians under Act VIII of 1890 and to pay him the dividends on the shares accrued and to accrue due, and to do all acts and things necessary to vest the shares in the plaintiff and for costs and other relief.

No written statement was put in by the defendant, but Mr. Macpherson (with the Advocate-General) raised the issue "whether the plaintiff is entitled to any and what relief," and **[352]** Mr. Inverarity for the plaintiff raised the issue "whether the defendants are entitled to demand probate of the will or letters of administration to the estate of Sarabhai Maganbhai."

From the evidence before me it appears that there was an old banking firm of the name of Karamchand Premchand belonging to Sarabai's grandfather Karamchand. Karamchand had two sons, Maganbhai and Motibhai. Motibhai had no sons and died before Maganbhai, Maganbhai adopted Sarabhai. And Maganbhai, Motibai, and Sarabhai were members of the joint and undivided Hindu family. Maganbhai's property was ancestral and he died in 1864, and Sarabhai continued the family firm under the same name. The only property that Sarabhai had was acquired from his father. The plaintiff was the natural son of Sarabhai and was joint and undivided with him till his death in March, 1895. It is also proved that the shares of the defendant Bank are ancestral property in the hands of the plaintiff and were bought from the firm's fund.

This suit was filed by the plaintiff by his next friend Chimanlal Nagindas, who with seven other gentlemen was appointed guardian of the estate of the plaintiff, who is a minor, and the said Chimanlal was alone appointed guardian of his person by an order of the District Court of Ahmedabad, dated the 24th of January, 1896. By an order of this Court, dated the 18th January, 1899, purporting to be made under Act XXVII

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of 1866, the right to transfer the shares in question (together with others) and to receive the dividends, &c., thereon was vested in the said Chimanlal Nagindas, and during the minority of the plaintiff the said Chimanlal was authorized to transfer the share, and receive the dividends, and was further ordered to transfer them to the plaintiff on his attaining majority.

The sole question to be decided is "Is the Bank of Bombay justified in insisting upon probate or letters of administration as above mentioned?" The Bank of Bombay, as is well known, is governed by Act XI of 1876 (the Presidency Banks Act, 1876), s. 23 of which is as follows:—

"When by the death of any proprietor or share-holder his stock or shares shall devolve on his legal representative the Bank **[353]** shall not be bound to recognise any legal representative of such proprietor or share-holder other than a person who has taken out from a Court having jurisdiction in this behalf probate of the will or letters of administration to the estate of the deceased."

The share-holders are defined as "the duly registered holders from time to time of the shares of the Bank." Sarabhai came within that definition. Mr. Macpherson argued (*inter alia*) that s. 20 of the Act must be complied with. Paragraph 1 of s. 20 runs as follows:—

"Every transfer of stock or shares may be by endorsement on the certificate or in such other form as the Board from time to time may approve, and shall be presented to the Bank accompanied by such evidence as the Board may require to prove the title of the transferor."

But it appears to me that s 23 refers to a transmission of shares, s. 20 to transfer. These two are entirely distinct. One means a transfer by the act of parties, the other means transmission by devolution of law: see *In re Bentham Mills Spinning Co.*(1). It was next objected that the plaintiff was a minor, but I do not find anything in the Act to prevent a minor, under circumstances like the present, from being registered as a share-holder. In England a minor can sign a memorandum of association of a company: see *Laxon & Co.* (2), and table A, art. 45, contemplates a minor voting by his guardian or any one of his guardians if more than one (Lindley, page 39). "An infant may be a member of a company, but he can repudiate his shares whilst he is an infant or on coming of age." In India, however, an infant is not "competent to contract," but in the present case the plaintiff is not contracting in any sense of the word. It was next objected that s. 22 precluded the Bank from being bound by, or affected by notice of any trust to which any share might be subject in the hands of the holder thereof, but Mr. Inverarity's answer to that seems to me to be correct, *viz.*, that s. 22 has no application when the trustee is dead, but only applies when he is alive, and, moreover, the managing member of a Hindu family is not a trustee: see Mayne's Hindu Law, s. 269. **[354]** Considerable stress has been laid on the risk that the Bank would be exposed to in having to decide who were the members of the joint Hindu family or what was the property thereof, but I have only to construe the Act without respect to such considerations, and there seems considerable force in Mr. Inverarity's objection that if a member of a joint Hindu family did take out letters of administration, and got the shares transferred to his name and misappropriated them, the Bank would have no defence to a suit filed against them by other members of the family entitled to the shares.

(1) (1879) 11 Ch. Div. 900.

(2) (1892) 3 Ch. 555.

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The real point, it seems to me, is, can the shares in this case be said to have devolved on the *legal* representative of Sarabhai?

Representation implies succession—and as Mr. Mayne says, s. 246: "There is no such thing as succession, properly so called, in an undivided Hindu family. The whole body of such a family, consisting of males and females, constitutes a sort of corporation, some of the members of which are co-parceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance. In Malabar and Kanara, where partition is not allowed, the idea of heirship would never present itself to the mind of any member of the family. Each person is simply entitled to reside and be maintained in the family house, and to enjoy that amount of affluence and consideration which arises from his belonging to a family possessed of greater or less wealth. As he dies out, his claims cease, and as others are born, their claims arise. But the claims of each spring from the mere fact of their entrance into the family, not from their taking the place of any particular individual. Deaths may enlarge the beneficial interests of the survivors by diminishing the number who have a claim upon the common fund, just as births may diminish their interests by increasing the number of the claimants. But although the fact that A is the child of B introduces him into the family, it does not give him any definite share of the property, for B himself has none. Nor upon the death of B does he succeed to anything, for B has left nothing behind to succeed to. Now in the rest of India the position of an undivided family is exactly the same, except that within certain limits each male member has, and in **[355]** Bengal some females have, a right to claim a partition, if they like. But until they elect to do so, the property continues to devolve upon the members of the family for the time being by survivorship and not by succession."

Sir William Markby in his Elements of Law, s. 780: "We in Europe have long been accustomed always to deal with the law of succession as connected with the rupture of the family by death; the Hindu lawyers deal with it as connected with the rupture of the family by partition. It might be said that there is, in fact, no Hindu law of succession, but only of partition."

Moreover, if probate or letters of administration were granted, these shares would not be comprised therein. For s. 3 of the Probate and Administration Act V of 1881 defines "Probate" as the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator, and "Administrator" as a person appointed by competent authority to administer the estate of a deceased person when there is no executor; and s. 4 of that Act after stating that "the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such," expressly goes on: "but nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person." This latter clause is a re-enactment of cl. 3 of the Hindu Wills Act XXI of 1870 which is repealed by s. 154 of the Probate and Administration Act (V of 1881). An executor or administrator could not swear that these shares were the property of the deceased, and, consequently, probate or letters of administration could not affect them. I may mention that in the case of *Goculdas Madhowji* v. *The Mofussil Company and others* (No. 499 of 1885), a report of which I have been supplied with from the *Bombay Gazette* of the 23rd of July

1886, in which judgment was given by Scott, J., on 26th July, 1886, a similar point is decided in the way I am deciding the present case.

It is not necessary for me to decide whether the *ex parte* order under Act XXVII of 1866 was good or bad, because under s. **[356]** 52 of that Act the Bank will be completely indemnified if acting upon the order. The result is that I must pass a decree for the plaintiff. I direct the defendants to issue fresh certificates in the name of the plaintiff in respect of the shares above specified, and to pay all dividends accrued due, or to become due, to the said Chimanlal Nagindas during the plaintiff's minority, and the receipt of the said Chimanlal Nagindas to be a sufficient discharge to the defendants. I further direct that the plaintiff and the said Chimanlal Nagindas do indemnify the Bank in respect of the issue of such shares and payment of such dividends to the satisfaction of the Bank, but, in the event of the parties disagreeing, the question of the sufficiency of such indemnity to be decided by the Judge in chambers. The defendants must pay the costs of this suit, but the plaintiff should, I think, pay the costs, if any, of such indemnity ; but if any application to the Judge in chambers be necessary hereafter, the costs thereof are to be dealt with by that Judge. On fresh certificates being issued by the Bank as above decreed the present certificates to be handed to the Bank for cancellation.

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Lang (Advocate General) and *Macpherson*, for appellants.

Inverarity, for respondent.

JUDGMENT.

The judgment of the appeal Court was delivered by

JENKINS, C. J.—The point for decision in this appeal is, whether the sole surviving co-parcener of a deceased Hindu can demand that the Bank of Bombay should, by reason of his survivorship, register him as a share-holder in respect of shares in the Bank, which stand in the name of his deceased co-parcener, without production of probate or letters of administration. Mr. Justice Russell has decided this point in the affirmative, and from this decision the Bank have presented this appeal.

The Bank of Bombay is regulated by the Presidency Banks Act of 1876, which in its 3rd section provides that in the Act "share-holders" means the duly registered holders from time to time of the shares of the Bank, and "registered" means registered in the books of the Bank. Chapter V of the Act deals with certificates and the transfer and transmission of shares, and **[357]** provides for a change in the legal title to shares in three ways : (*a*) by transfer by the act of share-holder ; (*b*) by survivorship ; (*c*) by transmission on death, insolvency or bankruptcy, or (in the case of female member) on marriage. (See ss. 20, 22 and 23). Here we are not concerned with a change of proprietorship effected or to be effected by transfer : the operative event in this case is death. There are in reference to it three possible views : (1) that it resulted in a survivorship under the Act ; (2) that it gave rise to a transmission by devolution under the Act ; and (3) that the contingency is unprovided for, and its results have to be determined apart from the Act.

Now survivorship under the Act takes place when the share is vested in more than one holder ; for in that case the share-holders shall, as between themselves and the Bank, be considered as joint owners with benefit of survivorship. But a share is only vested in holders when they are duly registered in the books of the Bank as the holders of that share. In this case these conditions did not exist ; for the deceased alone was the

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registered holder of the share : therefore it is clear that there was no survivorship under the Act.

Was there, then, a transmission within the meaning of s. 23 on the death of the deceased share-holder ? In reference to this question, s. 22 has a most material bearing. It provides that the share-holders for the time being and no other persons shall be members of the Bank, and that the Bank shall not (subject to an exception not now material) be bound or affected even by notice of any trust to which the share may be subject in the hands of the holder.

This provision, it will be noticed in passing, goes further than s. 29 of the Indian Companies Act of 1866. The effect of s. 22 as it appears to me, then, is, that a share, as between the Bank and all who may be interested in it, is the exclusive and separate property of the registered share-holder.

This result, it should be noted, arises not out of mere contractual obligation, but out of a provision of legislative force capable of moulding the rights of individuals in a form not possible by mere contract. It was argued that on the death of a **[358]** share-holder the provisions of s. 22 come to an abrupt end ; but this appears to me to be putting too narrow a construction on the words. I prefer to take the view expressed by James, L. J., in *Baird's case* (1), where he says "the dead share-holder remains,—that is, the estate remains—a member," and to say that, until there is such a transmission as the Act sanctions, the deceased holder must be treated as the share-holder for the time being, and the share must be deemed to be in his hands as the holder thereof even after his death, so that the Bank is not bound or affected by notice of any trust relating to the share.

The Legislature has, in my opinion, only given effect to what the conduct of the business requires when it provided that the Bank had only to do with the legal title to the share, and that a share was, for the purpose of devolution or survivorship, to be deemed, so far as the Bank was concerned, the exclusive property of its registered holder or holders.

But if for the purposes of the Act the share was the exclusive property of the deceased holder, on his death the legal title did not survive ; but it devolved on his legal representative, so that s. 23 of the Act applies. That section provides that the Bank shall not be bound to recognise any legal representative other than a person who has taken out from a Court having jurisdiction in this behalf probate of the will or letters of administration to the deceased. It has, however, been argued that, in view of the provisions of s. 4 of the Probate and Administration Act, s. 23 of the Presidency Banks Act cannot be treated as applicable. Section 4 provides :—

"The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him.

"But nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person."

It is said that inasmuch as the beneficial interest in the share passed by survivorship, the share would not, according to the words of the section, vest in the executor or administrator. But **[359]** this argument is founded on an obvious fallacy ; it confuses the legal title and the beneficial interest, and assumes that because the beneficial interest has survived, the legal

(1) (1870) L. R. 5 Ch. 725 (735).

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title must follow suit. But as I have pointed out, it is with the legal title alone that we are concerned, and that has not survived.

We have not at present to consider in what way representation should be taken out, or what duty should be paid; it is sufficient to hold, as in my opinion we should, that the present is a case in which s. 23 of the Presidency Banks Act applies, and that, if the Bank so requires, probate or letters of administration must be produced.

I have not overlooked the reference made by Mr. Inverarity to the order purporting to have been passed under s. 52 of Act XXVII of 1866, but in my opinion that makes no difference to the Bank's rights. I notice that the order under appeal directs the Bank to issue fresh certificates in the name of the plaintiff. The plaintiff is, however, a minor, and, though the point has not been raised before us, I desire to guard myself against being taken to assent to the proposition that the Bank can be forced to accept an infant as a share-holder (cf. *Symon's case*) (1). In the view, however, that I take of the Presidency Banks Act, no question of this kind can arise in the event of transmission or death. (See ss. 8 and 13 of the Probate and Administration Act, 1881).

In my opinion the decree of Mr. Justice Russell must be reversed, the suit must be dismissed, and the appeal allowed with costs.

CANDY, J., concurred.

Attorneys for the Bank (appellant-defendant):—Messrs. *Crawford, Brown and Co.*

Attorneys for the plaintiff-respondent:—Messrs. *Bhaishankar and Kanga.*

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24 B. 360 = 2 Bom. L.R. 25.

[360] APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

KRISHNAJI NARAYAN PARKHI (*Original Plaintiff*), *Appellant v.* RAJMAL MANIKCHAND MARWADI (*Original Defendant*), *Respondent.** [4th December, 1899.]

Hundi—Inadmissible in evidence for want of stamp—Independent admission of loan—Suit on the original consideration—Admission by pleader erroneous in law—Binding effect—Dishonour—Notice.

Where there is an independent admission of a loan, the holder of a hundi, bill or note, which is defective and inadmissible in evidence for want of a stamp, may still sue on the consideration the person to whom he gave it, though he cannot use the bill in support of his suit.

An admission by a pleader, if it is erroneous in law, is not binding on his client.

In a suit based on the consideration independently of a hundi, it is not necessary to prove notice of dishonour.

[**Diss.**, U.B.R. (1907), 3rd Qr., Evidence 5 = 14 Bur L.R. 179; **F.**, 8 Ind. Cas. 281 = 6 N.L.R. 125 (128); **R.**, 34 A. 158 = 9 A.L.J. 72 = 13 Ind. Cas. 138; 12 Bom L.R. 466 (470) = 6 Ind. Cas. 903; 16 Ind. Cas. 33; 17 C.L.J. 399 = 19 Ind. Cas. 840; 26 M.L.J. 19 = 14 M.L.T. 520 = (1914) M.W.N. 58; 28 M.L.J. 266 = 17 M.L.T. 170 = (1915) M.W.N. 105; 8 S.L.R. 156 = 27 Ind. Cas. 357; 20 M.C.C.R. 48 (51); 108 P.R. 1908; **D.**, 66 P.R. 1906 = 73 P.L.R. 1907.]

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* Second Appeal No. 304 of 1899.

(1) (1870) L.R. 5 Ch. 298 (301).

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APPELLATE CIVIL.

24 B. 360 = 2 Bom. L.R. 25.

SECOND appeal from the decision of C. H. Jopp, District Judge of Ahmednagar, reversing the decree of Rao Saheb E. Reuben, Subordinate Judge of Rahuri.

The plaintiff sued to recover Rs. 675 principal and Rs. 25 interest on a hundi dated the 6th May, 1877, alleging that the hundi had been dishonoured and that it had been lost.

The defendant replied that the hundi had not been properly stamped, that the suit could not be maintained in the absence of the hundi, and that he had no knowledge of its being dishonoured.

The Subordinate Judge, without deciding whether the suit could lie without the production of the hundi, found that Rs. 675, the original consideration for the hundi, were due to the plaintiff and awarded Rs. 700 as claimed with costs and future interest from the defendant.

On appeal by the defendant the Judge reversed the decree and rejected the claim. The following is an extract from his judgment:—

In the transaction relating to the hundi the original cause of action was the hundi. No cause of action existed independently of the hundi, for it was in consideration of plaintiff's paying the sum of Rs. 675 that defendant gave the hundi to him. Plaintiff cannot, therefore, now sue, as his pleader admits, for the consideration apart from the hundi (*Sheik Akbar* v. *Sheik Khan*, I. L. R., **[361]** 7 Cal., 256). He cannot recover Rs. 675 from the defendant on account of the consideration for the hundi. Nor can he recover from the defendant on the hundi, for though, as the defendant has admitted the hundi and its contents, the absence of the hundi does not prevent the suit lying on the hundi, the defendant contends that the bundi was not properly stamped. It ordinarily lies on the person, who objects that a lost document was insufficiently stamped, to show that the stamp was insufficient. But in this case, though the plaintiff asserts that the hundi has been lost, he has brought no evidence to show, and he has not shown, that it was lost, and this failure on the part of the plaintiff shifts the burden of proving the sufficiency of the stamp on to him. Plaintiff has not proved what the stamp was or that it was sufficient. It must, therefore, be concluded that the stamp was insufficient. The hundi cannot, therefore, be "acted on" and effect cannot be given to it even though it has been admitted by the defendant (*Chenbassappa* v. *Lakshman*, P.J. for 1893, p. 224; Act I of 1879, s. 34). Plaintiff's pleader, however, urges that his client is, at any rate, entitled to recover on the agreement mentioned in paragraph 2 of the plaint and that this agreement is proved by defendant's letter to the plaintiff (Ex. 21). To this the answer is that first the plaintiff at the trial plainly abandoned this cause of action and elected to proceed to trial on the hundi and on the original debt. Plaintiff cannot, therefore, be permitted now to rely on this agreement. Secondly, Ex. 21, if it is used to prove the agreement, is a promissory note. It requires a stamp, and as it is not stamped, it is inadmissible in evidence. Plaintiff is, therefore, entitled to no relief in this suit.

The plaintiff preferred a second appeal.

Rao Bahadur *Ghanasham N. Nadkarni*, for the appellant (plaintiff).

Narayan G. Chandavarkar, for the respondent (defendant).

The following authorities were cited in argument:—*Marine Investment Company* v. *Haviside*(1); *Valiappa Ravuthan* v. *Mahommed Khasim*(2);

(1) (1872) L.R. 5 Eng. and Ir. Ap. 624.

(2) 5 M. 166.

Sheikh Akbar v. *Sheikh Khan* (1); *Pothi Reddi* v. *Velayudasiva* (2); *Chenbasapa* v. *Lakshman*(3); *Kanhayalal* v. *Stowell*(4); *Farr* v. *Price* (5); *Nixon* v. *The Albion Marine Insurance Co.* (6); *Binja Ram* v. *Raj Mohan Roy*(7); *Damodar* v. *Atmaram* (8); *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree*(9), **[362]** *Sreemutty NoorBibee* v. *Shaikh Rumzan*(10); *Pramath Nath Sandal* v. *Dwarka Nath Dey* (11); *Hiralal* v. *Datadin* (12).

JUDGMENT.

JENKINS, C. J.—The plaintiff sues to recover 700 rupees. In the first Court this amount was decreed, but on appeal the claim was rejected with costs. From the appellate Court's decree this second appeal is preferred.

It seems that the plaintiff lent the defendant Rs. 675 and at the same time took a hundi to secure its repayment. The lower appellate Court has held (and it must, therefore, be so assumed by us) that the hundi was not stamped. It has further decided that the plaintiff cannot, apart from the hundi, recover the Rs. 675 that has been advanced.

The only point is whether this decision can be supported. There can be no doubt as to the existence of the debt and as to the merits; for when the defendant failed to pay the amount of the hundi, he admitted his liability and promised to pay. This admission and promise are contained in Ex. 21.

This document is part of the record and in the opinion of the District Judge is a promissory note: he says, however, that no relief can be granted on the footing of it, first, because any cause of action on it was abandoned, and, secondly, because it is not stamped. The first of these objections is hardly supported by the record, while as to the second the learned Judge appears to have overlooked the well-established rule that when a document has been admitted in evidence, no objection on the score of absence or deficiency in stamping can be taken on appeal.

Apart, however, from Ex. 21, it appears to me that the learned Judge has taken a needlessly technical view of the law. Stated generally, it may be said that the holder of a bill or note, which is defective and inadmissible in evidence for want of a stamp, may still sue on the consideration the person to whom he gave it, though he cannot use the bill in support of his suit. We have to determine whether the plaintiff can avail himself of that rule. The District Judge has held not, relying for this on **[363]** *Sheikh Akbar* v. *Sheikh Khan* (1). He also states that the plaintiff's pleader so admitted, but I need hardly say that the plaintiff is not bound by this admission, if it is erroneous in law.

I will first deal with *Sheikh Akbar's* case, and it is important to see what the real facts were and what was actually decided.

The plaintiff had a claim against the defendant for Rs. 225: he gave the defendant a registered receipt in full acquittance of that sum, and took from her a promissory note for that amount. It was considered by the lower Court (and in the opinion of Garth, C. J., rightly) that the giving of the note was "a sort of loan transaction." To quote the Chief Justice's words, "It was, therefore, a loan of the Rs. 225 to the defendants upon the terms contained in the promissory note, *and as there was no loan*

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(1) 7 C. 256. (2) 10 M. 94. (3) 18 B. 369.
(4) 3 A. 581. (5) (1800) 1 East's Rep. 55. (6) (1867) L.R. 2 Ex. 338.
(7) 8 C. 282. (8) 12 B. 443. (9) 3 C. 314.
(10) 24 W. R. 198. (11) 23 C. 851. (12) 4 A. 135.

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24 B. 360=
2 Bom. L.R.
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independently of the note, the note itself was the best evidence of the transaction, and as it could not be proved for want of a proper stamp, the plaintiff could not recover upon it." It is apparent from this that the actual *ratio decidendi* was that there was no loan independently of the note, so that it does not govern this case if, as I think, there was a loan independently of the note. In the course of his judgment Garth, C. J., referred to the decision of Sir R. Couch in *Ankur Chunder Roy* v. *Madhub Chunder Ghose* (1), and it has been relied on here as justifying the decree under appeal. At first sight it appears to favour the defendant's contention, but when the case is carefully analysed, it will be found not to touch the point with which we are now concerned. The suit was on the note, and it was held that evidence of its contents could not be supplied otherwise than by the note itself; but as that was impossible from defect of stamping, the suit in that form necessarily failed. There was not, as here, an independent admission of the loan: the defendant actually denied receipt of the money: and there was no suit on the consideration.

Turning then to *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree* (2), it was held in a case resembling this in its facts—these facts are stated in *Sheikh Akbar* v. *Sheikh Khan* (3)—that **[364]** the plaintiff could recover on the original consideration though the unstamped note could not be used. This case lays down no new law; it merely professes to follow *Farr* v. *Price* (4), which is but one of many cases where the law has been similarly expounded—*Wilson* v. *Kennedy* (5); *Brown* v. *Watts* (6); *Tyte* v. *Jones* (7). The latest Calcutta case which I have been able to find is *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (8) in which the judgment was delivered by Petheram, C. J., who had a wide experience and intimate knowledge of commercial law. There it was held, in a case on all fours with the present, that a suit would lie on the consideration. The judgment is further valuable as explaining certain remarks of Garth, C. J., in *Sheikh Akbar's* case, which are liable to be misunderstood and probably have influenced the District Judge in this case. It has been suggested that the s. 91 of the Evidence Act excludes the operation of these English cases: see illus. (*b*). In my opinion such a contention is not well founded. It is perfectly true that the terms of the contract contained in the hundi can, apart from the conditions which permit secondary evidence, only be proved by the hundi, but this does not prevent proof of the loan independently of the note. In the view, therefore, that I take of the law, the plaintiff is entitled to a decree, for there is no dispute that here there was an advance of money by way of loan, and that it still remains unpaid. It has been argued that notice of dishonour is not proved, but, even if this be so, it would not avail the defendant, because the suit is not on the note, but on the consideration—*Cundy* v. *Marriott* (9). The decree of the lower appellate Court should be reversed and a decree passed in the plaintiff's favour for Rs. 675 with interest at 6 per cent. from the date of the suit. Plaintiff to have his costs throughout.

CANDY, J.—The District Judge says that "the plaint discloses two causes of action—the first is an agreement dated 20th June, 1895, for the repayment of the money paid for the hundi on 25th June, 1897 (paragraph 2 of the plaint); and the second is the original consideration for the hundi (paragraph 7 of the plaint)."

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(1) 21 W.R. 1. (2) 3 C. 314. (3) 7 C. 256.
(4) (1800) 1 East 55. (5) (1794) 1 Esp. 245. (6) (1808) 1 Taunt. 353.
(7) (1788) 1 East 58 n. (8) 23 C. 851. (9) (1831) 1 B. and Ad. 696.

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24 B. 360=2 Bom. L.R. 25.

[365] This is not quite accurate. In paragraph 2 of the plaint it is alleged that notice of dishonour of the hundi being brought to the notice of defendant on 20th June, 1897, the defendant did, on 25th June, 1897, promise to repay the loan.

The District Judge further says :—

"Plaintiff's pleader urges (in the District Court) that his client is at any rate entitled to recover on the agreement mentioned in paragraph 2 of the plaint, and that this agreement is proved by defendant's letter to the plaintiff, Ex. 21. To this the answer is, first, that plaintiff at the trial plainly abandoned this cause of action and elected to proceed to trial on the hundi and on the original debt. Plaintiff cannot, therefore, be permitted now to rely on this agreement. Secondly, Ex. 21, if it is used to prove the agreement, is a promissory note. It requires a stamp, and as it is not stamped it is inadmissible in evidence."

Plaintiff's pleader was not quite correct in his contention in the District Court, nor was the District Judge's remark in accordance with the facts. Plaintiff did not bring his suit on the Ex. No. 21; nor did he at the trial abandon any cause of action. He used Ex. No. 21 to show that plaintiff admitted the loan of Rs. 675. As the District Judge correctly observed, "the issues raised in the lower Court and the Subordinate Judge's judgment indicate that the case proceeded to trial as if it was brought(1) on the hundi and (2) for the recovery of the original consideration." The question is whether on those pleadings the plaintiff is entitled to any relief.

The Subordinate Judge held in the affirmative. The District Judge held in the negative, on the authority of the case of *Sheikh Akbar* v. *Sheikh Khan* (1).

The District Judge further found as a fact that the hundi was not lost, and that it was kept back, because it was insufficiently stamped. We must accept those findings. Any question, therefore, of indemnity under s. 81 of the Negotiable Instruments Act does not arise.

Now, in considering the question whether plaintiff is entitled to recover the original loan, if such a question was from the first put in issue, it must be remembered that the decision in *Sheikh* [366] *Akbar* v *Sheikh Khan* (1) was explained in the subsequent case of *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (2). Petheram, C. J., after quoting part of the judgment of Garth, C. J., in the earlier case, said : "These words, taken alone, may seem to indicate that when a bill or note is taken for a debt, the action must be brought upon the bill or note; and that if for any reason the document is excluded, the action must fail; but a reference to the earlier portion of the judgment shows that such was not the meaning of the Chief Justice, and that when he spoke of a deposit he did not mean a loan, as he then says where money is *lent* and bill or note given for the loan which is not paid at maturity, the creditor may disregard the note and sue on the original consideration. This is in accordance with the case of *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree* (3), and with many unreported decisions of this Court, and is, in my opinion, the law in this country as well as in England." In the earlier Calcutta case quoted above, Kennedy, J., said : "The general principle seems well settled that the existence of an unstamped promissory note does not prevent the lender of money from recovering on the original consideration, if the pleadings are properly framed for that purpose

(1) 7 C. 256. (2) 23 C. 851. (3) 3 C. 314.

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24 B. 360 = 2 Bom. L.R. 25.

—*Farr* v. *Price* (1)." This distinction between cases in which the suit is brought solely on the note or hundi and cases in which there is and can be a claim to recover the original loan, has been acknowledged by this Court in *Chenbasapa* v. *Lakshman Ramchandra* (2), where the various decisions are cited, and in *Damodar* v. *Atmaram* (3), in which Mr. Justice Birdwood referred to the case of *Farr* v. *Price* (1).

So, too, at Allahabad in *Hira Lal* v. *Datadin* (4), in which the case came before the High Court specially with reference to the provisions of s. 91 of the Evidence Act, Straight, J., said : " The existence of the promissory note does not debar the plaintiff from resorting to his original consideration."

I would reverse the decree of the District Court and give plaintiff a decree for Rs. 675 with costs throughout and with 6 per cent. interest from date of suit.

Decree reversed.

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24 B. 367 (F.B.)* = 2 Bom. L. R. 163.

[367] APPELLATE CIVIL—FULL BENCH.

Before Sir L. H. Jenkins, Kt., Chief Justice, Mr. Justice Parsons, Mr. Justice Candy and Mr. Justice Ranade.

VYAS CHIMANLAL (*Original Defendant*), *Appellant v.* VYAS RAMCHANDRA (*Original Plaintiff*), *Respondent.*† [21st December, 1899.]

Hindu law—Adoption—Adoption of an only son—Validity of such adoption in Gujarat.

The adoption of an only son is valid in Gujarat, where the Mayukha is the paramount authority on Hindu law.

[F., 25 B. 537 (540) ; R., 24 B. 473.]

REFERENCE to a Full Bench.

The reference was made by Parsons and Ranade, JJ., in the following terms :—

" There are several objections taken to the validity of the adoption under which the plaintiff claims. One of them is that he was an only son. It was held by a Full Bench of this Court in the case of *Waman* v. *Krishnaji* (5) that the adoption of an only son is absolutely illegal and invalid, and that ruling has hitherto been followed by the Courts in this Presidency. The recent decision of their Lordships of the Privy Council in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (6) throws great doubt on its correctness, but does not, we think, directly decide that it is wrong. We, therefore, refer this question to a Full Bench namely :

" In Gujarat, where the Mayukha is the paramount authority, is the adoption of an only son legal and valid ? "

The reference was argued before Jenkins, C. J., Parsons, Candy and Ranade, JJ.

Ganpat Sadashiv Rao, for appellant.—The question is whether the adoption of an only son is valid in Gujarat. The paramount authority

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* See in this connection 24 B. 473 *infra*.

† Second Appeal No. 694 of 1898.

(1) (1800) 1 East, 55.
(2) 18 B. 369.
(3) 12 B. 443.
(4) 4 A. 135.
(5) 14 B. 249.
(6) 26 I.A. 113 = 22 M. 398.

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on Hindu law in Gujarat is the Vyavahar Mayukha. So far as the Mitakshara is concerned, the point is now finally settled by the recent Privy Council ruling in *Shri Balasu Gurulingaswami* [368] v. *Shri Balusu Ramalakshmamma* (1). This ruling expressly leaves the question open in cases governed by the Mayukha. The subject of adoption is treated by Nilkant in chap. IV, s. V. He quotes Saunak's text in paras. 8 and 9. That text lays down in clear and distinct terms as to who can, and who cannot, give a son in adoption. It states, "By no man having an only son is the gift of that son to be *ever* made;" the original verse contains words meaning that "*in no case*," "*under no circumstances whatever*," can a man give away an only son in adoption. The verse contains an absolute prohibition of the adoption of an only son. This is shown still further by the next verse—"By a man having more sons than one, such a gift is to be made." Reading both the verses together, the meaning is clear—that he alone is competent to give, who has more sons than one, but he who has an only son cannot give him in adoption. It follows, therefore, that according to Saunak's text an only son cannot be adopted. To fortify his position, Nilkanta quotes in placitum 16 Vasishtha's text, "Let no man give or accept an only son." This text prohibits both the giving and the taking of an only son, for he is destined to continue the line of his ancestors. That this prohibition is imperative, and not merely monitory, is obvious. The words used in the text are as clear and emphatic as they could possibly be. If we refer to the context, we find that the injunction prohibiting the adoption of an only son appears side by side (1) with the injunction prohibiting the adoption of a boy outside the caste of the adopter, (2) with the injunction prohibiting the adoption of a daughter's son or sister's son among the three regenerate classes. All the three injunctions stand apparently on the same footing. And if the last two injunctions are held to be mandatory, there is no reason why the first injunction about the adoption of an only son should be treated as directory or monitory only.

The Mayukha is one out of the twelve treatises written by Nilkantha forming an encyclopædia of the law, ethics, and religion of the Hindus. It is exclusively devoted to the exposition of the civil and criminal law. If the injunction in question were treated as a moral and not a legal precept, it would be out [369] of place in a treatise on law. It should further be noted that the section on adoption is but part and parcel of the chapter on inheritance. If the rules of inheritance laid down in this chapter are legally binding, the rules relating to adoption are equally so. The chapter on adoption deals with the *status* of an adopted son, and with his rights of inheritance and succession. The adopted son holds the same position as the son by birth. He succeeds lineally and collaterally to his adoptive father's kinsmen. When a stranger thus comes into the family and acquires important rights, it is absolutely necessary that his *status* should be legally defined. The law, therefore, lays down who can, and who cannot, be adopted. If the precepts on this point were treated as morally and not legally binding, the law of inheritance would be upset.

According to the Mayukha, no man has an inherent power to dispose of his son by gift (Chapter IX, placita 2 and 3). The power is derived from express texts; and if it is based on texts, it is subject to the limitations and restrictions imposed by texts. All these considerations point to

(1) 26 I. A. 113 = 22 M. 398.

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the conclusion that according to Nilkantha the adoption of an only son is absolutely forbidden.

The Shastris, who are the exponents of the local law as it is understood and practised at the present day, invariably pronounce against the validity of such an adoption—West and Bühler's Hindu Law, p. 989. See also the opiuions of the Shastris quoted in *Lakshmappa* v. *Ramava*(1). The adoption of an only son is forbidden among most of the castes of the Deccan—Steele on Hindu Law and Custom, p. 384. From Borradaile's Caste Rules (Vol. II, pp. 391—429) it appears that out of 200 castes of Gujarat who were consulted, 147 castes state that the custom of adoption does not exist among them; 28 castes say that they do not adopt, but if an adoption is to be made it must be made according to law; while 25 castes say that they adopt according to law. The conclusion to be drawn from these facts is that there is no special custom in Gujarat at variance with the general Hindu law on the subject of adoption.

[370] As to the decisions of this Court, the law has been practically settled since 1875, when the question was fully discussed by Westropp, C. J., in *Lakshmappa* v. *Ramava* (1). See also *Ramchandra* v. *Vittoba* (2); *Dada* v. *Abba* (3); *Somasekhara Raja* v. *Subhadramaji* (4); *Waman* v. *Krishnaji*(5).

Bhaishankar Nanabai, for respondent.—The recent decision of the Privy Council throws considerable doubt on the correctness of the Full Bench ruling of this Court in *Waman* v. *Krishnaji* (5). This ruling is mainly based on the *obiter dictum* of Westropp, C.J., in *Lakshmappa* v. *Ramava*(1). With regard to this *dictum* the Privy Council say that it is "a novel suggestion of the learned Chief Justice, unsustainable in principle and unsupported by authority unless there is something peculiar to Bombay to support it." I submit there is nothing peculiar to the law or usage of this Presidency to support the *dictum* of Westropp, C. J. The grounds upon which the Privy Council have decided the question apply with as much force to the Mayukha as to the Mitakshara. In the chapter on adoption Nilkantha quotes and comments on the texts of Manu, Saunaka, Vasishtha and Yadnyavalkya. These are the very texts quoted in the Mitakshara, and considered by the Privy Council. There is nothing in the Mayukha which necessitates a different construction to be put upon these texts. In fact, Nilkantha nowhere gives his own opinion about the validity or otherwise of the adoption of an only son. If his opinion had been against the validity of such an adoption, he would have said so in express terms. Wherever he differs from the Mitakshara, he expresses his dissent in clear and unambiguous language, as in the case of the adoption of the eldest son. But on this point he does not express any dissent. His views are, therefore, in harmony with those of the Mitakshara. If so, the Privy Council ruling applies with equal force to cases governed by the Mayukha. The prohibition to adopt an only son is directory and not mandatory.

JUDGMENT.

[371] JENKINS, C. J., PARSONS, and RANADE, JJ.—The question referred to us by the Division Bench is whether in Gujarat, where the Mayukha is the paramount authority, the adoption of an only son is legal

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(1) 12 B. H. C. R. 364 (390).
(2) (1879) Unreported Judgment.
(3) P.J. (1882), p. 294.
(4) 6 B. 524.
(5) 14 B. 249.

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and valid. A Full Bench of this Court in *Waman* v. *Krishnaji* (1) had held that the adoption of an only son was, by the general Hindu law, invalid. The judgment in that case states the result of the previous rulings on this subject. Sir Charles Sargent, C.J., observed that up to 1875, when the judgment in *Lakshmappa* v. *Ramava* (2) was passed, with the exception of the opinion expressed by Sir Joseph Arnould in *Bhaskar* v. *Mahadev* (3), the adoption of an only son had been regarded by the late Sadar Divani Adalat and by this Court as valid on the ground, that however blameable the act might be on the part of the giver, yet, if performed with proper ceremony, it could not be set aside. The decision in *Lakshmappa* v. *Ramava* turned on another point; but on the strength of the opinion expressed by Sir Michael Westropp in that case, when the matter came up again before a Full Bench in 1879, the Court held that the adoption of an only son by a Lingayat was invalid. No judgment was recorded in the Full Bench case of 1879, probably because the whole subject had been fully considered in *Lakshmappa* v. *Ramava*. Under these circumstances, Sir Charles Sargent and the Judges who sat with him were of opinion that (1) unless a decision of the Privy Council was subsequently passed, militating against the decision of the Full Bench, or (2) unless it could be shown that the Full Bench decision was based upon a mistaken impression as to the Hindu law texts on which it was founded, that decision must be adhered to as binding on this Court. The two contingencies, noted in the above extract, have been to some extent satisfied by the ruling of the Privy Council in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* and *Radha Mohun* v. *Hardai Bibi* (4). That decision was passed on two appeals heard together which came from the Madras and Allahabad High Courts, and their Lordships of the Privy Council discussed fully the whole question of the validity of the adoption of an only son. All the original Smriti texts of **[372]** Manu and Vasishtha and Shaunak, and the views of the commentators, Mitakshara, Dattaka Mimansa, Dattaka Chandrika and others, with the exception of the Vyavahar Mayukha, were considered by their Lordships, and all the previous decisions of the four High Courts were passed under review. As the result of this full consideration, their Lordships arrived at the conclusion that such an adoption is not contrary to Hindu law, and is valid. The Bombay decisions in *Lakshmappa* v. *Ramava* (2) and the unreported case of 1879 and *Waman* v. *Krishnaji* (1) were considered, and it was stated that, so far as the Mitakshara was concerned, Sir Michael Westropp's conclusions were unsustainable in principle and unsupported by authority. At the same time, their Lordships observed that they did not re-try the Bombay decision, and that the effect of the Mayukha had not been argued before them. Unless, therefore, there was something peculiar to Bombay to support the contrary view, their Lordships' judgment plainly suggests that they were prepared to uphold the view taken by the Madras and Allahabad High Courts about the validity of an only son's adoption, as being equally good law in the provinces of Bombay and Bengal, even at the risk of invalidating those titles which might have been acquired by the setting aside of completed adoptions of only sons in these latter provinces, especially as such cases were probably very few, and statutory protection might easily be given to those titles. It will be seen from this judgment that, while the

(1) 14 B. 249.
(2) 12 B.H.C. R. 364.
(3) 6 B. H. C. R. O. C. J. 1 (4).
(4) 22 M. 398.

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Privy Council declined formally to disapprove the Bombay cases, because the authority of the Mayukha, on which they were partly founded, had not been discussed before them, they were satisfied that, unless there was something special in the authority of the Mayukha, the Bombay decisions, so far as they were based on the interpretation of Mitakshara and the texts of Vasishtha, Manu and Shaunaka, were mistaken.

It is on this ground that the Division Bench have narrowed their reference solely to the inquiry whether in Gujarat, whence this case comes up, and where the Mayukha is the paramount authority, the adoption of an only son is valid.

[373] 2. In this connection, the relative position of the Mitakshara and the Mayukha as authorities on matters of Hindu law in the different parts of this Presidency, has first to be considered. In *Krishnaji* v. *Pandurang* (1) it was held that in Western India the first place in matters of inheritance was given to the Mitakshara, and the Mayukha occupies the second, though an important place. In Northern Konkan, it was held in *Sakharam* v. *Sitabai* (2) that the authority of the Mayukha prevailed, while that of Mitakshara prevailed against the Mayukha in the Ratnagiri District—*Balkrishna* v. *Lakshman* (3). In Gujarat, in some cases, the Vyavahar Mayukha is placed before the Mitakshara. This is especially the case in the succession of sisters and daughters, but, as observed in *Lallubhai* v. *Mankuvarbai* (4), the authority both of Mitakshara and Mayukha must be held to be subject to the control of the law and usage as it now obtains among the people. How far the preference of the Mayukha to the Mitakshara prevails in Gujarat, in respect of any given question, is a matter which must be cleared up by judicial determination. The question in dispute in the present case relates to adoption, and turning to the old Sadar Divani Adalat cases, we find that this question was considered by the Shastris in *Huebut Rao* v. *Govindrao*(5); *Ramajee* v. *Thukoo Baee*(6); *Shree Brijbhookunjee* v. *Shri Gokoolootsaojee* * (7); *Ruvee Bhudr* v. *Roopshunkur* *(8); *Ambawow* v. *Rutton Kristna* * (9); *Vishram* v. *Narainrow* (10). The cases marked with asterisks came from Gujarat, but it may be noted that neither in Gujarat nor in the Deccan cases is any special preference given to the Mayukha over the Mitakshara in the replies of the Shastris. The Shastris refer to both the Mitakshara and Mayukha and other authorities, suggesting the impression that there was no conflict between the Mitakshara and the Mayukha, the latter being mentioned as confirmatory of the former. This point must be borne in mind in the consideration of what follows.

[374] 3. Turning to the Mayukha itself, it may be noted that ch. IV, s. 5, refers to the law of adoption, as treated in the Mayukha. So far as the point now in dispute is concerned, the Mayukha refers to the same Smriti authorities, Manu, Vasishtha and Shaunak, which form the basis of the commentary of the Mitakshara on this subject, and refers to the same texts as those which have been considered in the judgment of the Privy Council. Among the commentators, Madan, Medhatithi, Kullukabhatta, Harinath, Smarth, Kalpataru, Hemadri, and Someshwar are mentioned, but mere commentaries can, in such matters, claim no independent authority. Katyayana, Parashara and Gautama among the

(1) 12 B.H.C.R. 65. (2) 3 B. 353. (3) 14 B. 605 (612).
(4) 2 B. 388. (5) (1822) 2 Borr. 83. (6) (1823) 2 Borr. 485.
(7) (1816) 1 Borr. 202. (8) (1824) 2 Bor. 713. (9) (1834) S.D. 1820-40, 150.
(10) (1857) 4 Morri Rep. 26.

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Smriti writers are also mentioned, but they do not relate to the point now under consideration. The texts, therefore, on which Vijnyaneshvara's commentary is based, are also the texts to which the author of the Mayuka himself refers. As these texts have now been interpreted by the highest authority so as not to militate against the validity of the adoption of an only son, it follows that any other interpretation, made by the writer of the Mayukha, cannot have much force of its own except, so far as was held in *Lallubhai* v. *Mankuvarbai* (1) such an interpretation was based on local usage and custom prevailing among the community. Digests, like the Vyavahar Mayukha, cannot make the law, which they are only supposed to interpret. Unless they are based upon older Smriti texts, which is admittedly not the case here, or unless they reflect or formulate the custom as now prevalent, they have no special value of their own except as expressing the individual opinion of the author of the Digest.

4. Turning to the chapter on adoption itself, the first para, as marked by Stokes relates to the definition of an adopted son based chiefly on the text of Manu, which is also the same text as is noticed in the Mitakshara. There is a difference noticeable between Vijnyaneshvar and Mayukha in paras. 2 and 3 of the Mayukha. While Vijnyaneshvar regards the gift made to a person not in distress to be improper as regards the giver, but not so as to affect the validity of the gift, the Mayukha thinks that the blame attaches to the giver and also to the gift. The gift, it may be remarked, is not religiously a perfect gift, **[375]** but, for all that, it does not follow that the adoption is invalid so as to be null and void from the first. In the 4th para. the question of the validity of the gift of the eldest son is considered; and the Mayukha notes that, in the opinion of the Mitakshara, the prohibition of the eldest son regards the giver and not the taker. Here also there is a difference between the Mayukha's and the Mitakshara's view. The Mayukha does not think that the text of Manu contains a prohibition of the gift of an eldest son. The paras. 6 and 7 relate to the adoption of females which is declared invalid. Next comes para. 8, which relates to Shaunak's statement about the ceremony of adoption. In para. 9, Mayukha considers what persons are capable of being adopted under this text of Shaunak, and it is in this place that Shaunak's text is considered—*naikaputrena kartavyam putra-danam kadachana ; Bahuputrena kartavyam putra-danam prayatnath.*—By one having an only son, gift of a son is not to be made. By one having many sons a gift of a son is to be made with effort—There is no remark made about any difference as regards the meaning of the word *kartavyam* in both the hemistiches of the text of Shaunaka. The words are interpreted in the same sense, and, in the absence of a remark to the contrary, the word *kartavyam* in the first half must be understood in the same sense as in the second half, as directory and not mandatory. Sir Michael Westropp following Colebrooke interpreted those words differently as meaning *must* in one place and *should* in the other, and, in regard to the Mayukha, he observed that as the Mayukha specially noticed the eldest son's case, the absence of any remark in this 9th para about an only son, suggested that the same different interpretation was acceptable to Mayukha. There is no such difference noticeable in the para. itself, and as the difference is now shown to be not well founded, but based on a mistake, Mayukha, in this para., must be understood as laying down the same law, *viz.*, that *kartavyam* here meant in both places *desirable* and *not obligatory*. Paras. 10—12 relate

(1) 2 B. 388.

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to the adoption of daughters' and sisters' sons who are held most eligible for Shudras. Paras. 13—15 relate to the ceremonies to be performed by Shudras and women. Para. 16 refers to the Vasishtha text commencing with *shukra shonita*, *&c.*, **[376]** noticed also in the Mitakshara, and there the words are "no man should give (*dadyat*) or receive an only son, for he saves the man (from *put* or hell); a woman should neither give nor receive a son in adoption except with the permission of her husband." No special interpretation is attempted of the passage in this place, which is, as will be seen, applicable both to the giver and acceptor. The distinction between the portion relating to men and women noticed in the judgment of the Allahabad Chief Justice in *Beni Prasad* v. *Hardai Bibi* (1), is not specially commented on, but these words have to be construed along with the previous passages noted above, where, in the case of the eldest son, the fault is said, according to the Mitakshara, to be in the giver, and not the taker. The preference of nearest kinsmen, and next to them of distant kinsmen, is also inculcated by the use of the same form *karayet*. This preference implies more or less eligibility, and the form *dadyat* must be understood to be used in the same sense as showing what is desirable, and not what is obligatory. Paras. 17 and 18 refer to the widow's power to adopt. In para. 19 the author of Mayukha explains the Vasishtha text discussed in para. 16, and he mentions that remote kinsmen here means one of another class, which would suggest that the interpretation of the word *sadrisha* (alike) used in the original Manu text noticed in para. 4, was not really acceptable to the Mayukha in all cases. In this para the author mentions his father's opinion that a married man, who has even a son born to him, may become an adopted son. This view the author of the Mayukha considers to be reasonable, and as not opposed to other maxims. This brings him into conflict with the Kalikapurana in para. 20, which is disposed of by denying the genuineness of the text of the Kalikapurana. The next paras. from 21 to 35 relate to the distinction made between simple adoption and dwyamushyayana adoption, and they need not be noticed here, as the point is not at present material. Para. 36 is not found in the Gujarat copies of the Mayukha, and professes to be a summary of the doctrines of Mayukha prepared by a more modern author. It has, however, its **[377]** value, as shewing the sense in which the views of Mayukha were understood. The words are translated by Rao Saheb Mandlik as "all have the power of giving any of their several sons except the eldest." The proper translation would be that found in Stokes, *viz.*, "All having many sons may give in adoption one who is not the eldest." This exhausts the whole chapter, and it will be seen that there is no substantial difference between the Mitakshara and the Mayukha about the point in issue. If possible, the Mayukha view is far more liberal in the case of daughters' and sisters' sons as also of 'asagotra' adoptions, and adoptions of grown up and married sagotra relations and adoptions even from a different class, than many of the other writers. On the whole, therefore, this detailed consideration of the chapter on adoption in Mayukha does not show that, in the opinion of the Mayukha, the gift of an only son, any more than that of an eldest son, is so absolutely prohibited, as to make the adoption duly made, invalid *ab initio*.

5. Mr. Rao referred to the 9th Chapter of Mayukha in support of his contention, that what is not fit to be given is also not fit to be taken in

(1) 14 A. 67.

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adoption. Turning to this chapter on subtraction of gifts, we find it no where mentioned that an only son is not a proper subject of gift. The Narada text, which mentions a son, a wife, &c., as property not liable to be given, must be read along with the other similar property, *viz.*, a pledge, a bail, joint property, the whole property of a man who has issues living, and what is promised to others, mentioned in the same passage. This chapter thus refers to a different class of Vyavahar. In old times the father was supposed to have a power to give away, or sell, or abandon a son or wife, and this text of Narada was intended to check this abuse. In this view, sons do not, like chattels, form the subject of property. This is the general rule. The chapter on adoption is an exception. It is true, in para. 5 of this chapter there is a general statement that a man shall not give even what he has promised to give, if the person, to whom the promise is made, is incapable of receiving it. This exception, of course, refers to a different class of gifts, and has no bearing on the capacity of a man receiving a boy in adoption. The whole chapter relates to void and valid gifts, and forms a part of the [378] law of contract and not of status. Mistake, fraud, force, disease, grief, fear, these invalidate gifts, so also the acts of minors, idiots, slaves or intoxicated persons are not binding on themselves. The whole subject has nothing to do with the law of adoption. The contentions, therefore, raised by Mr. Rao, the appellant's pleader, on this head appear to be more or less irrelevant. The same remark applies to his contention about the use of the word *kadachana* in the first portion of Shaunak's text as distinguishing it from the latter portion where the word *prayatnatah* is used. This contention was based on the authority of the Dattaka Mimansa according to which both the passages are to be understood as obligatory. That view, however, involves the inconsistency that a man with more than one son is bound to give them away in adoption, which view is not shared by any school of lawyers. In the case of Mayukha especially, such a view cannot be sustained, because Mayukha does not accept the Dattaka Mimansa doctrine that the father of two sons is not at liberty to give away one of his sons. Mayukha's view is that the word *bahuputra* means one having two or more sons.

6. As regards the Shaunak's text, over and above what their Lordships of the Privy Council have stated in their remarks, it may be noted that of the six qualifications noted in Shaunak's Karika, the mention of the gift by the father of one son, and the gift by a father of more sons than one, is made along with the items 2, 3 and 4, which give the preference to sapindas, next to asapindas, and, lastly, to members of another caste. If these three items are obviously discretional, the other two mentioned along with them must be equally so. The negative prohibition is only made applicable to adoption from another caste. No penalty attaches to the breach of other precepts.

7. As regards the Vasishtha text, their Lordships of the Privy Council did not fully adopt the view of the Chief Justice of Allahabad based on the rules of the Purva Mimansa. But seeing that in the case of the dwyamushyayana adoption, both Kuber and Nandapandita, authors of the Dattak Mimansa and Dattak Chandrika, have accepted the force of these rules of Jaimini, it follows that this argument is entitled to consideration in interpreting Vasishtha's text, especially in distinguishing the right of [379] the male adopter from the female, wife or widow, who adopts with or without assent of her husband. Rao Saheb Mandlik quotes a text from Dattaka Nirnaya of Shrinath where the prohibition about one son is expressly stated to be a defect which does not invalidate

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the gift, but makes the giver liable to blame. This blame, according to Mitakshara, is shared in all cases quoted by him in chap. II, s. 130. This view was accepted by their Lordships of the Privy Council, and there is nothing in the treatment of the same by Mayukha which conflicts with this view.

8. As regards decided cases, Mr. Rao contended that there was no case of the adoption of an only son which came from Gujarat. This remark is not strictly correct. Of course, the point is not whether any particular dispute of the sort we have now before us, had been decided on any former occasion. For all practical purposes, the question is whether the texts of Manu, Shaunaka and Vasishtha, and the commentaries of Mitakshara and Mayukha, were considered in any previous case. In this view the case of *Sree Brijbhookunjee Muharaj* v. *Sree Gokoolootsaojee Muharaj* (1) is to the point. It came from Surat, and the question at issue was whether a widow must adopt the nearest of kins, or may adopt a person otherwise qualified. Manu's definition about the Datrim son, Vasishtha's text *Shukra shonita*, &c., the portions of the Mayukha and the Mitakshara treating about adoption were fully considered at pp. 214 and 215—1 Borr. (Edition of 1862). It is mentioned in the Shastris' opinion that the son of one not in distress was, according to Mayukha, not eligible for adoption, while according to Vijnyaneshvar, this prohibition was held to apply to the giver only. In this case the Shastris held that what is done in conformity to the Vedas and Shastras can never be annulled by reason of remoteness of relationship. They further stated that, although a boy of five years is most eligible for adoption, if he is of the same gotra, no obstacle exists by reason of his being mature in years being married, and having a family, and the authority quoted is that of Shankarbhat, the father of the author of Mayukha. The Judges affirmed the decision of the District Court. **[380]** The case of *Hueout Rao* v. *Govindrao* (2) certainly came from the Southern Konkan, and is, therefore, not directly in point, but it is useful, as the dispute there was about the adoption of an eldest and only son, and the Shastris referred to the authorities of Manu and Vasishtha, the Mitakshara, Mayukha, Sanskar Kaustubha, Nandapandita, Dattaka Chandrika and Dattaka Mimansa. In answer to question 3, the Chief Shastris, Trimbak Shastri and Trivengal Shastri, quoted Mayukha, Sanskar Kaustubha and other books of Maratha Pandits as permitting, according to Maratha practice, a widow to adopt a son without the order of her husband. The case of *Vishram* v. *Narainrow* (3) came from the Carnatic, and is only valuable to show that the doctrine of *factum valet* was recognised by this Court so far back as the year 1857 in regard to the adoption of an only son. The case of *Abajee* v. *Gungadhur* (4), also of an only son, came from the Carnatic, and was disposed of on the same grounds. On the same principle of *factum valet*, the decisions in *Raje Vyankatrav* v. *Jayavantrav* (5) and *Ramchandra* v. *Nanaji* (6) seem to have been based, and the Madras cases of *Chinna* v. *Kumara* (7), *Sri Ammi Devi* v. *Sri Vikrama Devu* (8) and *Gurulingaswami* v. *Ramlakshmamma* (9) affirmed the same view. So did the Allahabad High Court in *Sukhbasi Lal* v. *Guman Singh* (10); *Beni Prasad* v. *Hardai Bibi* (11). It cannot, therefore, be safely said that there are no cases in which the Mayukha's authority was cited in support of the validity of the adoption of an only son.

(1) (1816) 1 Borr., 202. (2) (1822) 2 Borr., 83. (3) (1857) 4 Morris, 26.
(4) (1856) 3 Morris, 420. (5) 4 B.H.C.R. A.C.J. 191. (6) 7 B.H.C.R. A.C.J. 26.
(7) 1 M.H.C.R. 54. (8) 11 M. 486. (9) 18 M. 53.
(10) 2 A. 366. (11) 14 A. 67.

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9. Mr. Rao referred us to certain references made in Sir Michael Westropp's judgment in *Lakshmappa* v. *Ramava* (1) of opinions of pandits said to have been given in reply to the question made by the authors of West and Bühler Digests. Such opinions are of little value when they were not given with reference to any case before the Courts. The same remark applies to **[381]** Mr. Borradaile's Gujarati set of replies received from caste panchaits. The opinions of many castes in those early days were for obvious reasons opposed to adoption generally, and the particular issue now under consideration was not before them.

10. As regards the more recent cases, they were obviously influenced by the adverse decisions, on the Bengal side, of Jackson and Mitter, JJ., in *Upendra Lal's case* (2); *Manick Chunder* v. *Bhuggobutty Dossee* (3); *Bhaskar* v. *Mahadev* (4): *Lakshmappa* v. *Ramava* (1); *Somasekhara Raja* v. *Subhadramaji* (5) *Dada* v. *Appa* (6). It is sufficient to note the fact that, in the opinion of both Sir Michael Westropp and Sir Charles Sargent, the prevailing view up to 1875 was in favour of the validity of the adoption of an only son in all parts of this Presidency, and though under the influence of a wrong decision this view was given up since 1879 by the Courts in this Presidency, every native writer of note—men like Rao Saheb Mandlik and Golapchandra Sarkar—have all along held that the authority of the Mayukha and Mitakshara and the texts of Manu, Vasishtha and Shaunaka on which they were founded, did not in any way support the view taken by Sir Michael Westropp on this side of India, and Mr. Dwarkanath Mitra and Justice Markby on the Bengal side. The Madras High Court expressly dissented from this view of Sir Michael Westropp, and recently the Allahabad High Court took the same view.

11. Quite independently of these considerations, it may be noted that the necessity, for purposes of salvation, of having male issue, though a legitimate consideration in itself, has been a little exaggerated by the English text writers. If a man having the prospect of male issue seeks to provide for the welfare of his only son, by giving him in adoption, presumably to a person better circumstanced in life, such an act can hardly be said to jeopardize his own spiritual or temporal interests. The idea of sin attaching to this act is, in one sense, not in accord with the general view of the people. If a man can adopt an only son of **[382]** his brother, in the dwyamushyayana form, because he does not thereby cut off his son's connection with his natural father, there can be no reason why a greater restraint should be placed upon his own judgment as to what is most to his spiritual or temporal advantage, when he chooses to give away his son in simple adoption. The right of adoption, though it has its religious efficacy, is chiefly valued for its temporal advantages, and from this point of view the position taken up by those who interpret the Mitakshara and Mayukha, as, while not commending such adoptions, yet not condemning them at the same time as prohibited acts, is both reasonable and in accordance with general feeling.

12. We, therefore, answer the question put to us in the words of the Allahabad and Madras Judges that however blameable on the part of the giver the adoption of an only son may be, yet so far as the Mayukha is concerned, it is not prohibited nor invalid when duly completed, in Gujarat any more than in the Deccan.

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(1) 12 B.H.C.R. 364. (2) 1 B.L.R. 221. (3) 3 C. 443.
(4) 6 B. H.C.R. O.C.J. 1. (5) 6 B. 524. (6) P.J. (1885), p. 111.

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CANDY, J.—In *Waman* v. *Krisnaji* (1), Sargent, C. J., delivering the decision of the Full Bench that the adoption of an only son is by the general Hindu law invalid, said (p. 258): "Now according to the long established practice of this and, we believe, of the other High Courts, a decision of a Full Bench is regarded as conclusive, unless a decision of the Privy Council has been subsequently passed militating against it."

Such a decision has, in my opinion, been recently given by the Privy Council in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* and *Radha Mohun* v. *Hardai Bibi* (2), in which it was laid down as finally determined that the adoption of an only son having taken place in fact is not null and void under the Hindu law.

That their Lordships intended to lay down the law for the whole of British India is clear from the remarks at the conclusion of their judgment. They were reminded of the length of time for which the law must have been considered as settled in the contrary direction in Bombay and Calcutta. They admitted that (page 152) such decisions are not lightly to be set aside; and they **[383]** remarked that in Bengal and Bombay the law now pronounced would only tend to invalidate those titles which have been acquired by the setting aside of completed adoptions, and such cases are probably very few.

But it has been pointed out that the decision of the Full Bench, which the subsequent Full Bench as shown above in the extract from the judgment of Sargent, C. J., treated as conclusive, was an unreported decision on an application under Act XXVII of 1860, and was obviously based on an *obiter dictum* of Sir Michael Westropp, C.J. and Mr. Justice Nanabhai in *Lakshmappa* v. *Ramava* (3), and the Judicial Committee in the recent Privy Council case, referred to above, expressly interpolated the remark (p. 143 of the report) that "they are not retrying the Bombay decision, and the effect of the Mayukha has not been argued before them."

It is, therefore, contended that the question as to the validity of the adoption of an only son is still open in parts of the Presidency—*e.g.*, Gujarat—where the Mayukha is the paramount authority.

Assuming that this is so, the obvious duty is cast upon the learned pleader for appellants, who asserts that the adoption was invalid, to show that Nilkanth in the Mayukha expressly treated the texts, which he quoted, in a sense different from that in which they have been treated by the Privy Council. Unless he can do that his case must fail: for the Judicial Committee said: "Upon their own examination of the Smritis their Lordships find them by no means equally balanced between the two constructions, but with a decided preponderance in favour of that which treats the disputed injunctions as only monitory and as leaving individual freedom of choice," (p. 151). It is obviously not open to this Court to criticise the examination made by their Lordships of the Judicial Committee; and the burden lies on the appellants to prove that Nilkanth treated the injunctions in the texts as not merely monitory but imperative.

The portion of the Mayukha dealing with adoption is chapter IV, s. 5. **[384]** The text of Manu quoted in para. 1 does not directly deal with the point now in issue. The translation adopted by the Privy Council is (p. 129), "whom the mother or the father give with water a son in distress similar endowed with affection, he is to be deemed a datrima, one brought forth." Then Nilkanth proceeds: "By the use of the word 'distress' (it is to be understood) the giving is not to be made except in distress;"

(1) 14 B. 249. (2) 26 I.A. 113 = 22 M. 398. (3) 12 B.H. C.R. 364.

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and then he quotes Vijnaneshvara as elucidating this point. I need not dwell on this, as it was not dwelt upon by the learned pleader for appellants. The passage is explained by Mr. Mandlik at p. 503 of his commentary on the Mayukha.

The next text is that of Shaunaka, quoted in para. 9 : "By no man having an only son is the gift of a son ever to be made ; by a man having several sons such gift is to be made on account of difficulty."

There is nothing to show that Nilkanth read this otherwise than merely monitory.

Then comes what the Judicial Committee term "the crucial text of Vasishtha." It is quoted in para. 16. It is : "But let him not give or receive in adoption an only son. For he must remain to continue the line of ancestors." There is no commentary by Nilkanth to show that he considered this to be obligatory.

Lastly, the learned pleader referred to the summary in para. 36. It runs :—

"The rites of gift and acceptance of a son. In this matter all have the power of giving any of the several sons except the eldest ; but the right of accepting appertains to those to whom no son is born, or whose sons are dead."

Assuming that this is part of the Mayukha (see Stokes's note, p. 70), or that it is a correct summary of the doctrine of Nilkanth, it is obvious that it is far from laying down as an obligatory precept that the adoption of an only son is absolutely bad.

Why, then, should we refuse to follow the ruling of the Judicial Committee and consider ourselves bound by the reasoning of Sir Michael Westropp in the case of *Lakshmappa* v. *Ramava* (1875) ?

Sir Michael Westropp based his decision on the following facts :—

[385] (*a*) Three of the Smriti writers expressly prohibit such an act. He referred to texts of Vasishtha, Baudhyana (which is to the same effect as that Vasishtha) and Shaunaka. These have been construed by the Privy Council as not expressly prohibiting the gift of an only son.

(*b*) The commentary of the Mitakshara quoting Manu.

This also is disposed of by the Privy Council, and their Lordships of the Judicial Committee held that Mr. Colebrooke was wrong in drawing any distinction in his translation between the giving of an eldest son and the giving of an only son ("should not" and "must not").

(*c*) Sir Michael Westropp relying on the supposed distinction remarked (p. 378) : "This distinction is even more strongly marked in the Vyavahara Mayukha" and then (on p. 379) he went on to show how in his opinion this distinction is even more strongly marked.

"He (*i. e.*, Nilkanth, the author of the Mayukha) carefully abstains from affirming that this express prohibition by Vasishtha of giving or receiving an only son, or the previously mentioned text of Shaunaka, is to be limited to the giver only. Remembering what he did say with regard to the eldest son, his omission to repeat that remark with respect to an only son is important, challenged as he was by the text of Vasishtha to make such a remark, if there were grounds for it. That omission implies that the prohibition to adopt an only son was, by Nilkanth, deemed imperative. To whichever, therefore, of the two principal authorities in this Presidency we look, *viz.*, the Mitakshara and the Mayukha, we find an absolute prohibition of the giving of an only son in adoption, and at the very least a strongly implied prohibition in the latter of the taking also."

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Now it is manifest that the weight to be attached to this opinion of Sir Michael Westropp is much lessened when it is noted that as a fact there is no text of Shaunaka prohibiting the adoption of the eldest son. Nor does Nilkanth nor does Shaunaka say that this prohibition applies to the giver and not the taker. On the contrary, Nilkanth (placita 4—5) quotes Vijnaneshvara's quotation of Manu's text about the eldest son, and then proceeds to show [386] that the prohibition applies both to the giver and receiver. So that Nilkanth's reasoning, when correctly regarded, is exactly the opposite of what Sir Michael Westropp thought it was.

It is unnecessary to quote Sir Michael Westropp's reliance on the Dattaka Mimansa and the Dattaka Chandrika, as these authorities were dealt with by the Privy Council.

As to Steele and Borradaile quoted by Mr. Rao for appellants, it is clear that the usage referred to by these authorities cannot outweigh the texts of the Smriti writers. From the answers given by 200 castes as collected by Mr. Borradaile, it appears that 147 said that they had no custom of adoption (it is notorious that in Gujarat adoption has not in the past been so prevalent as in other parts of India), 28 said there was no custom, but if an adopted son was taken, it must be according to the shastras, while 25 said that they adopted according to law.

Lastly, Mr. Rao referred to the points of Hindu law in regard to which this Presidency differs from other parts of India—*e.g.*, the daughter's and sister's estate of inheritance, the position of the widows of gotraja sapindas, and such like. These analogies would be good if it could be shown that, apart from judicial decisions, the Hindu texts have invariably been received in this Presidency as absolutely forbidding the adoption of an only son. In the absence of such overwhelming evidence we are bound to follow the ruling of the Privy Council; and I would, therefore, answer the question put to us by the referring Bench in the affirmative.

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24 B. 386 = 2 Bom. L.R. 191.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

GOPIKABAI (*Original Defendant*), *Appellant v.* DATTATRAYA AND OTHERS (*Original Plaintiffs*), *Respondents.** [9th January, 1900.]

Hindu law—Widow—Maintenance—Decree for maintenance—Suit for altering the rate of maintenance fixed by a decree—Practice—Procedure.

A suit will lie to obtain a reduction in the amount of maintenance decreed to a Hindu widow on a change of circumstances, such as a permanent deterioration in the value of the family property.

[387] But where such deterioration is due to the plaintiff's own default in not keeping the property in a proper state of repair, he has no right to ask for a reduction.

Per PARSONS, J.—Courts should insert words which would enable them on application to set aside or modify their orders as circumstances might require, and in such cases the remedy would be the more appropriate one by application under the leave reserved.

[R., 26 B. 707 (709) = 4 Bom. L.R. 531; 12 C.L.J. 173 = 15 C.W.N. 205 (212) = 7 Ind. Cas. 118, 27 M.L.J. 656 = 27 Ind. Cas. 379 = (1914) M.W.N. 900.]

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* Second Appeal No. 227 of 1899.

1900
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24 B. 386 = 2 Bom. L.R. 191.

SECOND appeal from the decision of Rao Bahadur Thakurdas Mathuradas, Assistant Judge of Ratnagiri.

On the 11th March, 1889, Gopikabai, a Hindu widow, obtained a decree awarding her maintenance at the rate of Rs. 20 a month out of the ancestral property in the hands of plaintiff's father, who was the surviving co-parcener of her husband's family.

Plaintiffs' father paid the maintenance as ordered till his death in 1894.

In 1897, plaintiffs filed the present suit to have the rate of maintenance reduced to Rs. 5 a month. The material allegations in the plaint were the following :—

(1) At our father's death the salary of Rs. 300 a year which he drew from the Savantvadi State ceased.

(2) At the time of the decree the income that fell to our father's share was not properly estimated, but a decision was come to on a rough estimate of the value of the property.

(3) Since the death of our father the income has become much diminished, and the immoveable property has fallen into disrepair.

The defendant pleaded (*inter alia*) that the suit would not lie, as there was no provision in the decree for reducing the rate of maintenance, and that even if the suit were maintainable, there were not sufficient grounds for reducing the amount of maintenance.

The Court of first instance dismissed the suit, holding that the value of the family property was not in any way diminished.

On appeal, the Assistant Judge held that the house had deteriorated in value since the last litigation, but the value of the house site was increasing every year. He reduced the rate of maintenance from Rs. 20 to Rs. 17 a month.

[388] Against this decision Gopikabai, the defendant, preferred a second appeal to the High Court.

M. R. Bodas, for appellant.

B. N. Bhajekar, for respondents.

JUDGMENT.

PARSONS, J.—In suit No. 412 of 1884 (which arose out of proceedings in the execution of the partition decree in suit No. 69 of 1881 obtained by the plaintiffs' father), the Subordinate Judge awarded the present defendant maintenance at the rate of Rs. 30 a month, taking the value of the estate to be Rs. 48,000, as given by the plaintiff himself, and the share of the defendant's late husband to have been a fourth, or Rs. 12,000. This amount was reduced by the District Judge, on appeal, to Rs. 20 a month. He found that the plaintiff had realized Rs. 6,000 or Rs. 7,000; that the ancestral house was worth Rs. 8,000 or Rs. 9,000 ; that the whole value, therefore, was Rs. 14,000 or Rs. 16,000 ; and that the share of the defendant's husband was one-fourth of this, say Rs. 4,000, which at 6 per cent. interest would produce Rs. 240 a year. This decree was confirmed by the High Court on the 11th March, 1889.

The plaintiffs on the 30th July, 1897, brought this suit to have the rate of maintenance reduced to Rs. 5 a month. In their plaint they set out the former proceedings and the decree against their father, and made the following allegations, namely :—" These Rs. 20 were paid till the death of their father ; at his death the salary of Rs. 300 a year that he drew from the Savantvadi State ceased. At the time of the decree the income of the property that fell to their father's share was not properly

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estimated, but a decision was come to on a rough estimation of the value of the property. Since the death of their father, the income has become much diminished, and the immoveable property has fallen into disrepair; therefore the amount ordered in the decree cannot be paid. An estimate should be made of the income of the property and its condition, and the amount of maintenance fixed accordingly." The Subordinate Judge dismissed the suit. He says: "On carefully appreciating the evidence adduced on behalf of both the parties, I am not prepared to hold that the value of the family property is in any way diminished. The [389] decree in suit No. 412 of 1884 seems to show that the amount of defendant's maintenance was fixed by estimating the value of the family property and with due regard to all the circumstances of the case."

The Assistant Judge altered the amount of maintenance to Rs. 17 a month. He says: "On a consideration of the whole of the evidence, I would assess the value of the property of the plaintiffs as below:—

Rs.	7,000	Being the value of the property realized by the plaintiff's father (Ex. 54).
,,	5,000	Value of the house and its compound.
,,	1,300	Value of the share of Lotlikars in the Outram's bungalow which share has since been sold (Exs. 50 and 51).
Rs.	13,300	

The annual value of the property at the rate of 6 per cent would be Rs. 798 + Rs. 4, being the annual rent of the Adiware property, total Rs. 802. The share of the defendant's husband therein would be $\frac{1}{4}$, *viz.*, Rs. 200$\frac{1}{2}$ per year or roughly Rs. 17 a month. I find that the house has deteriorated in value since the last litigation, but the value of the house site is increasing every year. Bearing these circumstances in mind, as also the rent of the house and the landed property above referred to, and taking into account the expenses of repairs and the item of house-tax, I would reduce the rate of the maintenance awarded to the defendant from Rs. 20 to 17."

It will thus be seen that the sole reason for his altering the decree is that the house has deteriorated in value since the last litigation from Rs. 8,000, to Rs. 5,000. There is no evidence adduced to show that this has been brought about by natural causes; no evidence, that is, that house property in the town of Ratnagiri has decreased in value generally, or that less rent is obtainable now than in 1884. The only cause assigned in the plaint for the reduction of value is that the property has fallen into disrepair. This, however, is a matter for which the plaintiffs [390] themselves are directly responsible, and it is clear that they would have no right to ask a Court to alter its decree on the ground of diminished value of the family property where that diminishment has been caused by their own default—see *Vijaya* v. *Sripathi* (1). It was their duty to have kept the property in a proper state of repair.

I think, therefore, that the Subordinate Judge was right in dismissing the suit, and that the Assistant Judge should not have interfered with the decree.

I may add that we have accepted the principle that such a suit as this will lie, following such precedents as those of *Sreeram Buttacharji* v. *Puddomookhee Debia*(2), *Ruka Bai* v. *Ganda Bai*(3), *Vijaya* v. *Sripathi*(1);

(1) 8 M. 94. (2) 9 W. R. 152. (3) 1 A. 594.

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but we think that, in decrees where maintenance is awarded, Courts should insert words which would enable them on application to set aside or modify their orders as circumstances might require, and in such cases the remedy would be the more appropriate one by application under the leave reserved.

We have also allowed the plaint and memo. of appeal to stand as presented on a Court-fee of Rs. 10, following the practice of the Allahabad High Court observed in the case of *Ruka Bai* v. *Ganda Bai* (1) as kindly reported to us by the Registrar.

The decree of the lower appellate Court is reversed and the decree of the Court of first instance restored with costs in this and the lower appellate Court on the plaintiffs.

RANADE, J.—The respondent-plaintiffs' father obtained a partition decree in suit No. 69 of 1881; and certain property was assigned to his share. When he sought to obtain possession of this property, the appellant-defendant obstructed the delivery of such possession, and the application for the removal of obstruction was registered as suit No. 412 of 1884. This litigation went up to the High Court, and the final decree directed the respondents' father to pay 20 Rs. a month as maintenance to the appellant-defendant, and her obstruction to the delivery of possession was **[391]** removed. The respondents' father paid the maintenance as ordered till his death in 1894, and the present suit was brought in 1897 by the respondent-plaintiffs for a declaration that they were only liable to pay 5 Rs. as maintenance to the appellant-defendant. The reasons assigned for reducing the amount of maintenance was that the plaintiffs' income was greatly reduced by their father's death, as he used to receive 300 Rs. as pay in Savantvadi service, and the income was not properly and correctly estimated in the previous suit, being based on a rough calculation that the income was about 6 per cent. on the total valuation, and the actual income realized was much reduced chiefly by the want of repairs and the deterioration of the property. The maintenance of 20 Rs. a month was fixed on an estimate of the total property being 16,000 Rs. out of which the appellant-defendant's husband's share would be 4,000 Rs. whereas the present value of that share would be about 2,000 Rs. only, and the amount of maintenance should, therefore, be reduced to 5 Rs.

The appellant-defendant contended that the suit would not lie under s. 13, and that it was further time-barred; that it was not properly valued; that the maintenance was fixed by way of settlement of her claim to the property, and defendant did not admit that there was any reduction of the income, and urged that, even if the income were reduced, it was due to the default of the respondent-plaintiffs.

The Court of first instance disallowed the claim chiefly on the ground that the income had not been reduced as alleged. The District Court, in appeal, held that the value had been reduced from 16,000 Rs. to 13,300 Rs., and it accordingly reduced the maintenance from 20 to 17 Rs.

In her second appeal the appellant contended that the lower appellate Court was in error in going behind the decree passed in the suit of 1884, the decision in which operated as *res judicata*. It was further urged that there were no grounds for reducing the maintenance.

Two points of law chiefly have to be considered in this appeal:

(1) 1 A. 594.

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(1) Whether such a suit for reducing maintenance once decreed can be maintained?

[392] (2) Whether the reasons assigned for reduction were sufficient to justify such reduction in the circumstances of the present case?

The first point must be decided in the affirmative, and the second in the negative.

The decisions in *Vijaya* v. *Sripathi*(1) and *Ruka Bai* v. *Ganda Bai* (2) are express authorities on the question of the competency of Civil Courts to entertain suits for the reduction of maintenance for sufficient reasons such as the permanent reduction of the value of the property. Maintenance decrees are by their very nature subject to such modification according to change of circumstances—*Nubo Gopal Roy* v. *Sreemutty Amrit Moyee Dosee* (3).

It is not expressly necessary to insert words to that effect to make the decree liable to variation according to circumstances—*Motilal* v. *Bai Kashi*(4).

The claim of a Hindu widow for maintenance is not based on contract, but on the provisions of the Hindu law, which expressly govern the rights and duties of the different members of a joint family—*Sidlingapa* v. *Sidava*(5).

I have not been able to lay my hands on a still earlier case in the old Reports, where I had to decide a suit for raising the amount of maintenance settled by a decree, and my decision was upheld by the High Court on these and other grounds. The Courts below were, therefore, right in holding that the present suit was maintainable, and the only question to be considered is whether sufficient cause has been shown for reducing the amount of maintenance. The amount of maintenance to which a widow is entitled does not bear any fixed ratio to the means of the family, but this latter circumstance must govern the amount to a large degree, along with the consideration of the status and position of the widow in the family—*Sreemutty Nitto Kissoree Dossee* v. *Jogendro Nauth Mallick* (6); *Devi Persad* v. *Gunwanti Koer* (7); *Baisni* v. *Rup Singh* (8); *Narhar Singh* v. *Dirgnath Kuar* (9). The right of [393] maintenance is not dependent on near relationship, but on the existence in the hands of her husband's heirs of ancestral property, in which he might have claimed a share—*Ramabai* v. *Trimbak*(10); *Savitribai* v. *Luximibai*(11); *Apaji* v. *Gangabai* (12).

In the present case the allegation is that the value of the property has been reduced. The Court of first instance held that the income was not reduced, but the lower appellate Court has found as a fact that the value of the property estimated at 16,000 Rs. in 1884 was reduced to Rs. 13,300. The Assistant Judge, however, did not consider the question whether the reduction was due to causes over which the respondent-plaintiffs had no control, or whether it was the result of their own voluntary default or negligence. In the Madras case—*Vijaya* v. *Sripathi*(1) noted above, the reduction claimed was disallowed, because the plaintiff had given a certain portion of the property to certain persons mentioned in his father's will, and had entered upon certain litigation. In the present case, the reduction in value is not of a serious character, and it is admittedly due to the respondents' failure

(1) 8 M. 94. (2) 1 A. 594. (3) 24 W. R. 428.
(4) 17 B. 45 (5) 2 B. 624. (6) 5 I. A. 55.
(7) 22 C. 410. (8) 12 A. 558. (9) 2 A. 407.
(10) 9 B.H.C.R. 283. (11) 2 B. 573. (12) 2 B. 632.

to keep the properties in repair. If these considerations were not borne in mind, there would be no finality in any maintenance decree. Property must deteriorate from year to year, and if that circumstance alone were held sufficient justification for altering the amount of the settlement, there would be no end of litigation, and a premium would be placed upon negligence and fraudulent failure to keep up repairs. The lower appellate Court has disposed of the case on mere arithmetical calculations, which make no practical difference in the position of the parties. I, accordingly, agree with Mr. Justice Parsons in reversing the decree of the lower appellate Court and restoring that of the Court of first instance, which rejected the claim.

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Decree reversed.

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24 B. 394 = 2 Bom. L.R. 122.

[394] APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

VASUDEO ANANT (*Original Plaintiff*), *Appellant v.* RAMKRISHNA RAO NARAYAN AND ANOTHER (*Original Defendants*), *Respondents.**
[22nd January, 1900.]

Dekkhan Agriculturists' Relief Act (*XVII of* 1879), *s.* 72, *cl.* (*a*)—"*Written instrument*" —*Limitation.*

On the 7th April, 1888, an agriculturist in the Deccan passed a writing to his creditor to the following effect :—

"Receipt taken by Vasudeo from Ramkrishna, agriculturist. I have borrowed Rs. 1,045 from you from time to time for my private expenses. I have passed you no bond for the money. To-day I have taken Rs. 300 more, making Rs. 1,345 in all. For that I will give you a bond fifteen days hence. I have received the money.

This document was duly registered under s. 58 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

In June, 1897, the creditor sued to recover the principal and interest due under this document.

Held, that the document sued upon was a "written instrument" within the meaning of s.72, cl. (*a*), of the Dekkhan Agriculturists' Relief Act (XVII of 1879), and that the suit was, therefore, not barred, having been brought within twelve years from the date of the document.

Held, also, that the document was not a mere acknowledgement of a debt, but an agreement containing a distinct undertaking that the debtor would pass a bond for the debt within fifteen days.

[R., 5 Ind. Cas. 418 (419).]

SECOND appeal from the decision of R. Knight, District Judge of Satara.

On the 7th April, 1888, the defendant's father, an agriculturist in the Deccan passed to the plaintiff's father a document to the following effect :—

"Receipt taken by Vasudeo from Ramkrishna, agriculturist. I have borrowed Rs. 1,045 from you from time to time for my private expenses. I have passed you no bond for the money. To-day I have taken Rs. 300 more, making Rs. 1,345 in all. For that I will give you a bond fifteen days hence. I have received the money."

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* Second Appeal, No. 569 of 1899.

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[395] The document was duly registered under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

Plaintiffs brought this suit on 19th June, 1897, to recover Rs. 2,690 for principal and interest due under the above document.

Defendants contended (*inter alia*) that a suit would not lie on the document, that their father was not an agriculturist at the date of its execution, and that the claim was time-barred.

The Subordinate Judge of Karad decreed the plaintiff's claim.

On appeal the District Judge held that the document sued upon was an acknowledgment of a debt, and as such could not serve as the basis of a suit, and that the claim was time-barred under cl. (*b*) of s. 72 of Act XVII of 1879.

Against this decision plaintiff preferred a second appeal to the High Court.

Chimanlal H. Setalvad (with *Bhaishankar Nanabhai*), for appellants.

D. A. Khare, for respondents.

JUDGMENT.

RANADE, J.—The decision of this appeal depends upon the construction to be placed on Ex. 21 on which the claim was made to rest by the appellant-plaintiff. It is called a receipt in the original, but is a document which purports to have been taken by the deceased plaintiff, in whose favour it was executed by the deceased defendant. It states that "I borrowed from you on various occasions sums amounting in all to Rs. 1,045 for which no document had been passed, and on this day I borrowed Rs. 300 in cash, and for the whole sum Rs. 1,345 I will pass a bond in fifteen days, that Rs. 300 were received in cash to-day, *viz.*, 7th April 1888." It was signed by the deceased, and it was registered under the Agriculturists' Relief Act the same day, and was attested by two persons. The plaintiffs claimed the principal with an equal amount of interest—in all Rs. 2,690. The defence was that the suit could not lie on the document, that defendants' father was not an agriculturist, and, therefore, the claim was time-barred on 19th June, 1897, when the suit was filed. The Court of first instance held that the document was proved to have been [396] executed, and that the suit was maintainable, and not time-barred, that the payment of consideration was proved, and that the plaintiffs could claim interest. The claim was, therefore, allowed. In appeal the District Judge held that the suit could not be regarded as founded on a written instrument, and, therefore, s. 72 of the Agriculturists' Relief Act did not apply. He held that the document was a receipt which could not be the foundation for a suit, but was only a written acknowledgment, and that, therefore, the claim was time-barred under cl. (*b*) of the section which provided six, and not twelve years' limitation.

Section 72 contains two cls. (*a*) and (*b*). Clause (*a*) relates to suits founded on written instruments registered under the Act, for which the limitation prescribed is of twelve years, and cl. (*b*) applies to claims other than those under cl. (*a*). The question to be considered, therefore, is whether this suit can be regarded as based on a written instrument. If the suit had been brought in time for specific performance, it would have been held to be a suit on a written instrument. The lower Court of Appeal appears to have chiefly relied on the decision in *Shankar* v. *Mukta* (1). That decision, however, relates to a ruzu-khata. The instrument, on which the

(1) 22 B. 513.

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present claim is based, is of the nature, not of a ruzu-khata, but of an agreement which contains a distinct undertaking that the debtor would pass a bond after fifteen days. The decisions, therefore, on ruzu-khata cannot apply. The present case more nearly resembles the decision in *Jodharaj* v. *Raghavgir*,(1) where it was held that defendant's conduct in borrowing a fresh sum and making up and signing the old account must be taken as a promise which was the foundation of a new contract. A khata consisting only of one item has, no doubt, been held to be a mere acknowledgment, but the cases of such acknowledgments have been distinguished from others like the present. The case of *Shankar* v. *Mukta*(2) relied on by the District Judge was the case of a ruzu-khata. In the present dispute the claim is founded on an old debt and a new loan, both covered by an agreement to pass a fresh bond. The case, therefore, must be governed by other considerations than those of ruzu-khata acknowledgments. **[397]** The English cases cited by appellants' counsel—*Prance* v. *Sympson*(3) and *Banner* v. *Berridge*(4)—seem to be more in point, and they may be safely followed. The suit must be regarded as one based on a written instrument, and, as such, falls under cl. (*a*), the instrument being registered. We must, therefore, reverse the decree of the Court below and remand the case for fresh decision on the merits. Costs will follow the final decision.

Decree reversed and case remanded.

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24 B. 397 = 2 Bom. L. R. 136.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice and Mr. Justice Candy.

NINGAPPA (*Original Plaintiff*), *Applicant* v. ADEVEPPA AND OTHERS (*Original Defendants*), *Opponents.** [1st February, 1900.]

Mamlatdar's Court—Decree—Execution—Person ousted in execution no party to the decree—Suit for possession in Mamlatdar's Court by person ousted—Jurisdiction.

A person ousted in execution of a decree of the Mamlatdar's Court, to which he was no party, can himself bring a suit for possession in the Mamlatdar's Court against the person by whom he was ousted, and the defendant in such a suit cannot rely on the fact of his having obtained possession in execution of a decree against other parties as a bar to the jurisdiction of the Mamlatdar.

APPLICATION under the extraordinary jurisdiction, s. 622 of the Civil Procedure Code (Act XIV of 1882), against the decision of Rao Saheb B. W. Dhume, Mamlatdar of Sampgaon in a possessory suit.

The plaintiff sued the defendants in the Mamlatdar's Court to recover possession of certain land, alleging that defendant No. 1, in collusion with defendants Nos. 2 and 3, got a decree against them in a possessory suit in the Mamlatdar's Court and in execution obtained possession, although as a fact the plaintiff was in possession at the time and not defendants Nos. 2 and 3.

The Mamlatdar found that the plaintiff was in possession within six months prior to the institution of the suit and that defendant No. 1 had

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* Application, No. 216 of 1899 under extraordinary jurisdiction.

(1) P. J. (1893), p. 48.
(2) 22 B. 513.
(3) (1854) Kay's Rep. 678.
(4) (1881) 18 Ch. Div. 254 (273).

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not obtained possession otherwise than by due course of law, inasmuch as he acquired it in execution of [398] the decree against defendants Nos. 2 and 3. He, therefore, dismissed the suit.

The plaintiff applied to the High Court under its extraordinary jurisdiction, urging (*inter alia*), that the dispossession by defendant No. 1 was not in due course of law, as the previous decree was not against plaintiff, and that the Mamlatdar failed to exercise jurisdiction vested in him by law. A rule *nisi* was issued requiring the defendants to show cause why the decision of the Mamlatdar should not be set aside.

Balaji A. Bhagavat, appeared for the applicant (plaintiff).—The only question is whether the dispossession by defendant No. 1 of plaintiff in execution of a decree of the Mamlatdar's Court obtained against third parties was a dispossession in due course of law. We submit it was not. As the plaintiff was not a party to the previous suit before the Mamlatdar, he could not be bound by the decree in that suit. The dispossession was illegal, because the decree under which the plaintiff was dispossessed had nothing to do with him. A stranger thus ousted has his remedy in the Mamlatdar's Court—*Antu* v. *Vishnu*(1); *Chinaya* v. *Gangava* (2); *Kasam-saheb* v. *Maruti* (3): *Mulchand* v. *Chhagan* (4).

Manekshah J. Talcyarkhan, appeared for opponent No. 1 (defendant No. 1).—We submit that the Mamlatdar having once decided on the ground of possession, the plaintiff should seek his remedy in a Civil Court on the basis of his title if he has any. It has been held that dispossession under a wrong decree cannot give rise to a cause of action in a Mamlatdar's Court—*Ramchandra Subrao* v. *Ravji* (5); *Manikchand* v. *Daji*(6).

Bhagavat in reply:—The dispossession in the cases relied on was in execution of the Civil Court's decrees and not in execution of a Mamlatdar's decree as in the present case. There is a distinction in the execution under the Mamlatdar's Courts Act and the Civil Procedure Code. In the latter if a stranger is ousted he has his remedy under the Code. In the Mamlatdar's Courts Act there is no such remedy, and, therefore, a fresh suit before the Mamlatdar is the only remedy.

JUDGMENT.

[399] JENKINS, C. J.—The sole question in this case is whether the defendant No. 1 obtained possession otherwise than by due course of law. He obtained that possession by the execution of a decree which had the result of ousting the present plaintiff then in possession and who was not a party to the suit in the Mamlatdar's Court. That decree expressly directed that possession should be obtained from the defendants in that suit and handed over to the then plaintiff (now defendant No. 1). It has been decided and repeatedly recognized by the cases—*Mulchand* v. *Chhagan* (4); *Kasam Saheb* v. *Maruti* (3); *Chinaya* v. *Gangava* (2) and *Antu* v. *Vishnu* (1)—that under such circumstances a person ousted in execution of a decree of the Mamlatdar's Court, to which he was no party, can himself bring a suit for possession in the Mamlatdar's Court against the person by whom he was ousted, and the defendant in such a suit cannot rely on the fact of his having obtained possession in execution of a decree against other parties as a bar to the jurisdiction of the Mamlatdar. This course of procedure has been so long sanctioned

(1) P.J. (1896), p. 488. (2) 21 B. 775. (3) 13 B. 552.
(4) 10 B. 75. (5) 20 B. 351. (6) P.J. (1896), p. 665.

that we think it would not be right for us now to depart from it notwithstanding the decisions in the cases of *Ramchandra Subrao* v. *Ravji* (1) and *Manikchand* v. *Daji* (2), which possibly can be distinguished.

We must, therefore, make the rule absolute, and, as the Mamlatdar found the facts in favour of the plaintiff, we reverse the order dismissing the suit and pass a decree in favour of plaintiff, with costs throughout.

Rule made absolute.

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24 B. 400 = 2 Bom. L.R. 220.

[400] APPELLATE CIVIL.

Before Sir L.H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

KARALIA NANUBHAI MAHOMEDBHAI (*Original Defendant*), *Appellant* v. MANSUKHRAM VAKHATCHAND (*Original Plaintiff*), *Respondent.**

[14th February, 1900.]

Contract of sale—Delivery of possession—Payment of the whole of the purchase-money—Registered conveyance not executed—Transfer—Attachment—Vendor having no attachable interest—Transfer of Property Act (IV of 1882), ss. 40, 54, 55 (6; (b)—Trusts Act (II of 1882), s. 91.

Under a contract of sale with respect to certain fields, possession was delivered to the vendee, and the whole of the purchase-money was paid to the vendor, but the transfer was not effected, as the necessary registered conveyance had not been executed. Subsequently a judgment-creditor of the vendor sought for a declaration that the fields were liable to be attached and sold as the property of the judgment-debtor. Before the case was decided by the Court of first instance, a registered conveyance had been executed.

Held, that the judgment-debtor was nothing more than a bare trustee and had no attachable interest in the property.

Hormasji v. *Keshav* (3) distinguished.

[F., 26 A. 266 (270) = 24 A.W.N. 8; R., 5 Bur.L.T. 296 = 18 Ind. Cas. 524 = 6 L.B.R. 170; 7 L.B.R. 170; D., 36 C. 920 (922) = 4 Ind. Cas. 414; 29 M. 336 (347) = 16 M.L.J. 395 = 1 M.L.T. 153.]

SECOND appeal from the decision of Rao Babadur D. G. Gharpur, Additional First Class Subordinate Judge of Ahmedabad with appellate powers, reversing the decree of Rao Saheb Karpurram M. Additional Joint Subordinate Judge.

The plaintiff sued for a declaration that certain fields belonged to his judgment-debtor Jivanlal Chhotalal, and that he had a right to have them sold in execution of his decree No. 3058 of 1894. He alleged that the fields belonged to his judgment-debtor and as such he attached them in execution of his decree under Darkhast No. 754 of 1896, and that the defendant having applied for the removal of the attachment, the attachment was raised on the 9th December, 1897.

The defendant answered (*inter alia*) that the fields did not belong to the plaintiff's judgment-debtor Jivanlal; that he had sold them to the defendant for Rs. 900 in October, 1893; that since then the defendant had been in possession; and that the plaintiff had no right to have them sold.

[401] The Subordinate Judge found that the fields did not belong to Jivanlal and that the plaintiff had no right to attach them. He, therefore,

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* Second Appeal No. 739 of 1899.

(1) 20 B. 351. (2) P. J. (1896) p. 665. (3) 18 B. 13.

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dismissed the suit, observing in his judgment that the defect in the defendant's title (owing to there being no registered conveyance) was cured, inasmuch as a conveyance was, pending suit, reduced to writing and registered under a decree obtained by the defendant against Jivanlal for specific performance of the contract of sale.

On appeal by the plaintiff the Judge, relying on s. 54 of the Transfer of Property Act (IV of 1882) and the decision in *Hormasji* v. *Keshav* (1), found that the purchase by the defendant was invalid because it was not accompanied by a registered conveyance. He, therefore, reversed the decree and allowed the claim.

The defendant preferred a second appeal.

Lallubhai A. Shah, for the appellant (defendant).—We became the equitable owner of the lands in dispute, inasmuch as we paid the purchase-money and obtained possession although no registered conveyance was passed to us simultaneously with the transaction. The plaintiff's judgment-debtor had no attachable interest in the property at the date of the attachment. The provisions of s. 54 of the Transfer of Property Act are not exhaustive—for instance, see s. 55 (6) (*b*), which creates a charge upon the property under certain circumstances. The ruling in *Hormasji* v. *Keshav* (1) does not apply. It was a case of a purely executory contract which was covered by the last clause of s. 56 of the Transfer of Property Act. The present case is quite different. The principle enunciated in the case of *Dagdu* v. *Panchamsing* (2) ought to be followed. Here the original defect in our title has been cured by the execution of a subsequent registered sale-deed. The judgment-debtor having no right, title or interest which he could honestly sell, the auction-purchaser would get nothing under the sale.

[JENKINS, C. J.—Section 91 of the Trusts Act makes the point quite clear.]

[402] *Krishnalal M. Jhaveri*, for the respondent (plaintiff).—The provisions of s. 54 of the Transfer of Property Act are clear, and without a registered conveyance no title could pass to the defendant. The case of *Hormasji* v. *Keshav* (1) is a direct authority on the point. The decision in *Papireddi* v. *Narasareddi* (3) also supports our contention. A conveyance executed subsequent to the attachment cannot help the defendant. On the date of the attachment the title was vested in the judgment-debtor. The plaintiff not being a party to the suit brought by the defendant against the judgment-debtor for specific performance of contract, the decree is not binding upon him.

JUDGMENT.

JENKINS, C. J.—The facts are clear. The plaintiff sought for a declaration that the fields in dispute can be attached and sold as the property of his judgment-debtor Jivanlal. But Jivanlal had in 1893 sold these fields to the present defendant for Rs. 900, which sum was paid at the time possession was given to the purchaser. Transfer, however, was not effected, as the necessary registered conveyance had not been executed. The lower appellate Court, therefore, held that, at the time of the attachment in 1896, Jivanlal had an attachable interest, relying on the decision of Starling J., in *Hormasji* v. *Keshav* (1). In that case no purchase-money had been paid. Here the purchase-money, as shown above, was paid when possession was given to the purchaser. Reliance has been placed

(1) 18 B. 13. (2) 17 B. 375. (3) 16 M. 464.

on the concluding words of s. 54 of the Transfer of Property Act, which provide that a contract "does not, of itself, create any interest in or charge on" the property sold. But the answer is that here reliance is not placed on the contract of sale alone; there is something more: there is possession and payment of the whole of the purchase-money; and that this makes a material difference is manifest from s. 55 (6) (*b*), which entitles the purchasers to a charge on the property for the amount of any purchase-money properly paid by him. Reference may also be made to s. 40 of Transfer of Property Act and to s. 91 of the Trusts Acts. Furthermore, before this case was decided by the Court of first instance, a registered conveyance had been executed, so that the **[403]** purchaser's title was perfected, and it would be impossible for us to cancel that deed. It is not suggested before us that the decree for specific performance was wrongly given. We hold that from September, 1893, Jivanlal was nothing more than a bare trustee and had no attachable interest.

Under these circumstances we must reverse the decision of the lower appellate Court and restore that of the Second Class Subordinate Judge, dismissing the suit with all costs throughout on plaintiff.

Decree reversed.

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FEB. 14.
APPELLATE CIVIL.
24 B. 400=2 Bom. L.R. 220.

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24 B. 403=2 Bom. L.R. 778.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

LAKHMICHAND RAMCHAND (*Original Plaintiff*), *Appellant v.* CHOTOORAM MOTIRAM AND ANOTHER (*Original Defendants*), *Respondents.**

[29th and 30th March, 1900.]

Principal and agent—Agent—Revocation of authority—Interest of agent in property—Exercise of authority so as to bind principal—Contract Act (IX of 1872), ss. 201, 202, 203—Counter-claim—Permission to extend—Practice.

The plaintiff received instructions by letter from the defendants to purchase cotton on their behalf. This letter was received by the plaintiff before a telegram sent by the defendants the next day revoking the order reached him. The plaintiff replied by letter stating that the telegram had arrived too late and that the purchase had already been made. In fact, the plaintiff had merely appropriated to the defendants a contract entered into by himself with a third party the day before the defendants' order reached him.

Held, that the telegram was a revocation of the order contained in the letter of the previous day.

Held, further, that the plaintiff had no such interest in the subject-matter of the agency as to prevent its termination; nor had he exercised his authority so as to bind his principal, no contractual relation with any third person having been created before the receipt of the telegram.

The defendants owing to their ignorance of the true facts did not include in their counter claim certain sums paid by them to the plaintiff in part-payment of the alleged losses incurred in respect of the purchase and re-sale of the aforesaid cotton.

Held, that the lower Court (RUSSELL, J.) had rightly permitted the defendants to put in a supplemental written statement extending their counter-claim so as to include these items.

[404] THE plaintiff alleged in his plaint that the defendants in September, 1896, instructed the plaintiff's firm as their commission agents

* Suit No. 37 of 1899; Appeal No. 1052.

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ORIGINAL CIVIL.
24 B. 403 = 2 Bom. L.R. 778.

in Bombay to purchase on their account 100 bales of cotton for delivery between the 15th and 25th of March. The plaintiff alleged that in accordance with these instructions he purchased the cotton at the rate of Rs. 235 per khandi. On the approach of the due date the market-rate having fallen, the plaintiff called on the defendants to give security for the due fulfilment of the contract, and the defendants accordingly deposited with the plaintiff 45 pullas of cotton and paid to the plaintiff a sum of Rs. 500 on account. The plaintiff alleged that he thereupon took delivery of the 100 bales on the defendants' account. Considerable correspondence passed between the plaintiff and defendants concerning the advisability of selling the cotton, which had greatly fallen in value. Finally the defendants gave definite instructions to the plaintiff to sell, and on the 17th December, 1897, the cotton was finally sold at Rs. 161-4-0 per khandi. The plaintiff sued defendants for the difference between Rs. 235 and Rs. 161-4-0 per khandi and for sundry costs and expenses. In their account annexed to the plaint the plaintiff gave the defendants credit for three sums of Rs. 800, Rs. 400 and Rs. 396 paid to him by them on account and in respect of this transaction. The defendants in their written statement admitted having instructed the plaintiff to purchase 100 bales of cotton on their account, but stated that they "are not aware as to whether the plaintiff's Bombay firm entered into a contract for the purchase thereof at the rate of Rs. 235 per khandi as alleged in the plaint, and put the plaintiff to the proof of the same." They also put the plaintiff to proof of his allegations that he had taken delivery of and sold the said cotton on their account. They counter-claimed in respect of the 45 pullas of cotton deposited as security on the defendants paying to the plaintiff what might be found due to him on the proper accounts being taken.

At the hearing before Mr. Justice Russell it appeared that the order to purchase was despatched from Jamner by the defendants on the 27th of September, 1896, and would in due course arrive in Bombay on the 28th September, and that on the morning **[405]** of the 28th September the defendants sent a telegram to the plaintiff countermanding the order. In a letter dated the 28th September the plaintiff informed the defendants that their telegram had been received at 2-30 P.M. on that day, but that the purchase had been effected before the receipt of the telegram.

The plaintiff put in a contract with one Govindas Lachmondas representing it to be the contract for the purchase of 100 bales, at Rs. 235 per khandi, in respect of which he sought to hold the defendants liable. This contract was dated the 27th of September. The plaintiff bought 200 bales more for other constituents from Govindas Lachmondas, and finally sold all the 300 bales to him. He stated that on the due date he had to receive 100 bales from one Naranji Dwarkadas and that he had appropriated these to the defendants. The contract with Naranji Dwarkadas was dated the 6th of July, 1896, and purported to be a sale by Naranji Dwarkadas of 100 bales of cotton at Rs. 205 per khandi.

On this state of facts Mr. Justice Russell held that the plaintiff had without any intimation to the defendants sold to and purchased from the defendants his own goods. That, in consequence, his duty and his interest were in direct conflict, as the greater the fall in the market the greater the profit accruing to the plaintiff, the lukewarmness observable in the advice given by him to the defendants to sell the cotton as shown by the correspondence being traceable to this circumstance. He accordingly dismissed

the plaintiff's claim, but reserved judgment upon the defendants' counter-claim. At the resumed hearing the defendants asked for leave to amend their written statement by adding a counter claim in respect of the 45 pullas deposited as security and in respect of the sums paid by them to the plaintiff on account of the transaction sued on in the plaint, which under the Court's ruling were improperly demanded by the plaintiff. The learned Judge granted the leave applied for, and gave judgment for the defendants for the full amount of the counter claim as set out in the amended written statement.

The plaintiff appealed.

Starling (with him *Davar*), for the appellant.

Lang, Advocate General (with him *Robertson*), for the respondents.

JUDGMENT.

[406] The judgment of the Appeal Court was delivered by

JENKINS, C. J. (who after stating the facts, and holding that the telegram of the 28th September was clearly a revocation of the order contained in the letter of the previous day, proceeded :)

The further question arises, whether any of the circumstances indicated in ss. 201, 202 and 203 of the Contract Act intervened.

The combined result of these sections is that the principal has power to revoke, unless the agent has an interest in the subject-matter of the agency, or unless the agent has exercised his authority so as to bind his principal. First, can the agent be said to have had an interest in the property in this case ? Clearly not ; the interest which the agent has in effecting a sale and the prospect of remuneration to arise therefrom are not such an interest as would prevent the termination of the agency. Is there, then, anything in s. 203 which precluded the defendants from revoking the authority ? I think not ; for at no time was the authority so exercised as to bind the principal ; no contractual relation with any third party was at any time created before receipt of the telegram revoking the agent's authority.

It is further contended that Russell, J., gave too much by way of counter claim. The defendants having only counterclaimed in their original written statement in respect of 45 pullas of cotton, that alone should have been awarded to them. But the plaintiff has himself to thank for the defects of the counter claim. If the plaintiff had placed the full facts before the defendants, the claim would have been made from the beginning. Russell, J. was, therefore, perfectly right in allowing the defendants to put in a supplemental written statement. It is not suggested that the extension of the counter claim has caused any damage to the plaintiff beyond compelling him to pay what he is bound to pay. We see no reason to interfere with the discretion exercised by Russell, J., which we do not think went beyond what the justice of the case required.

Appeal dismissed.

Attorneys for plaintiff.—Messrs. *Bicknell, Merwanji and Motilal.*
Attorneys for defendants.—Messrs. *Dikshit and Dhunjisha.*

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[407] APPELLATE CIVIL.

Before Sir L.H. Jenkins, Kt., Chief Justice and Mr. Justice Candy.

KASHINATH GOVIND (*Original Plaintiff*), *Appellant v.* ANANT SITARAMBOA (*Original Defendant*), *Respondent.** [11th December, 1899.]

Jurisdiction—Suit to establish right to a share in certain income—Property having a foreign origin—Incomes received within the jurisdiction of the Court—Question of title not involved—Jurisdiction of the Court to entertain the suit—Civil Procedure Code (Act XIV of 1882), ss. 16 and 17.

All property having a foreign origin is not outside the jurisdiction of a British Court.

"The Courts of Equity in England are, and always have been, Courts of conscience, operating in *personam* and not in *rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction." The jurisdiction of Courts in India is governed and must be ascertained by the same principles except so far as they may be at variance with legislative enactment.

Ewing v. *Orr Ewing* (1) followed.

The plaintiff sued in the Court at Nasik in British India to establish his right to a share in the income derived from certain grants of land situate outside of British India, but received by the defendant within the jurisdiction of the Nasik Court.

Held, that the suit was within the jurisdiction of the Court, there being no dispute as to title.

Keshav v. *Vinayak* (2) distinguished.

[D., 122 P.R. 1908.]

SECOND appeal from the decision of Rao Bahadur D. G. Gharpure, Assistant First Class Subordinate Judge of Nasik with appellate powers, reversing the decree of Rao Saheb L. K. Nulkar, Second Class Subordinate Judge of Nasik.

The plaintiff, who was a member of one of three branches of pujaris (worshippers) attached to the temple of Ram at Nasik, sued to establish his right to a third-share in four incomes and also to recover the arrears due to his share. One of the said incomes consisted of the revenue of a village called Bhagatvadi in the Nizam's territory and another of an annuity from the Chief of Ramdurg.

[408] The defendant answered (*inter alia*) that the Court had no jurisdiction to entertain the suit; that the properties were acquired by his ancestors after a division had been effected between the branches of the pujari families; that the plaintiff had, therefore, no right to sue; and that the claim was time-barred.

The Subordinate Judge found that the claim as regards the right to a share in the incomes as well as to arrears thereof for three years previous to the suit was not time-barred; that the jaghir of Bhagatvadi and the annuity from Ramdurg were acquired by the defendant's branch for the idol of Ram at Nasik and were in their possession, but not as the self-acquired property of that branch; that the two other properties were acquired by the defendant's ancestors as their self-acquisitions after partition; that the Court had jurisdiction to entertain the suit; and that the

* Second Appeal No. 300 of 1899.

(1) (1883) 9 A.C. 34.

(2) 23 B. 22.

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plaintiff was entitled to a third share in the Bhagatvadi and Ramdurg incomes only and to his share of arrears in those incomes for three years prior to the suit. He, therefore, awarded the claim to the extent above mentioned and rejected the rest.

On appeal by the defendant the Judge reversed the decree and dismissed the suit *in toto* on the ground that the Court had no jurisdiction to entertain the suit. The following is an extract from his judgment :—

" Bhagatvadi village is admittedly out of the local jurisdiction of any Civil Court in British India. The same is the case with the Ramdurg treasury from which the allowance in suit is received. These are the only two properties with which this appeal is concerned, there being no appeal by plaintiff against the dismissal of his claim in regard to other properties. Being situate out of British India, British Courts have no jurisdiction to entertain a suit regarding the former properties. The case *Keshav* v. *Vinayak* (Printed Judgments, 1897, page 425) is on all fours with the present. It is urged by Mr. Vaidya (plaintiff's pleader) that plaintiff's suit is concerned with the money received here in Nasik although from sources outside the jurisdiction of this Court. This was precisely the argument used by Mr. Chaubal in *Keshav* v. *Vinayak*, and their Lordships disallowed it. I do not think that there is any real distinction between that case and the present ; and I, therefore, hold that this Court has no jurisdiction."

The plaintiff preferred a second appeal.

Robertson with *N.B Pendse*, for the appellant (plaintiff).—The only question in the case is whether the Subordinate Judge's Court at Nasik had jurisdiction to entertain the suit. We contend **[409]** that it had. The allowances in suit were granted for the performance of the puja, the offering of *naivedya*, and for defraying the expenses of the idol of Ram at Nasik. The plaintiff, defendant and a third person are pujaris and they incur expenses in equal shares. The Judge has relied upon *Keshav* v. *Vinayak* (1). But that decision has no application to the present case. In that case there was a dispute as to title, while in the present case our title is not denied, and what we claim is that our one-third share in the allowances should be declared. Virtually this is a suit for money had and received by the defendant. The sources of the income are, no doubt, situate beyond British India, but the incomes are received in British India. Therefore Courts in British India have clearly jurisdiction to entertain a suit like the present. The parties are bound by contract, and, further, they are in the position of trustees—*Penn* v. *Lord Baltimore* (2).

Daji A. Khare, for the respondent (defendant) :—In the plaint a declaration is sought in connection with property situate outside British India. The property in suit consists of allowances which have been held to be immoveable property. According to s. 16 of the Civil Procedure Code a suit for immoveable property must be filed in the Court within the local limits of whose jurisdiction the property is situate. Therefore the Court at Nasik had no jurisdiction to entertain the suit.

Robertson, in reply.—Civil Procedure Code applies to property in British India. The properties in dispute being situate within the territories of the Nizam and the Chief of Ramdurg, s. 16 of the Civil Procedure Code has no application. All the parties reside at Nasik and

(1) 23 B. 22.

(2) (1750) 1 W. and T.L.C. 755.

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the allowances are also receivable at that place. Therefore s. 17 of the Code applies.

JUDGMENT.

JENKINS, C. J.—The plaintiff has brought this suit to establish his right to a one-third share of four incomes and to recover Rs. 2,761-10-8 from the defendant as his share of those incomes. In the first Court a decree was passed in his favour, but on appeal that decree was reversed on the ground that the Court had no jurisdiction. From this reversal the present appeal is preferred.

[410] The judgment of the lower appellate Court purports to proceed on the case of *Keshav* v. *Vinayak* (1), and on the assumption that it is on all fours with the present case the Judge held that there was no jurisdiction. It is to be regretted that the lower appellate Court should not have gone more closely into the facts and have determined what they actually were, for though the judgment under appeal may in the end prove to be justified by the facts when they have been ascertained, the judgment is of such a meagre character that we have no alternative but to send it back. No doubt the case on which the lower appellate Court relied bears a superficial resemblance to the present; but had the Judge closely examined that case, he would have perceived that the reasoning on which it was based has no application to the case the appellant seeks to establish.

In fact, this case only illustrates how important it is that Courts should first ascertain with accuracy and appreciate the facts under consideration before turning their attention to the authorities. Now all that was decided in *Keshav* v. *Vinayak* is that a Court will not determine the title to land situate in a foreign jurisdiction: the learned Judges did not purport to lay down any new principle, but they simply applied to the facts of that case a well-established and elementary rule of law.

It is conceded here that the ostensible title to the land is with the respondent; but it is claimed that the rents, when they are received, are burdened with an obligation arising out of contract or trust, as a result of which the plaintiff is entitled to succeed in the claim he makes. The appellant may or may not succeed in making out this case; but the lower appellate Court has failed to entertain it. When the Court has determined what the true facts are, then it will be time enough to consider whether they fall within the rule which governed the decision in *Keshav* v. *Vinayak*.

The lower appellate Court seems to have thought that all property which had a foreign origin was outside the jurisdiction of the Court: this, however, is not a correct view of the law.

[411] The general principle is clearly stated by Lord Cottenham in *Ex parte Pollard* (2), where he says (pp. 250-1): "If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities." Then, again,

(1) 23 B. 22.

(2) (1840) Mont. and Chit. 239.

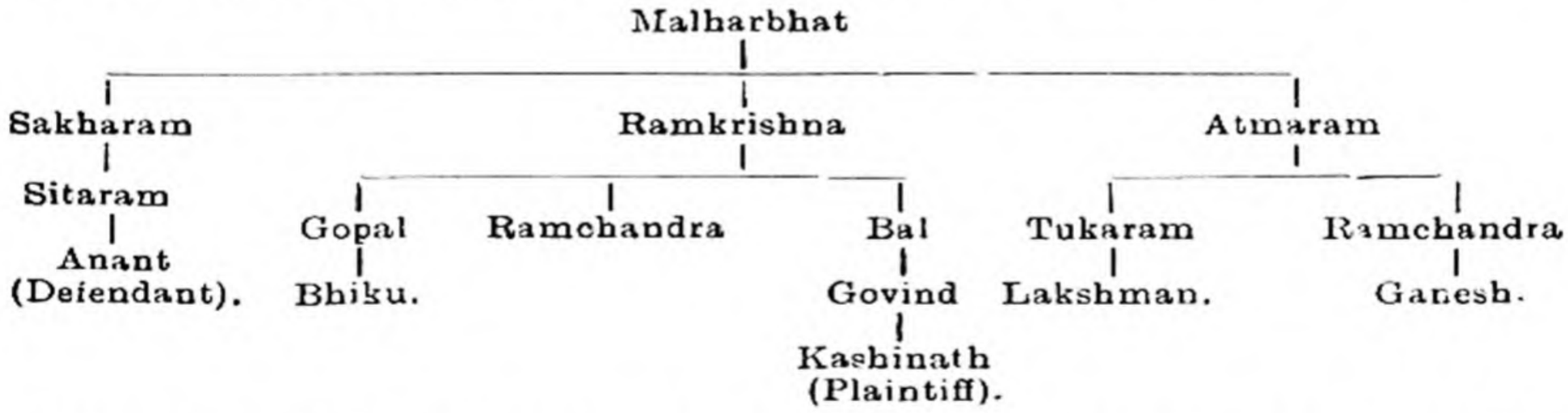
it is laid down by Lord Selborne in *Ewing* v. *Orr Ewing* (1) : "The Courts of Equity in England are, and always have been, Courts of conscience, operating in *personam* and not in *rem* : and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so, as to land, in Scotland, in Ireland, in the Colonies, in foreign countries."

In my opinion the jurisdiction of Courts in this country is governed and must be ascertained by the same principles except so far as they may be at variance with legislative enactment.

But, then, it has been argued by Mr. D. A. Khare that regard must be had to s. 16 of the Code of Civil Procedure. In my opinion, however, that section presents no difficulty. The suit, I agree, does not fall within the terms of that section, because it is excluded by the explanation ; still the principle enunciated by Lord Cottenham shows that it is a suit that will lie ; and as s. 16 has no application, the forum is to be determined by reference to s. 17 of the Civil Procedure Code. It is not suggested that the provisions of that section have not been observed in this case.

For the reasons I have expressed, the decree of the lower Court must be reversed and the case remanded that it may be disposed [412] of according to the merits. The costs of this appeal will follow the result.

CANDY, J.—The subject-matter of this appeal is the income from the jaghir village of Bhagatvadi in the Nizam's dominions and certain money remitted annually by the Ramdurg treasury, which are received by the defendant, one of the pujaris of the well-known temple of Ram in Panchwati (Nasik). Plaintiff is another pujari of the same temple, Ganesh Ramchandra (called also Ganpatibova) being the third. These parties are related as shown in the following "tree" :—



It is admitted that the above-mentioned income and cash allowances are endowments of the said temple, and that they were grants to defendant's father and grandfather after defendant's branch had separated from the branches of Ramkrishna and Atmaram. Defendant, therefore, is the grantee and entitled to receive the said items of endowment.

But plaintiff alleges that by express agreement between the members of the family, and by the custom of the pujari vatan, all endowments are shared by the three pujaris for the expenses of the worship, and that after deducting such expenses, the balance is divided among the three branches. Defendant denied this allegation, and pleaded (*inter alia*) that the endowments in question were under his sole management, while admitting that the said endowments were for the services and expenses of the god.

(1) (1883) 9 A. C. 34 (40).

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This was the main issue in the Court of first instance; and the Subordinate Judge found in favour of the plaintiff.

On the question of jurisdiction he said: "The plaintiff only seeks to establish his right to share in the incomes after they [413] come into the hands of the defendant, and to get arrears of the incomes already received by defendant in Panchwati, Nasik. This Court has, therefore, jurisdiction."

In appeal to the District Court the Subordinate Judge, A. P., reversed that decision, holding, on the authority of the case of *Keshav* v. *Vinayak* (1), that the Courts in British India had no jurisdiction.

This is the question which has been argued in second appeal.

In my opinion the case of *Keshav* v. *Vinayak* is clearly distinguishable from the present case. In that case the grants had been made to a common ancestor of the parties, and the question for decision was whether the grant was to the grantee and his heirs to the exclusion of collaterals, or whether it was a grant to the grantee and all the members of the family.

Here there is no such question. The grants were admittedly to the father and grandfather of defendant. There is no dispute as to title. If the plaintiff's allegations are correct, to refer him to the Nizam's or the Ramdurg Courts will amount to a denial of justice. For those Courts would naturally say, we have nothing to do with any arrangement which the grantee and his co-pujaris, the members of his family, make when the funds are received at Nasik: all we know is that the grant was to A B for the worship of the temple and the income is remitted to A B's representative. There is thus no claim to be determined according to the law in force at Ramdurg or in the Nizam's dominions. In *Keshav* v. *Vinayak* the Judges were careful to note that in the case before them the defendants were in no fiduciary relations with the plaintiffs, nor bound by contract with them. In the present case evidence was produced—whether reliable or not—with the object of showing that by express contract and also by implied contract, as shown by the custom of the vatan, the three pujaris were bound—to adopt the expression used by the learned counsel—to "pool", all endowments. That is the question for decision. It is obviously not one for the determination by any foreign Court. Hundreds of shrines in British India receive large endowments from States outside [414] British India. The management and expenditure of those endowments are continually the subject of arrangement and contract between the various parties who conduct the management of the shrines. To say that the Court, in whose local jurisdiction the money is received and expended and the parties reside, has no power to determine questions as to the management of the funds quite apart from the title to the grant, which may not be in dispute, seems to me to amount to a denial of justice.

In the view which I take of the facts, this is not a suit in respect of immoveable property, and, therefore, s. 16 of the Civil Procedure Code does not apply.

I would reverse the decision of the lower appellate Court and remand the case for decision by the District Court on the merits. Costs to abide the result.

Decree reversed and case remanded.

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(1) 23 B. 22.

24 B. 414=2 Bom. L.R. 41.

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APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

24 B. 414=2 Bom. L.R. 41.

RANCHODDAS AND ANOTHER (*Original Plaintiffs*), *Appellants v.* JUGALDAS AND ANOTHER (*Original Defendants*), *Respondents.**

[14th December, 1899.]

Mahomedan law—Shaffa—*Pre-emption*—*Right of support "appendages of property"*—*Easement*—"*Participator in the appendages of property.*"

The right of *shaffa* (or pre-emption) belongs first to a partner in the property sold, secondly, to a participator in its appendages, and thirdly to a neighbour.

The right of support is not an appendage to property; it is merely included in the incident of neighbourhood.

A's house adjoined the house in dispute towards the east. B's house adjoined the house in dispute towards the south, and was separated from it only by a wall. B's house was subject to the easement of support in favour of the house in dispute. A's house was subject to the easement of receiving and carrying off the rain-water falling from the roof of the disputed house.

Held that A as owner of the servient tenement was a "participator in the appendages" of the house in dispute, and, as such, had a preferential right to purchase the house in dispute over B, who was a mere neighbour.

[415] SECOND appeal from the decision of R. G. C. Lord, Assistant Judge, F. P., at Broach.

Suit for pre-emption. The house in dispute belonged to defendant No. 1. Plaintiffs' house adjoined the house in dispute towards the east. Defendant No. 2's house adjoined it towards the south. The roof of the house in dispute projected over the terrace of the plaintiffs' house, so that the rain-water from the roof fell into the terrace.

On 18th August, 1897, defendant No. 1 sold the house in dispute to defendant No. 2.

Thereupon the plaintiffs filed the present suit to enforce their right of pre-emption.

The Court of first instance rejected the plaintiffs' claim, holding that plaintiffs were mortgagees, and not owners of their house, and as such had no right of pre-emption, and that even if they were owners, defendant No. 2 had a preferential right to purchase the house (1) because he was a next door neighbour, and (2) because the wall between his house and that in dispute was the common property of both. On these grounds the suit was dismissed.

On appeal, the Assistant Judge confirmed the first Court's decree. His reasons were as follows :—

"Defendant's house is beside the house in dispute, and separated from it only by a wall, while plaintiff's house is behind and is subject to an easement of receiving the water from the roof of the house in dispute; so much is admitted. The Subordinate Judge presumes the wall between defendant's house and that in dispute (which we shall call A for shortness, plaintiff's being P and defendant's D) is a party wall, and then rejects plaintiff's claim on the ground of the superior claim of defendant as co-owner of the party wall. But the wall is described in defendant's sale-deed (the only evidence on the point in the suit) as the property of defendant, which, as an admission, should defeat the presumption. However, it is clear that the house D is then subject to an easement of support

* Second Appeal No. 492 of 1899.

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in favour of house A, even though the wall is only fifteen years old, as the easement necessary to give [416] rise to the right of pre-emption would appear to be another thing from the perfected easement of the Easement Act. Macnaghten describes that class of pre-emptors as 'participators in appendages,' thus indicating a difference from an easement as known to Indian law.

"Both defendant and plaintiff, then, are in the second class of pre-emptors, and are also in the third as neighbours, but Amir Ali, p. 549, indicates a preference for the man in the same street over the owner of the house behind; thus defendant is any how a preferable pre-emptor to plaintiff, and the latter's right is not valid as against the former."

Against this decision plaintiff preferred a second appeal to the High Court.

Kallabhai Lallubhai, for appellants.

N. G. Chandavarkar, for respondents.

JUDGMENT.

PARSONS, J.—This is a suit for pre-emption. The Subordinate Judge dismissed it, holding that the plaintiffs had no right of pre-emption, first, because they were not owners, but mortgagees only, of the house in respect of which the right was claimed, and second, because the right of the defendant No. 2 to pre-emption was better than the plaintiffs'; he was a next door neighbour, and the wall between his house and that in dispute was a party wall, the common property of the owners, whereas the plaintiffs were merely owners of a servient tenement. The Assistant Judge summarily dismissed the appeal filed by the plaintiffs; he was of opinion that the wall between the house in dispute and the house of defendant No. 2 was not a party wall, but he thought that the house of the defendant No. 2 was bound to support the disputed house, and hence that both the defendant No. 2 and the plaintiffs were participators in appendages and also neighbours, and that as the house of the defendant No 2 was in the same street as the disputed house, the latter had a preferential right to purchase the house. It appears to me that this is not a correct decision. In their plaint the plaintiffs based their right upon the allegations that originally their house and the disputed house formed one house, and that the roof of the disputed house projected over [417] their house which had to receive and carry off the water from its roof. In addition to these allegations, Mr. Kalabhai argued in this Court that there was a right of way through the disputed house to the house of the plaintiffs as described in the Exs. 33, 34 and 35. There is no finding by the Judges of the Courts below as to anything more than that the plaintiffs' house is subject to the easement of receiving and carrying off the water which may fall from the roof of the disputed house; therefore, as they rightly say, the plaintiffs' house is a servient tenement and the disputed house is a dominant tenement. Their finding as to the defendant's house is conflicting. The Subordinate Judge found that there was a party-wall between them, the Assistant Judge, F. P., did not accept that finding, but thought that the defendant's house was subject to an easement of support in favour of the disputed house. No evidence whatever is pointed out to justify this opinion. Assuming, however, that it is correct, the fact that his house had to support the disputed house would not make the defendant a participator in appendages entitling him to rank above the plaintiffs. The right of *shafa* belongs first to a partner in the property sold, secondly, to a participator in its appendages, and thirdly, to a neighbour. It is admitted that the plaintiffs come

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within the second class, and as such they will rank above a neighbour—see *Chand Khan* v. *Naimat Khan* (1). I can find no authority for holding that the right of support is an appendage to the property; it seems to be merely included in the incident of neighbourhood. Thus, it is said in the Hedaya (2), "the laying of beams on the wall of a house gives a right of *shafa* from neighbourhood, but not from partnership, since this act does not constitute a partnership in the property of the house. In the same manner, also, a person who is a partner in a beam laid on the top of the wall is only held in the light of a neighbour."

In Baillie's Mahomedan Law, p. 476, a *khalit* is defined as a partner in its rights, as of water or way, and in the note it is stated that "though rights of water and way are given as examples, it does not appear that a *khalit* in any other right than **[418]** these has the right of pre-emption. Amir Ali says the claim of a person who has a right of way is stronger than that of the person who has a right to discharge water over the land sold. In no work on Mahomedan Law can I find the right of support specifically mentioned, and yet it is one that would exist in almost every case where premises adjoin each other as regards at any rate the land itself. I conclude, therefore, that it does not give a neighbour any greater right of pre-emption than he would have as being a neighbour. For this reason I would reverse the decree of the Assistant Judge summarily dismissing the appeal of the plaintiffs. I cannot, in this second appeal, finally determine the first issue, because this Court is not a judge of fact, and there have been no findings of fact arrived at by the lower appellate Court which dismissed the appeal without hearing the defendant. All I would decide is that the plaintiffs, if they are found to be owners of a servient tenement, will have a right of pre-emption preferable to that of the defendant, if the claim of the latter is found to rest upon no higher title than that of neighbourhood (including support). There has, however, been no determination by the lower appellate Court of any of the rights of the parties, and so I purposely leave them open.

We reverse the decree of the lower appellate Court and remand the appeal to it for trial and decision on the merits after due notice to the defendants under the provisions of s. 552 and following sections of the Civil Procedure Code. All costs to be costs in the cause.

RANADE, J.—The Assistant Judge has disposed of this appeal under s. 551. Such a summary disposal of a case, in which the points in issue related to the rather complicated law of pre-emption, can hardly be regarded as satisfactory. The appellant-plaintiffs claimed pre-emption on the ground, first, of their own house and the disputed house having belonged to the same owner, and secondly, on the ground that their house received the rain water from the eaves of the disputed house. On this double ground they claimed that their rights were superior to those of the respondent, whose claim was based on the ground that his house was on the back side of the disputed house. The respondent on his side contended that his house had a right of support from **[419]** the party-wall between the house in dispute and his own house. The Court of first instance dismissed the appellant-plaintiffs' claim on the ground (1) that they were not the owners of the house in which they lived, but only mortgagees, and (2) on the ground that respondent was a next

(1) 3 B. L. R. 296.

(2) Hamilton, 549.

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door neighbour, and the party-wall was common to both houses. On this double ground, respondent's right was held to be superior to that of the appellants, whose right was founded only on the easement claimed about the rain-water. In appeal, the Assistant Judge raised only one general issue. He did not agree with the first Court as regards the party-wall, which he held was not common, but notwithstanding this, he held that appellants' claim was not superior to that of the respondent, as though both were participators in appendages, and neighbours, yet respondent's house was in the same street, while appellant's house was behind the disputed house.

It is clear that the single general issue does not cover the several points in dispute, especially the one on which the lower appellate Court based its judgment. There is nothing to show whether the house in dispute is in the same street with that of the appellants' house, or whether the house in dispute and respondent's house are in the same street. The appellants' contention all along was that the house they live in and the house in dispute belong to the same owner. The house in dispute is in the corner of two streets, the appellants' house being to the east of it, and respondents' house being to the south of it. The question of the street neighbourhood cannot, therefore, be settled unless a separate issue is laid down and inquired into. Similarly, it must be considered whether the owner of a party-wall, supposing respondent was owner of the wall which is distinctly found against respondent by the Assistant Judge, stands in the same position as a participator in appendages with an owner of a servient tenement, which receives rain-water from the disputed house. The owner of an easement of irrigation channel has a superior claim to a mere neighbour—*Chand Khan* v. *Naimat Khan*(1). A part owner of the substance of the estate has a superior claim to the participator in appendages—*Golam Ali Khan* v. *Agurjeet Roy*(2). The whole chapter on pre-emption in Baillie's work, pp. 476—81, and the Precedents **[420]** of Macnaghten, show clearly that the whole subject of pre-emption is very complicated, and a dispute such as this cannot be disposed of in a summary way by laying down a single general issue. I agree, therefore, with Mr. Justice Parsons in reversing the decree of the Assistant Judge and remanding the case for further inquiry after giving notice to both sides and laying down the proper issues.

Decree reversed and case remanded.

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24 B. 420 = 2 Bom.L.R. 46.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

CHUNILAL (*Original Defendant No.* 1), *Appellant v.* BAI MULI (*Original Plaintiff*), *Respondent.** [18th December, 1899.]

Will—Hindu will—Construction—Vested remainder—Words "malak and waras."

A Hindu died, leaving a will which provided (*inter alia*) as follows:—
"After my death, my wife, if she be alive, is the rightful heir, and if she be not alive, and after the death of my wife, my daugther Bai Nathi is my rightful heir

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* Second Appeal No. 451 of 1899.

(1) 3 B. L. R. 296.

(2) 17 W.R. 343.

(*kakdar waras*)".....“ As to my daughter Nathi, whom I have, after the lifetime of myself and of my wife, appointed heir to my property, and as to the surplus the heir to the same is my daughter Nathi.”

The testator died in 1894 ; Nathi in 1895 ; and the wife in 1897. Thereupon the testator's step-mother claimed the property as his reversionary heir.

Held, that under the will Nathi took an estate vested in interest from the testator's death, which would pass to *her* heirs on her death, and the step-mother would have no title.

There is no real difference in the meaning of the words “ *waras* ” (heirs) and “ *malak* ” (owner).

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APPELLATE CIVIL.

24 B. 420 = 2 Bom L.R. 46.

[R., 35 B. 279 = 13 Bom. L.R. 471 ; 17 C.L J. 630 = 16 Ind. Cas. 809.]

SECOND appeal from the decision of Rao Bahadur Chunilal D. Kaveshvar, First Class Subordinate Judge of Ahmedabad.

One Bogaldas Girdhar died in 1894, leaving him surviving a widow Fulkore, a daughter Bai Nathi, and a step-mother (the plaintiff).

He left a will, which provided (*inter alia*) as follows :—

“ As to the money, ornaments, and immoveable property and sundry sums of money which may remain after deducting the said **[421]** expenses, to the same after me (*i.e.*,) after my death, my wife, if she be alive, is the rightful heir, and if she be not alive and (that is to say) after the death of my wife my daughter named Bai Nathi is my rightful heir.....As to my one daughter Behen Nathi whom I have after the lifetime of myself and of my wife appointed heir to the property remaining after the deduction of all the expenses, she has been married to Desai (Chunilal Vithaldas) bin Mahasukram of Kapadvanj, and as to the surplus which may remain out of the aforesaid property after deducting therefrom the expenses and outlays which I and my wife may make so long as we are alive, the heir to the same is my daughter Nathi.”

Bai Nathi died in 1895.

On 7th August, 1896, Fulkore sold the house in dispute to the defendant. Fulkore died shortly afterwards.

In 1897 the plaintiff filed the present suit to have the sale to the defendant set aside and to recover possession of the house.

Defendant set up a *jus tertii*, contending that under Bogaldas' will the property had vested absolutely in Bai Nathi, and passed on her death to her husband, and that the plaintiff had, therefore, no title to the property.

The Subordinate Judge held that as Bai Nathi died before her mother, the bequest to her did not take effect, and that as the sale to the defendant was not made under a legal necessity, the plaintiff as a reversionary heir of Bogaldas was entitled to have it set aside and recover the property. He, therefore, decreed the plaintiff's claim.

This decision was upheld, on appeal, by the First Class Subordinate Judge, A. P. His reasons were as follows :—

“ Now the first point to be decided is whether Bai Nathi had a vested interest in her father's estate by the will, and whether it passed to her husband as her heir in preference to the plaintiff, her father's step-mother. The appellant's learned pleader has cited the case of *Lallu* v. *Jagmohan* (1). It appears to me that the present case is not similar to the case cited ; and the property was not vested in Bai Nathi on her father's death by the terms of the will made by her father. In the case cited **[422]** the words of the will are, ‘when I am not alive, my wife named Suraj is the owner of the property, and after her death, my daughter

(1) 22 B. 409.

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24 B. 420 = 2 Bom. L.R. 46.

Mahalaxmi is the owner of that property.' The testator made his wife owner of his property on his death, and after her death the daughter Mahalaxmi owner of the same property. But here it is not. Here there is no word 'owner,' but the word used is 'heir.' * * * * *

"Here the daughter was to take the property as heiress on the death of her mother in the same way as might have been the case if no will was made. Under the circumstances I hold that Bai Nathi took no vested interest by the terms of the will."

Against the decision defendant preferred a second appeal to the High Court.

Ganpat S. Rao, for appellant.—The case of *Lallu* v. *Jagmohan* (1) is on all fours with the present. In that case, as in this, the testator gives a life estate to his wife, with remainder over to his daughter. The daughter takes a vested interest in the property from the testator's death, and though she died before the widow, the bequest to her did not lapse. Her interest passed on her death to her husband as her heir. There is no difference in meaning between the words "owner" and "heir."

Nagindas Tulsidas, for respondent.—Both the lower Courts hold, on the construction of the will, that the intention of the testator was to give his wife and daughter the same estate which they would get under the Hindu law. The will leaves them in precisely the same position in which they would have been if the deceased had died intestate. That being the case, the daughter having died in the lifetime of the widow, took no interest in the property which could pass to her husband. The words "owner," and "heir" do not bear the same meaning.

JUDGMENT.

PARSONS, J.—Bogaldas died in 1894, leaving a will in which the following declarations are made :—"After my death, my wife, if she be alive, is the rightful heir, and, if she be not alive and after the death of my wife, my daughter Bai Nathi is my rightful heir (*hakdar waras*)"..... "As to my daughter Nathi, whom I have, after the lifetime of myself and of my wife, appointed heir to **[423]** my property and as to the surplus the heir to the same is my daughter Nathi." Nathi died in 1895, the wife died in 1897. The facts, therefore, are almost exactly the same as those in the case of *Lallu* v. *Jagmohan* (1), and, if that ruling is followed, the result would be that Nathi would take an estate vested in interest from the testator's death which would pass to her heirs on her death, and the plaintiff would have no title.

The Judge of the lower appellate Court has, however, distinguished it on the ground that, in the will there dealt with, the word "owner was used, whereas in the will now under discussion the word "heir" is employed. We think that this is not correct. There is no real difference in the meaning of the words *malak* (assuming that that was the vernacular word translated owner) and *waras* when they are used in the wills. The intention of the testator in each case to give his whole property to his wife for life and on her death to his daughter absolutely is clear, and we cannot hold that because in this case he has said they shall be heirs of the property, and not said they shall be owners, the intention fails.

For this reason we reverse the decree of the lower appellate Court and dismiss the plaintiff's claim with costs throughout.

Decree reversed.

(1) 22 B. 409.

24 B. 423=2 Bom. L.R. 52.

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APPELLATE CRIMINAL.

APPELLATE CRIMINAL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

24 B. 423=2 Bom. L.R. 52.

QUEEN-EMPRESS *v.* TYAB ALLI.* [10th January, 1900.]

Indian Arms Act (XI of 1878), s. 22—Master and servant—Master's liability for the criminal acts of his servant.

Where the manager of a licensed vendor of arms, ammunition and military stores sold certain military stores without previously ascertaining that the buyer was legally authorized to possess the same,

Held, that the licensee was liable to punishment under s. 22 of the Indian Arms Act (XI of 1878). though the goods were not sold with his knowledge and consent.

[424] The principle—"whatever a servant does in the course of his employment with which he is entrusted and as a part of it, is his master's act"— is applicable to the present case.

Attorney-General v. *Siddon* (1) followed.

[F., 34 A. 319=9 A.L.J. 288=13 Cr.L.J. 282=14 Ind. Cas. 666; R., 8 Cr. L.J.18=4 N.L.R. 78 (79); D., 34 A. 146=8 A.L.J. 1324=13 Cr.L.J. 8=13 Ind. Cas. 101.]

APPEAL from the conviction and sentence recorded by Sanders Slater, Chief Presidency Magistrate, in the case of *Queen-Empress* v. *Tyab Alli*.

The accused kept a shop under a license granted to him for the sale of arms, ammunition and military stores. He did not himself sell the goods, but placed a man in charge of the shop for the purpose of selling the goods. This man sold certain military stores, *viz.*, 8 cwts. of laden bird shot, to one Hasan Ali and fuzes to Raghunath Martand, without previously ascertaining that such persons were legally authorized to possess the same.

Thereupon the accused was prosecuted under s. 22 of the Indian Arms Act (XI of 1878) (2).

The accused pleaded that the goods were sold without his knowledge and consent, and that he was not criminally liable for the acts of his servant.

The Chief Presidency Magistrate overruled this contention, and convicted the accused under s. 22 of Act XI of 1878 and sentenced him to pay a fine of Rs. 250.

The accused appealed from this conviction and sentence.

Macpherson (with him Messrs. *Nanu and Hormusji*), for accused.—A principal is not criminally answerable for the acts of his agent. There must be a *mens rea*, a guilty knowledge, before a person can be convicted of a criminal offence. In the present case it is found that the military stores were sold and delivered without **[425]** the knowledge and consent of the accused. The conviction is, therefore, illegal—*Queen* v. *Stephens* (3);

* Criminal Appeal No. 492 of 1899.

(1) (1830) 1 Cr. and J. 220.

(2) Section 22 of Act XI of 1878 provides as follows:—

"Whoever knowingly purchases any arms, ammunition or military stores from any person not licensed or authorized under the proviso to s. 5 to sell the same; or delivers any arms, ammunition or military stores into the possession of any person without previously ascertaining that such person is legally authorized to possess the same, shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, or with both."

(3) (1866) L. R. 1 Q. B. 702 (710.)

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Hearne v. *Garton* (1); *Imperatrix* v. *Balu Miya* (2). There is no provision in the Indian Arms Act (XI of 1878) which makes the master liable for the acts of his servant.

Lang, (Advocate General), for the Crown.—The goods were delivered by the accused's servant in the course of his employment. The delivery by the servant would, therefore, be a delivery by the master. Otherwise the provisions of the Act would be defeated. The master may be ignorant of his servant's doings, he may have given express directions to his servant to act in accordance with the provisions of the Act, and yet he will be held responsible if the servant breaks the law. To prevent an indiscriminate sale of military stores, the law requires a dealer to take a license. If he chooses to misplace his confidence, he must suffer. The fact that he is a seller, and not the actual salesman, makes no difference in his liability. Refers to *Mullins* v. *Collins* (3) and *Coppen* v. *Moore* (No. 2) (4).

JUDGMENT.

PARSONS, J.—The Indian Arms Act, 1878, s. 22, makes penal the delivery of military stores into the possession of any person without previously ascertaining that such person is legally authorized to possess the same. The question is whether the appellant in this case delivered the stores. He did not deliver them with his own hands, that is admitted, because that was not his mode of business. He had a shop which was kept under a license granted to him for the sale of arms, ammunition and military stores, but he did not himself sell any stores there; he only visited it occasionally for purposes of inspection. He placed a man in charge of the shop for the purpose of selling the goods there. We fail to see how it can be contended that under these circumstances a delivery of goods by the man in charge would not be a delivery by the owner of the shop? It is not a question of intention, of *mens rea*, or of knowledge; it is the delivery which the Act makes penal, and the delivery by the manager is clearly in this case a delivery by the licensee. The **[426]** authorities are concurrent upon this point. In *The Attorney General* v. *Siddon* (5) the rule is thus stated: "Whatever a servant does in the course of his employment with which he is entrusted and as a part of it is the master's act." This rule, which is of general application so far as civil liability goes, is applicable to certain criminal proceedings also. In *Mullins* v. *Collins* (3), where the servant of a licensed victualler supplied liquor to a constable on duty without the authority of his superior officer, it was held that the licensed victualler was liable to be convicted under 35 and 36 Vict. Chap. 94, s. 16, sub-s. 2, although he had no knowledge of the act of his servant, that statute forbidding any licensed person to supply liquor in that way. So, too, it was held in *Coppen* v. *Moore* (No. 2.) (4), that a master was liable for the sale by his servants when acting under the general scope of their employment of goods in contravention of the provisions of s. 2, sub-s. 2 of the Merchandise Marks Act, 1887. The present case is undistinguishable from these, and we have no doubt that the appellant is liable. "Any other conclusion would render the act ineffective for its avowed purposes." The appeal is dismissed.

Appeal dismissed.

(1) (1859) 28 L. J. M. C. 216.
(2) (1891) Bom. H.C. Cr. Rul. No. 40.
(3) (1874) L. R. 9 Q. B. 292.
(4) (1898) 2 Q. B. 306.
(5) (1830) 1 Cr. and J. 220.

24 B. 426=2 Bom.L.R. 228.

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APPELLATE CIVIL.

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24 B. 426=2 Bom. L.R. 228.

Before Mr. Justice Parsons and Mr. Justice Ranade.

MAHIPAT RANE AND OTHERS (*Original Plaintiffs*), *Appellants v.* LAKSHMAN AND OTHERS (*Original Defendants*), *Respondents.**

[5th February, 1900.]

Landlord and tenant—Ejectment—Disclaimer of title—Notice to quit—Limitation—Khoti Act (Bom. Act I of 1880), *ss.* 20, 21, 22—*Decision of survey officer as to nature of tenure*—Botkhat—*Date of framing* botkhat.

Where a tenant under a plea of ownership has succeeded in obtaining a possessory order in a suit before a Mamlatdar, it is not necessary for the evicted landlord to give notice to quit before suing in ejectment on his title.

[427] It would be otherwise where the possessory order was sought on the ground of a disturbance of an existing tenancy.

The plaintiffs were khots and defendants were their yearly tenants in occupation of their *khoti khasgi* lands. In 1890, the survey officer purporting to act under s. 20 of the Bombay Khoti Act (Bom. Act I of 1880) decided that defendants were occupancy tenants, but the plaintiffs did not come to know of this decision till 1893, when the *botkhat* was prepared and signed. Shortly afterwards the plaintiffs took forcible possession of the lands. Thereupon the defendants filed a suit in the Mamlatdar's Court to recover possession, alleging that they were owners of the land, and that they had been illegally dispossessed. The Mamlatdar restored them to possession.

In 1896, plaintiffs filed the present suit to eject defendants. Defendants pleaded (*inter alia*) that the suit was bad for want of notice to quit and that the claim was time-barred.

Held, that defendants having distinctly repudiated the landlord's title in the possessory suit were not entitled to a notice to quit.

Held, also, that the suit was within time, the cause of action having accrued in 1893, when the *botkhat* was prepared, and not in 1890, when the survey officer passed his decision.

[R., 3 Bom. L.R. 420 (421).**]**

SECOND appeal from the decision of Thakurdas Mathuradas, Assistant Judge at Ratnagiri.

Suit in ejectment.

The lands in dispute belonged to plaintiffs, who were khots of the village of Lore.

In 1842 the lands were mortgaged with possession to the ancestors of the defendants.

In 1880, plaintiffs obtained a decree for redemption of the mortgaged lands and in execution they were put into symbolical possession of the lands in 1884.

On the 15th of April, 1890, the Survey Officer purporting to act under s. 20 of the Bombay Khoti Act (Bom. Act I of 1880) decided that defendant No. 1 was an occupancy tenant, but the plaintiffs did not become aware of this decision till 1893, when the *botkhat* was prepared and finally signed.

Plaintiffs thereupon took forcible possession of the lands from the defendants.

Defendants then brought a possessory suit in the Mamlatdar's Court, alleging that the lands were in their possession as owners, **[428]** and that

* Second Appeal No. 539 of 1899.

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24 B. 426 =
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they had been illegally ousted by plaintiffs. The Mamlatdar passed an order restoring them to possession.

Thereupon plaintiffs brought the present suit on 25th July, 1896, to eject defendants and to recover three years' mesne profits. Defendant No. 1 pleaded (*inter alia*) that he was a permanent and not a yearly tenant; that even if he were an yearly tenant, plaintiffs had not given him a legal notice to quit; that the suit was barred by limitation; and that he had paid the rent to Government for the period claimed, as the village had been under attachment.

The Court of first instance held that defendants were yearly tenants, and that as no notice to quit had been given by the plaintiffs, they were not entitled to eject the defendants.

The Court, however, awarded Rs. 55 for three years' rent, and the rest of the claim was rejected.

In appeal, the Assistant Judge held that the lands belonged to the plaintiffs as their *khoti khasgi* lands; that the defendants were their yearly tenants; that plaintiffs and their co-sharers should have given them a notice to quit before suing in ejectment; that for want of such notice the suit would not lie, and that defendants had paid rent as alleged by them.

On these grounds, the Assistant Judge varied the decree of the first Court and rejected the claim *in toto*.

Against this decision plaintiffs preferred a second appeal to the High Court.

H. C. Coyaji (for *Manekshah Jehangirshah*), for appellants.

D. A. Khare, for respondent No. 1.

JUDGMENT.

PARSONS, J.—The Judges of both the lower Courts have held the title of the plaintiffs proved, but they have dismissed the suit, because they find that the defendants were yearly tenants and no proper notice to quit had been given to them prior to suit. There can be no question of the correctness of the finding as to the title of the plaintiffs. It is proved by the mortgages and the decrees for redemption and partition. Appeal is brought by the plaintiffs only on the ground that no notice was necessary since the defendants, if tenants, had repudiated their **[429]** title. The evidence in the case shows that this is so. The defendants originally came into possession as the mortgagees of the Rane (that is, the plaintiffs') family. In the redemption suit they contended that they held possession under a permanent lease, but this plea was held not proved, and the Ranes obtained symbolical possession under their decree in 1884. In 1893 the plaintiffs gained actual possession, and it was then that the defendants went before the Mamlatdar and filed a suit in order to regain possession. In their plaint they alleged that the property was of their *malaki* (ownership) and in their occupation (*vahiwat*), and that they were about to plough and sow it when the present plaintiffs created obstruction and sowed the lands themselves. The Mamlatdar passed an order in favour of the defendants and they were placed in possession, and it is to set aside that order and to recover possession that the present suit is brought. I am clearly of opinion that, where under a plea of ownership a party has succeeded in obtaining a possessory order in a suit before a Mamlatdar, it is not necessary for the evicted party to give notice to quit before suing in ejectment on his title. It might be otherwise when the possessory order was sought on the plea of

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24 B. 426 = 2 Bom. L.R. 228.

a disturbance of an existing tenancy, but that is not the case here. The Judge of the lower Court has not correctly construed the plaint and the deposition of the defendants in the suit before the Mamlatdar; for there is not a word in them about their being either occupancy or permanent tenants. The assertion was that they were the owners of the land, and it was made in no ambiguous terms, and it is impossible to hold otherwise than that it amounted to an express denial of the title of the plaintiffs to the land which justified the latter in forthwith bringing a suit in ejectment.

The respondent's pleader, however, sought to support the decree dismissing the plaintiffs' suit on the ground that the defendants' title to remain in possession of the land had become absolute by prescription. He contended that the survey officer, under the provisions of s. 20 of the Khoti Settlement Act, 1880, decided on the 15th April, 1890, that the defendant Lakshman was an occupancy tenant; that under s. 21 of the said Act this decision was binding until reversed by a **[430]** decree of a competent Court; that no suit was brought to reverse it within the statutory period; and that the decision, therefore, had become final and binding on the plaintiffs. No doubt there is force in the argument if we take the starting point of limitation to be the date of the decision, namely, the 15th April, 1890, for the present suit was filed on the 25th July, 1896. The Judge of the lower appellate Court did not take that date; he says that there is nothing in the case to show that the decision was communicated to the khot that day or that the khot had knowledge that the decision would be made that day, and he has taken as the proper date the date when the *botkhat* was signed, which was some time in 1893, and so has brought the filing of this suit within the limitation period.

In this point I agree with the Assistant Judge. It is true that s. 21 makes mention of the decision only, but ss. 20 and 22 show that it is not the decision, but the framing of the register or other record which is the important function of the survey officer. If a dispute exists, he is to determine it, but he can do this of his own motion, and no provision is made for the communication of his decision to any of the parties affected thereby. It may lie buried in his desk for three years as in the present case, and no one may know of its existence till it is made use of for the purpose of framing the register. It is not necessary to discuss what effect the proved communication of the decision might have; it is sufficient to say that the decision can have no force until it is pronounced or in some way brought to the notice of the parties, and that as this is not shown to have been done in the present case till the *botkhat* was framed and signed, the date when this was done should be taken as the starting point of limitation. The decree, therefore, cannot be supported in the way the defendants' pleader has sought to do.

The objection as to want of notice failing, there is no reason why the plaintiffs should not obtain possession of the lands which are their own and which they have redeemed from the defendants. The lease, under which the defendants claimed to have the right to hold the lands as permanent tenants, has been held to be a forgery, and the decision of the revenue authorities, that **[431]** they were occupancy tenants, has been found to be incorrect; they have, therefore, no right whatever over the lands, but are in possession as trespassers. The order of the first Court, that they pay not only the assessment but the rent admitted by them as mesne profits, is correct.

We amend the decree of the lower Court and award the plaintiffs possession of the lands in suit, with Rs. 55 as the profits thereof for the

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three years preceding suit, with subsequent mesne profits from the date of suit to the date of the plaintiffs' recovering possession or until three years of date of this decree (whichever event first occurs); the amount of the same to be determined in execution. We further order the defendants to pay the plaintiffs' costs throughout in this litigation.

RANADE, J.—The dispute in this case relates to certain lands forming part of a hamlet called Wadi Gawali, which hamlet belonged to the Rane family. Certain members of the Rane family mortgaged the whole hamlet, including the lands in dispute, to the ancestor of the defendant-respondents so far back as 1842. There were subsequent mortgage charges on the same property effected in 1854 and 1872. The mortgagor Ranes brought a suit in 1880 for the redemption of the mortgages, and got a decree in execution of which they obtained possession of the wadi in 1884. The appellant-plaintiffs were members of the Rane family, and they obtained a partition decree in 1884 against the other Rane *bhaubands*, including those of them who had mortgaged the lands with the respondents' ancestors, and obtained the redemption decree noted above. In the execution of the partition decree, the lands in dispute fell to the share of the plaintiff-appellants, and the right to recover the rent and profits of the land in dispute from the respondent No. 1 was allotted to the plaintiffs. The respondent No. 1 got the lands entered in his name in 1893 after partition with his brother, respondent No. 2, and the appellant-plaintiffs' application to have the lands transferred to their names was disallowed. Subsequently, the plaintiff-appellants and other Ranes obtained possession of the lands by force, and thereupon a possessory suit was brought by the respondent No. 1. He succeeded in recovering possession in the Mamlatdar's Court, and thereupon the present suit was brought in ejectment. **[432]** The appellant-plaintiffs' case was that the respondent-defendants were their yearly tenants, and that respondent No. 1 had fraudulently got the lands entered in his name, and that they had a right to obtain possession of the land by evicting him. The defence was that respondent No. 1 was a permanent tenant, and his right of possession was independent of the mortgage, and that as the land was entered in his name by the settlement officer, he was entitled to retain possession, and the appellant-plaintiffs' claim was time-barred. On the principal issue whether the respondent, defendant No. 1, was a permanent tenant or a yearly tenant, both the lower Courts have found against the respondent, and in plaintiff-appellants' favour. They held that the respondent had obtained possession of the lands only as a mortgagee of the Ranes, and had not obtained any permanent rights of occupancy. The Court of first instance, however, held that the appellant-plaintiffs could not, for want of proper notice to quit, recover possession of the lands in this suit and were only entitled to recover rent. The lower Court of appeal held further that the respondent No. 1 was a yearly tenant of the whole body of Ranes, and not of appellant-plaintiffs only, and that the suit must fail for want of notice, and that the claim for rent must also fail, because the assessment paid exceeded the rent, and, therefore, the appellant-plaintiffs were not entitled to recover any rent. Accordingly it amended the first Court's decree by rejecting the claim *in toto*.

In the appeal before us, the chief point urged by the appellants' pleader was that as the respondent, defendant No. 1, was a yearly tenant of the plaintiffs, notice was not necessary, and plaintiff-appellants were entitled both to possession and the rent claimed. The respondent's pleader, in support of the lower Court's decree, urged that the settlement

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officer's decision barred the appellant-plaintiffs' claim by reason of the six years' limitation having expired. The points for consideration are thus, (1) whether notice was necessary in this case, (2) whether the respondent was a tenant of the appellants or of the Ranes generally, and (3) whether the claim was time-barred.

It appears to me that on all these points we must decide the issues in favour of appellants and against respondents. The decree obtained in the partition suit between the appellant-plaintiffs **[433]** and other Ranes transferred the rights of all the Rane *bhaubands* to the appellant-plaintiffs by reason of the decree, and the allotment in execution of that decree of the lands in suit to the appellant-plaintiffs. The partition decree shows that the plaintiff-appellants sought an equal one-sixth share in all the lands including the hamlet Gawali Wadi, and the decree awarded the share as agreed to in a private arrangement between the parties (Ex. 84), and the Collector made the allotment accordingly (Ex. 100). After that execution, the Rane *bhaubands* had no interest left in the property, and the respondent-defendant must be regarded as a tenant, not of the Ranes generally, but of the plaintiff-appellants. The lower Court seems to have thought that the right to get possession of the land, as between the appellants and the Rane *bhaubands* generally, still remained with the latter, and the appellants only obtained the right to recover rents from the tenants. This appears to me to be a very narrow interpretation of the decree. The rights of the Ranes generally came to the plaintiff-appellants, and there was no reservation in the matter of ownership or possession. It is true that when the question of possession was raised by the respondent, the Collector, in Ex. 98, informed him that the partition effected was confined to the right to recover rents. As against the tenants, this might or might not be true, but it did not affect the plaintiff-appellants' claim to all the rights which the Ranes enjoyed as owners. These rights both Courts have found to be of full ownership when they held that the respondent had not established his permanent occupancy, but was only a yearly tenant.

The next question, therefore, is whether the respondent was entitled to a notice to quit. That depends on the question whether he repudiated his landlord's title. If there was no repudiation, he would be entitled to a notice. Exhibit 92 shows that respondent No. 1 did set up his ownership of the lands in the application he made to the Mamlatdar. The lower Court of appeal thought that this did not amount to a denial of the landlord's right, because in his deposition, Ex. 35, the respondent stated that he paid rent. The fact, however, that he applied to the settlement officer, and got his name entered in the *botkhat* as owner (Ex. 91), shows that the Rane landlord's claim was denied, **[434]** and the rulings, therefore, relied on in his favour do not apply. The case falls more within the ruling in *Venkaji* v. *Lakshman* (1)—see also *Shahaba Khan* v. *Balya* (2) and *Dodhu* v. *Madhavrao* (3). It is a disclaimer for a yearly tenant, when he claims to be a *mirasi* or permanent tenant, and such a disclaimer need not necessarily be made to the landlord himself. In a suit where defendant claimed to be a *makta* tenant as against the plaintiff who sued him for *thal*, and the defence failed, notice to quit was held not necessary. There is admittedly no lease in this case, and the mortgage under which respondent-defendant first entered into possession has been redeemed, and thus the tenant only holds over without right. A notice to quit is not, therefore,

(1) 20 B. 354. (2) P. J. (1873), p. 66. (3) 18 B. 110.

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necessary in such a case. The subsequent payment and acceptance of rent might create a yearly tenancy, but no such payment has been made here, as, since 1892, the respondent got his name entered in the *botkhat* as owner and made the payment directly. We must, therefore, hold that notice to quit was not necessary in the present case. Plaintiffs' right to be full owners and entitled to possession under the partition decree is not questioned, and the technical ground on which their claim for possession was disallowed appears not to have been made out. With the claim for possession, the claim for rent must also be allowed. It was allowed by the first Court, but disallowed by the lower appellate Court on the unsupported statement of the respondent No. 1. No receipt was put in in the Court of first instance, and the receipt produced in the second Court was not admitted by that Court. This part of the claim must, therefore, be allowed.

As regards the survey officer's decision it was contended by the respondent that the suit was not in time as being brought more than six years after the date of the decision, *viz.*, 15th April, 1890. There is an entry in Ex. 97, dated 15th April, 1890, to the effect that the defendant was an occupancy tenant. There is, however, nothing to show that the khots, against whom that decision was passed, had knowledge of the date fixed for the inquiry. Even the respondent was not present (Ex. 97), and the matter appears to have been left undecided (Ex. 96), **[435]** and appellants came to know of the decision in 1893 when the *botkhat* was prepared and finally signed. The suit is within six years from that date. Both the Courts have held that the respondent was neither an occupancy nor a permanent tenant, but only a yearly tenant. For these reasons, I would reverse the decree of the lower Court of appeal, and award the appellants possession of the lands in dispute, together with 55 Rs. for rent and the costs of the suit with further mesne profits.

Decree reversed.

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Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy, and on reference before Mr. Justice Parsons.

SURANNANNA DEVAPPA HEGDE (*Original Plaintiff*), *Appellant v.* THE SECRETARY OF STATE FOR INDIA AND ANOTHER (*Original Defendants*), *Respondents.** [19th February, 1900.]

Limitation Act (XV of 1877), sch. II, art. 14—Land Revenue Code (Bom Act V of 1879), ss. 37, 39, 135 (1)—Land presumably the property of the plaintiff—Plaintiff in uninterrupted possession—Revenue survey—Entry of the land in the register as Government waste land—Order of the Revenue Commissioner directing land to be given to defendant No. 2—Plaintiff's dispossession—Suit against the Secretary of State and defendant No. 2—Nature of the Revenue Commissioner's order—Setting aside of the order—Limitation—Title—Cause of action.

A certain land which the plaintiff alleged was his property and was uninterruptedly in his possession till the 16th November, 1895, was at the introduction

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* Appeal No. 94 of 1899.

(1) Sections 37, 39, 135 of the Land Revenue Code (Bom. Act V of 1879):—
37. All public roads, lanes and paths, the bridges, ditches, dikes and fences, on or beside the same, the bed of the sea and of harbours and creeks below high-water-mark,

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[436] of the revenue survey in 1852 entered in the register as Government waste land. On the 12th November, 1895, the Revenue Commissioner, on appeal against the order of the Collector, ordered it to be given to defendant No. 2 on his paying the assessment due since the survey settlement. This order was communicated to the plaintiff on the 20th November, 1895. On the 16th November, 1895, the plaintiff was ousted by the order of the Collector, and defendant No. 2 was placed in possession. The plaintiff thereupon on the 15th November, 1896, filed the present suit in the District Court against the Secretary of State for India as defendant No. 1 and defendant No 2 praying (1) to have set aside the order passed by the Revenue Commissioner, (2) to have his right to the land established, and (3) to obtain possession with mesne profits. Defendants contended that the suit was time-barred under art. 14, sch. II of the Limitation Act (XV of 1877), not having been brought within one year from the 12th November, 1895, the date of the Revenue Commissioner's order.

Held, that the plaintiff could maintain a suit for the recovery of his land without having the order of the 12th November, 1895, passed by the Revenue Commissioner set aside.

Held, further, that the order of the Revenue Commissioner was not such an order as is contemplated by art. 14, sch. II of the Limitation Act (XV of 1877), and that in itself it gave no cause of action, and needed no setting aside. The cause of action was given by the act of the Collector dispossessing the plaintiff on the 16th November, 1895, and as the suit was brought within one year of that date, it was in time.

[F., 7 S.L.R. 169 = 24 Ind. Cas. 813; R., 29 B. 480 (490) = 7 Bom. L.R. 497; 31 B. 456 (460) = 9 Bom. L.R. 719; 36 B. 325 = 14 Bom. L.R. 332 = 15 Ind. Cas. 517; 32 C. 1107 (1123) = 2 C.L.J. 107; 15 C.W.N. 300 (312) = 9 Ind. Cas. 688; 6 S.L.R. 210.]

APPEAL against the decision of H. L. Hervey, District Judge of Kanara, in suit No. 3 of 1896.

The plaintiff sued to establish his title as owner of survey No. 43 in the village of Terkanhallibhagi, to set aside the order of the Revenue Commissioner, Southern Division, granting the occupancy of the said land to defendant No. 2, Parmaya bin Krishnappa, and to recover possession thereof from the said [437] defendant with Rs. 25 as mesne profits for the year 1895-96 and future mesne profits at the same rate. The plaintiff alleged that the land in question originally formed part of "muli warg," No. 3 of the village of Terkanhallibhagi; that the said "warg" was the property of his family; that at the time of the introduction of the revenue survey he was the owner thereof and the khata stood in his name; that the survey officials by mistake separated the land in dispute, which was

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and of rivers, streams, nalas, lakes, and tanks, and all canals and water-courses, and all standing and flowing water, and all lands whatever situated, which are not the property of individuals, or of aggregate of persons legally capable of holding property, and except in so far as any rights of such persons may be established in or over the same and except as may be otherwise provided in any law for the time being in force, are and are hereby declared to be, with all rights in and over the same, or appertaining thereto, the property of Government; and it shall be lawful for the Collector, subject to the orders of the Commissioner, to dispose of them in such manner as he may deem fit, or as may be authorized by general rules sanctioned by Government, subject always to the rights of way, and all other rights of the public or of individuals legally subsisting.

[436] *Explanation*.—In this section "high-water-mark" means the highest point reached by ordinary spring-tides at any season of the year.

39. The right of grazing on free pasturage lands shall extend only to the cattle of the village or villages to which such lands belong or have been assigned, and shall be regulated by rules to be from time to time, either generally or in any particular instance, prescribed by the Collector with the sanction of the Commissioner. The Collector's decision in any case of dispute as to the said right of grazing shall be conclusive.

135. Any suit instituted in a Civil Court to set aside any order passed by the Collector under s. 37 or 129 in respect of any land situate within the site of a village, town, or city, shall be dismissed, although limitation has not been set up as a defence, if it has not been instituted within one year from the date of the order.

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known as "Allimaranna Makhi," from the remainder of the "warg," numbered it as survey No. 43 and entered it in the revenue records as "assessed waste;" that the plaintiff presented a petition to the Assistant Collector objecting to the action of the survey authorities, but obtained no relief; that in 1895 defendant No. 2 applied to the Assistant Collector for the occupancy of the land, which was at the time in plaintiff's possession and enjoyment; that the order granting the petition was passed without notice to the plaintiff; that the plaintiff thereupon appealed on the 6th May, 1895, to the Collector, who ordered the occupancy of the land to be put up to auction; that both the parties then presented appeals to the Revenue Commissioner, Southern Division, who on the 12th November, 1895, reversed the order of the Collector and restored that of the Assistant Collector; and that defendant No. 2, accordingly, on the strength of the Revenue Commissioner's order, moved defendant No. 1, who dispossessed plaintiff of the land in suit on the 16th November, 1895, and hence the suit which was filed on the 15th November, 1896.

Defendant No. 1 answered that the plaintiff's cause of action arose at the time of the introduction of the survey settlement in the year 1882; that the suit was time-barred; that it was also barred under the provisions of s. 109 of the Land Revenue Code, that the plaintiff having failed to assert his claim to the land within two years of the date on which it was entered as "Government waste," Government was entitled to dispose of it in any way it thought proper; that the Revenue Commissioner having enquired into the dispute between the plaintiff and defendant No. 2, came to the conclusion that defendant No. 2 had a stronger claim to the occupancy of the land, and accordingly granted **[438]** it to him; and that the plaintiff was not entitled to question the legality of justice of the Commissioner's order.

Defendant No. 2 replied that the plaintiff never had possession or enjoyment of the land in dispute; that it was true that the land originally formed part of "muli warg" No. 3, which stood in the name of an ancestor of himself and the plaintiff; that at a partition effected between his branch of the family and that of the plaintiff more than fifty years ago, all the lands included in "warg" No. 3 were allotted to the share of the father of defendant No. 2 and his uncle Shivappa; that from that time the said lands remained continuously in the sole possession and enjoyment of himself, his father and his cousin Narasinha bin Shivappa until the introduction of the survey settlement; that though the land in dispute was declared to be Government waste, the defendant nevertheless remained in occupation of the same; that he applied to Government to confirm his possession, and that his petition was granted on condition of his paying Rs. 85 on account of arrears of assessment, which he accordingly did; that he had, therefore, become and had always been the owner of the land; and that as he had been in uninterrupted possession and enjoyment thereof for upwards of twelve years, the suit was time-barred.

The Judge found that the suit was time-barred; that the claim was not barred by s. 109 of the Land Revenue Code; and that the plaintiff was not entitled to any relief. He, therefore, dismissed the suit.

The plaintiff having preferred an appeal,

Shamrav Vithal appeared for the appellant (plaintiff).

Rao Babadur *Vasudev J. Kirtikar* (Government Pleader) appeared for respondent No. 1 (defendant No. 1).

Daji A. Khare appeared for respondent No. 2 (defendant No. 2).

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Shamrav Vithal, for the appellant (plaintiff).—The Judge was wrong in holding that our claim against defendant No. 1 was time-barred under art. 14, sch. II, of the Limitation Act. Our cause of action as against both the defendants arose when we were actually dispossessed at the instance of defendant [439] No. 2 by defendant No. 1 acting in pursuance of the order of the Revenue Commissioner. It is true that the order of the Revenue Commissioner was passed more than a year prior to the institution of the suit, but we contend that the mere passing of the order on paper would not give us a cause of action. We were actually in possession and we could institute a suit only when our possession was disturbed—*Laloo Singh* v. *Purna Chunder Banerjee* (1).

The Judge declined to determine the question of our title to the property as against defendant No. 2, because our suit as against defendant No. 2 was time-barred. The main relief that we seek in the present suit is the recovery of possession, and such a suit is governed by twelve years' limitation. Article 14, sch. II of the Limitation Act is not applicable. Further, the original entry in the revenue register was made by the survey officers, and the Revenue Commissioner merely acted on the strength of that entry. The Commissioner did not hold an independent inquiry in passing his decision in favour of defendant No. 2. Under these circumstances it was not at all necessary for us to take proceedings to set aside the order of the Commissioner. It had no binding effect upon us. We do not seek to set aside the order. What we want is that the land should be restored to us. The two reliefs have no bearing upon each other—*Moti Lal* v. *Karrabuldin* (2).

The Judge observed that if defendant No. 1 was not a necessary party, then he had no jurisdiction to entertain the suit against defendant No. 2, and that the suit ought to have been instituted in the Subordinate Judge's Court. But defendant No. 1 never contended that he was not a necessary party. We submit that it was necessary for us to join defendant No. 1, because defendant No. 2 was put in possession by him. Even supposing that defendant No. 1 was not a necessary party, the Judge was wrong in dismissing our suit. He ought to have returned the plaint to us for presentation to the proper Court.

Rao Bahadur *Vasudev J. Kirtikar* (Government Pleader), for respondent No. 1 (defendant No. 1).—The suit is time-barred, because the land was a long time ago entered in the survey [440] record as Government waste land. The plaintiff had knowledge of the entry, and he tried to get it set aside, but failed. As the plaintiff had knowledge of the entry, we contend that the entry was adverse to his interest, and that being so we were as it were in adverse possession. Therefore the suit ought to have been brought within twelve years from the date of entry.

[JENKINS, C. J.—Have you got any authority in support of your contention?]

We have not been able to find any authority. But the entry in Government record is tantamount to our possession. Government cannot be in actual physical possession.

Daji A. Khare, for respondent No. 2 (defendant No. 2).—The land in dispute was given to us by the Collector and Commissioner if not earlier than at least on the 16th November, 1895, under s. 37 of the Land Revenue Code, and the suit being brought more than one year after the order of the Commissioner, dated the 12th November, 1895, is barred by art. 14, sch. II,

(1) 24 C. 149.

(2) 25 C. 179.

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of the Limitation Act. An identical question arose in *Nagu* v. *Salu* (1), and although the bar of limitation there arose under s. 135 of the Land Revenue Code, the principle of the decision applies on all fours to this case. Here the orders of the Collector and the Commissioner were not beyond the range of their functions The disposal of land in *Nagu* v. *Salu* (1) was exactly like the present disposal, the only difference being that in the reported case the land was situated in a village site and here it is situated outside a village site. But the character of the disposal is one and the same, and the competency of the disposal is one and the same. Here it cannot be contended that the order was *ultra vires*. If, then, the order was passed under the authority of s. 35 of the Land Revenue Code, the plaintiff cannot get the land unless he gets that order set aside under art. 14, sch. II, of the Limitation Act. But under that article he is now too late. In *Nagu* v. *Salu* (1) as well as in the present case the authorities declared that the land dealt with was the property of Government, and if that case is rightly decided, the present suit must be held time-barred. It cannot rightly be contended **[441]** that in *Nagu* v. *Salu* (1) the order was not *ultra vires*, but that in the present case it is so, for there is no distinction in the circumstances. In *Nagu* v. *Salu* (1) also the plaintiff sought to shew that the land was not the property of Government. If the land is really the property of the plaintiff, then no question of limitation would arise. In every case it is necessary to decide the question of plaintiff's title for the purposes of art. 14, sch. II, of the Limitation Act.

We also contend that Government was a necessary party, because the plaintiff wants to set aside the Commissioner's order.

December, 1899, JENKINS, C. J.—The plaintiff claims to be the owner of Survey No. 43 in the village of Terkanhallibhagi, and in that capacity he has brought this suit against the Secretary of State for India in Council and the second defendant, who is in possession of the land.

From the judgment of the District Judge, whose decree is under appeal, it seems that the land in suit was at the time of the introduction of the survey entered in the settlement register as "unoccupied Government waste" and this entry was confirmed on the 22nd March, 1882. This fact was certainly known to the plaintiff in 1884; for in that year he presented a petition in which he objected to the action of the survey authorities. His application failed.

In 1895 the second defendant applied to the Assistant Collector, who passed an order granting him possession. The Collector on appeal varied this order, but it was ultimately restored by the Commissioner. Under the Commissioner's order, according to the plaintiff's allegations, the second defendant was put into possession of the land on the 16th November, 1895; he says, however, that the order was not communicated to him until the 20th of November, 1895. The plaintiff commenced this suit on the 15th November, 1896, and by it he claims "to have set aside the order passed by the Commissioner against me and to have my right to the piece of land in suit established; and further to get myself put in possession of the said piece of land and to obtain an order directing defendant No. 2 to pay me the value of the amount of **[442]** produce which I am likely to get during the interval between the date of my dispossession and that of my restoration to the actual possession of the said land at the rate of Rs. 25 per annum. My further prayer is that such of the defendants as may be found liable therefor, be ordered to pay me all my costs of this suit."

(1) 15 B. 424.

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The plaintiff alleges that he has been in possession from 1882 and earlier, but the District Judge has declined to go into this question, or to consider the plaintiff's title, holding that in any case the suit is barred by limitation as against the Secretary of State for India, and that, as a result, the claim as against the second defendant must be dismissed, because, if the claim against the Secretary of State be excluded, it should have been filed in the Subordinate Court.

It is conceded that, so far as the Secretary of State was properly a party, the suit was instituted in the right Court, and, that being so, it has been argued that the claim should not have been dismissed as against the defendant, for the reason adopted by the District Judge. In the view I take of the facts, it is unnecessary to express any opinion on this point and, therefore, I refrain from deciding it.

It must be allowed that the claim to set aside the order of November, 1895, is barred by art. 14 of the Indian Limitation Act of 1877, and if that were the only part of the claim with which the Secretary of State is concerned, I should have agreed in thinking that, as against him, the suit must be dismissed. But in my opinion the plaintiff was entitled to have the Secretary of State before the Court in order to try his claim of title; so it becomes necessary to consider whether this claim too was barred. For the purpose of determining this point it must be assumed that the plaintiff will be able to prove his allegation that he has been in possession since 1882 and earlier.

Notwithstanding this the District Judge seems to have thought that the entry in 1882 of the lands in the settlement registry as unoccupied Government waste has somehow created rights in the Government which cannot now be assailed by reason of the bar of limitation.

[443] The learned Government Pleader suggested that the bar of limitation arose from the assertion for upwards of twelve years of an adverse title, but he candidly admitted he could produce no authority for such a proposition. The truth is that the error has arisen from failure to perceive that the statute of limitation does not operate in favour of an assertion of adverse title apart from, and unaccompanied by, adverse possession.

A may assert, as long as he pleases, that B's field belongs to him, but, if he does nothing more, the law of limitation does not assist him.

Still, though the District Judge in my opinion erred on this point, it does not necessarily dispose of the case. It has been argued before us, that, inasmuch as the plaintiff did not within a year from its date sue to set aside the order of November, 1895, the disposition it effected is now binding on him.

This argument proceeds on s. 37 of the Bombay Land Revenue Code of 1879, which is in these terms (His Lordship read the section (1)).

The effect, therefore, it is contended, is that the order of 1895, having proceeded on the footing that the land is the property of Government, it must be taken that such is in fact the case, until that order is set aside by a suit in the Civil Courts. But as such a suit would be barred by art. 14 of the Limitation Act, the disposition cannot now be questioned, and so any title the plaintiff might otherwise have had is now of no avail to him.

It is sought to enforce this argument by a reference to s. 135 of the Land Revenue Code, which is as follows (His Lordship then read the section (2)).

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(1) 24 B. 435.

(2) 24 B. 436.

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It will, however, be noticed that this section is limited in its operation to land situate within the site of any village, town or city, a fact which, if anything, is suggestive of the conclusion that in the case of land not falling within this category, it was not the scheme of the local Legislature that an order under s. 37 should have the far reaching effects for which the defendants contend. The land in suit admittedly would not come within the operation of s. 135. I will first consider the [444] case apart from the authorities, limiting myself for the moment to a consideration of s. 37 of the Land Revenue Code.

Now the construction the defendants would have us place on this section, would unquestionably have the effect of taking from individuals their rights of property in a manner that would not otherwise be possible; it is, in other words, a legislative encroachment on private right of property. But, in accordance with a well-established canon of construction, such an effect is not to be attributed to the provisions of the Legislature unless the words clearly demand it. Section 37, no doubt, empowers a Collector to dispose of certain lands in a particular way, but this power is limited to lands falling within the description contained in the section,—that is to say, lands of which it can be said that they are not the property of individuals, and are in consequence by the section declared to be the property of Government. If they are not the property of Government, the Collector cannot dispose of them, and any attempt on his part to that end would, according to the ordinary reading of the section, be a mere *brutum fulmen*: it would be no more than if A attempted to dispose of the land of B.

The defendants' construction would vest in the Collector a power to dispose, not only of lands which are by the section declared to be the property of Government, but also of lands which in his opinion were the property of Government, and I fail to see any authority or reason for introducing into the section words not inserted by the Legislature, more especially when the result might be a serious encroachment on the rights of property.

In my opinion, therefore, apart from the authorities, an individual, who asserts that a Collector has disposed of property which belongs to him, and consequently does not come within the operation of s. 37, is entitled to have his title to the property tried in the ordinary Courts; if he succeeds in establishing his claim, the disposition by the Collector would be so much waste paper, and it would be unnecessary to set it aside. Government from its intrinsic nature must act through agents, and the introduction of the Collector into the section appears to me to be merely for the purpose of indicating the agent through whom [445] Government is to exercise this particular act of ownership over its own property; and in my opinion the closing words of the section show how far it was from the intention of the Legislature to make the slightest encroachment on the rights of private persons.

If I am right in this view, it would follow that art. 14 has nothing to do with the case.

But then it has been argued that, if art. 14 does not apply to an order such as that of November, 1895, there is no order under this section to which it could apply.

This argument, however, appears to me to be fallacious; for it proceeds on the assumption, that it is for some reason necessary that there should be some order under this section on which art. 14 would apply.

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as though art. 14 had the right to demand that there should be an order under s. 37 of the Land Revenue Code on which it should operate.

But if, for some reason which I cannot appreciate, art. 14 is entitled to demand a tribute from s. 37, I conceive there would be no difficulty in that section paying its dues.

Even a Collector may so dispose of land, which by the section is declared to belong to Government, as to interfere with the rights of others, and in that case it would be proper to have this disposition set aside.

Now I come to the authorities. The case on which reliance was more especially placed is *Nagu* v. *Salu* (1).

There the Collector had granted to Nagu a piece of open ground in a village site; the plaintiff, claiming the ground as his, sued the Secretary of State and Nagu to have the grant set aside and to recover possession. The case came on appeal to the High Court, and was heard in the first instance by Jardine and Candy, JJ. They differed in opinion, Jardine, J., being in favour of affirming the District Judge, who awarded possession; Candy, J., being of the opposite view, because in his opinion the suit was barred, since the plaintiff had not sued within the year to set **[446]** aside the grant. This difference of opinion necessitated a reference to a third Judge under s. 575 of the Civil Procedure Code, and thus the appeal was again heard by Bayley, J., who agreed with Candy, J.

Now it is at once obvious that this case is not an authority on the one now before us: it was governed by s. 135 of the Land Revenue Code, which has no application here, and consequently it called into operation considerations with which we are in no way concerned.

The point on which Bayley, J., based his decision was that it was not suggested the Collector's order was *ultra vires*, and manifestly, if that were so, the order would be binding until it was set aside. Here, I have endeavoured to show the order of 1895 was *ultra vires*, if the land in suit was not the property of Government, and so on that supposition no necessity has arisen to set it aside. Similarly, Candy, J., clearly points out that "had the Collector affected to deal with something in its nature or legal character beyond the range of his functions, his order would have been legally a nullity, and there would have been no need for plaintiff to bring a suit to set it aside."

Candy, J., here practically adopts the principle laid down by West, J., in *Shivaji Yesji Chawan* v. *The Collector of Ratnagiri*(2) where the point under debate was whether art. 14 was a bar to a suit to recover possession of land, of which a grant had been made by the Collector. The lower Courts had held the suit to be barred, but the High Court remanded the case for retrial, laying down this principle for the guidance of the lower Courts. These two cases have recently formed the basis of a decision pronounced by the Calcutta High Court in *Bejoy Chand Mahatab Bahadur* v. *Kristo Mohini Dasi*(3). There the Collector having a power to dispose of land in fact transferred it to a person to whom he ought not to have granted it in view of the facts as found. The High Court held that the order of transfer was a nullity, and, applying the principle to which I have referred, determined that the suit was not barred by art. 14. I have referred to the authorities by which the respondent-defendants **[447]** ought to support their case, and I find nothing in them opposed to the view I have formed of the conjoint effect of s. 37 of the Land Revenue Code, and art. 14.

(1) 15 B. 424. (2) 11 B. 429. (3) 21 C. 626.

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The cause of action was, in my opinion, the dispossession, not the order; for that, if the land in suit is the property of the plaintiff, is a mere nullity. To hold otherwise might have the result that a man might through the disposition of a Collector wrongly purporting to act under s. 37 without his knowledge be irretrievably deprived of his land; for art. 14 provides that time shall run from the passing of the order, not from knowledge of the order. I cannot, in the absence of the clearest words, attribute to the Legislature an intention to make so serious, and, as it seems to me, unnecessary, an inroad on rights of property, and I certainly would not place upon the statutes under consideration a judicial construction going in that direction beyond the words used.

I would, therefore, reverse the decree under appeal and remand the case for retrial, but as my learned colleague holds a different view, the case must be referred to a third Judge in accordance with s. 575, Civil Procedure Code.

CANDY, J.—The question of limitation arises in this first appeal under the following circumstances:—

On the 15th November, 1896, plaintiff filed the present suit against defendant No. 1, the Secretary of State, and defendant No. 2, one Parmaya, alleging that he and his predecessors had continuously enjoyed possession of a plot of land called "Allima rana Maleki" as part of their holding in a certain "muli warg" No. III; that the Survey Department, instead of treating the plot as part of the said holding, had by mistake (in 1882) entered the land in the Government registers as uncultivated waste, and given it a separate survey No. 43, outside and not included in the said holding; that he (the plaintiff) had complained to the authorities against the above action, but had obtained no relief; that in 1895 defendant No. 2 prevailed on the Assistant Collector to give him the said land for cultivation; that he (plaintiff) then appealed to the Collector, who ordered that the right of occupancy of the said land should be put up [448] to auction; that a further appeal was made to the Revenue Commissioner, who (12th November, 1895) upheld the order of the Assistant Collector, and accordingly in November, 1895, (16th November it appears) on the strength of the said order the defendant No. 2 dispossessed him (the plaintiff).

Plaintiff, therefore, prayed—

(*a*) to have set aside the order passed by the Revenue Commissioner;
(*b*) to have his right to the said piece of land established;
(*c*) and to obtain possession with mesne profits.

Various defences were raised on behalf of the two defendants, which it is unnecessary to particularize. The District Judge dismissed the suit on the ground that it was barred under art. 14 of the sch. II of the Limitation Act of 1877, not being brought within one year from the date of the order of the Revenue Commissioner, S. D., which plaintiff sought to set aside.

The District Judge also thought the suit in its present form as against defendant No. 1 time-barred on other grounds, having been instituted nearly fifteen years after the date of the entry of the land in the settlement register as "unoccupied Government waste."

The District Judge went on to say:—

"It is not now necessary to consider whether plaintiff can institute a suit for possession of the property in dispute against defendant No. 2 alone, based on his alleged dispossession in November, 1895.....A suit of that nature would, however, have to be filed in the Subordinate Court, and I

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need not at present seek to determine whether plaintiff would be held to have forfeited his title owing to his failure to take action against Government in time."

Against the dismissal of the suit plaintiff has appealed to this Court, and, as I understood his learned pleader, Mr. Shamrao Vithal, he did not deny that the prayer of the plaint, to have set aside the order of the Revenue Commissioner of 12th November, 1895, was barred by limitation; but he contended that plaintiff **[449]** was entitled to have the other prayers of his plaint enquired into, and to establish his right to the piece of land; and that he was not obliged to have the order of the Revenue Commissioner set aside, for it could be treated as a nullity.

To that the natural rejoinder is that, if the plaintiff can ignore the order of the Revenue Commissioner, then the suit is simply one in ejectment against the second defendant, and must be instituted in the Court of the lowest grade competent to try it, (s. 15, Civil Procedure Code), which is not the District Court.

But then, it is pointed out, the plaintiff is bound to sue the Secretary of State, for defendant No. 2 will plead that it was by the order of the Secretary of State's subordinate that the land was formally put into his (second defendant's) possession; the plaintiff seeks to establish his right as against the Secretary of State as well as against the second defendant; and though he (plaintiff) is entitled to ignore the action of the survey and revenue officials in treating this land as Government waste since 1882—of which action he was well aware—yet he cannot ignore the fact that it was owing to the order of the Revenue Commissioner that he has been dispossessed.

If this be so, then in my opinion plaintiff is bound to sue to have that order set aside, which is, in fact, what he did do, and the Court cannot, I think, deal with the case apart from the first prayer of the plaint.

Plaintiff's pleader naturally relies on Mr. Justice West's judgment in *Shivaji* v. *The Collector of Ratnagiri*(1). In the subsequent case of *Nagu* v. *Salu* (2), I had occasion to examine the *ratio decidendi* as shown by Mr. Justice West's judgment, and I need not repeat at length the conclusions at which I arrived. It must be remembered that in *Shivaji's* case the Assistant Judge, and in appeal the District Judge, had dismissed the suit solely on the pleadings; no evidence was recorded. Mr. Justice West said "that is not sufficient," and that it was not an inevitable conclusion that the suit could not be one for dispossession. The case was, therefore, remanded for retrial "even on the point of limitation."

[450] After careful consideration, and I must admit with hesitation as the contrary view is held by my colleague, the learned Chief Justice, I adhere to the view which I previously took as to what were the principles laid down by Mr. Justice West in *Shivaji's* case; and in my opinion the principles so viewed are correct.

It does not seem to me to be a valid answer to the application of art. 14 of the Schedule of the Limitation Act, 1877, to say—though the plaintiff is forced by the order of the Revenue Commissioner to sue the Secretary of State, yet he need not sue to have that order set aside. Why need he not have the order set aside? Because, it is said, the order could only be valid if the land in question was not the property of an individual, and plaintiff is prepared to show that the land in question is his property,

(1) 11 B. 429.

(2) 15 B. 424 (427).

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and if he succeeds in proving that, then the order is a nullity and can be ignored.

This is the proposition with which I am unable to concur. Plaintiff in effect says: "I admit that, to my knowledge, this land has for many years been entered in the Government registers as Government waste, though I say wrongly so; it is lawful for the Collector, subject to the order of the Commissioner, to dispose of Government waste; the Collector under the orders of the Commissioner has purported to do so, the effect of which is that I have been dispossessed; this order was not passed behind my back, but after enquiry, and was in its form, as shown by the copy of the Revenue Commissioner's proceedings produced by me, a *quasi*-judicial order: but I am entitled to ignore it (though as a fact I did sue to have it set aside), and I can, if I choose, wait till within a day of twelve years subsequent to the date (16th November, 1895) of the Revenue Commissioner's order being carried out, and then sue in ejectment against defendant No. 2 as a trespasser, and against defendant No. 1 (the Secretary of State) to establish my right to the land."

Prima facie an act or order of an officer of Government in his official capacity can be set aside, because the authority, on which the officer professed to act, does not, when all the facts are judicially enquired into, justify such an act or order. For a plaintiff to say—I prove such a state of things, therefore it is not necessary for me to have the order set aside—seems to me somewhat [451] illogical. The act or order of the Government official, purporting to be done or given under s. 37, can be set aside if it is shown that the land disposed of is really the property of an individual, and "such person's established right" has thus been invaded: equally so when the land is not the property of an individual but of Government, and the "legally subsisting right" of an individual (*e.g.*, right of way) has been invaded, the disposition may be set aside. I see no reason why the order of disposition should be treated as a nullity in the one case and not in the other. And if it is proper to have the disposition set aside in the one case, equally so is it in the other.

When Mr. Justice West said "There are orders not within the scope of the authority of the official who makes them—*ratione materiæ*," it must not be forgotten that he went on to say: "He affects to deal with something in its nature or legal character beyond the range of his functions."

If the Collector said: Here is a field in the occupation of A.B. I will dispose of it under s. 37 of the Land Revenue Code and give it to C D: he would be affecting to deal with something in its nature and legal character beyond the range of his functions; the order would not be within the scope of the Collector's authority *ratione materiæ*. But when the Revenue Commissioner after a regular inquiry says: This is a plot of land which has always been registered as Government waste: under s. 37 of the Land Revenue Code I direct the Collector to give it to C D, (and this order in no way contravenes the rules sanctioned by Government for disposing of such lands): then to say that A B can sue to establish his right against Government to that land any time within twelve years of the Commissioner's orders being carried out, is, in my humble opinion, not in accord either with the letter or the intention of the Statute.

For I cannot help thinking that the Legislature must have intended to draw a distinction between the case of an ordinary trespasser, who by twelve years' adverse possession can acquire title, and the case of a person who professes to acquire title under the official orders of an officer

of Government. It is obvious that it would be unreasonable to allow twelve years' limitation within which such a title as the latter can be assailed.

[452] I am not oppressed by the argument that if my view is correct, then a man may have an order passed against him behind his back, and yet he is allowed but one year from the date of the order within which to assert his rights. In the first place I think that the "order" in art. 14 must be an order of at least a quasi-judicial character, and not a mere executive order, just as was held with regard to "order" in art. 12. (See the decision in *Sakharam* v. *Collector of Ratnagiri* (1).) Here the order was passed by the Revenue Commissioner under the statutory powers given him by s. 37 of the Land Revenue Code, and as is clear by the proceedings, after enquiry. In the next place the argument, if good at all, must be good against the applicability of art. 14 to any possible set of facts or circumstances. *Prima facie* the "order" in art. 14 must be an order which it is necessary that plaintiff should, for the protection of his own rights, get set aside. But if the article cannot apply to a given case, because it is possible to suppose such an order being passed behind a man's back, then it can never apply to any case whatever.

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Why the local Legislature deemed it expedient in 1879 to enact the peculiar provisions of s. 135 of the Land Revenue Code (Bombay Act V of 1879) in regard to land situate within the site of a village, town or city, it is difficult to say. But it is hardly safe to suppose that the local Legislature thought that art. 14 of the schedule of the Limitation Act of 1877 would be inapplicable to orders passed under s. 37 of the Land Revenue Code. Rather it would seem that, accepting the applicability of art. 14, the local Legislature added the special provision that, as regards lands situate within the site of a village, town or city, the strict limitation must be applied by the Courts, even though it had not been set up as a defence. However that may be, it is to my mind clear that the same principles, which govern the applicability of s. 135, should govern the applicability of art. 14. If in the one case a plaintiff can claim to evade the bar of limitation by asserting that he can prove that his rights have been ignored, and so there was no valid order under s. 37 of the Land Revenue Code, so too **[453]** he can do the same in the other. If this course is not open to him in the one case, neither is it open to him in the other.

For all these reasons, I think that the present plaintiff, if he is bound to sue the first defendant, as is admitted, is bound to have the order of the Revenue Commissioner set aside; and that consequently the suit is barred by limitation.

Thus there being a difference of opinion between the Judges, the case was referred to Parsons, J., for disposal.

Shamrav Vithal, for appellant.

Rao Bahadur *V. J. Kirtikar*, for respondent.

JUDGMENT.

PARSONS, J.—The following are the only facts which need to be stated. The land which is for the purposes of this appeal assumed to be the property of the plaintiff and to have been in his possession uninterruptedly up to the 16th November, 1895, was, at the introduction of the revenue survey

(1) 8 B.H.C.R. A.C.J. 219.

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in 1882, entered in the register as Government waste land. On the 12th November, 1895, the Revenue Commissioner ordered it to be given to the defendant No. 2, on the latter paying the assessment due since the survey settlement. This order was communicated to the plaintiff on the 20th November, 1895. On the 16th November, the plaintiff was ousted by the order of the Collector, and the defendant No. 2 placed in possession. This suit was filed by the plaintiff on the 15th November, 1896. It was contended for the defendants that the suit was time-barred under the Indian Limitation Act, 1877, not having been brought within one year from the 12th November, 1895, the date of the Revenue Commissioner's order, as required by art. 14 of the schedule to that Act.

The decision of this point appears to me to depend, first, upon whether the plaintiff can maintain a suit for the recovery of his land without having the order of the 12th November, 1895, passed by the Revenue Commissioner set aside, and, second, upon whether that order is within the terms of art. 14 and governed by it.

1. To answer this question I must examine the provision of law under which the order purports to have been passed and see how far the order is justified by that provision and affects the **[454]** plaintiff. The law is contained in s. 37 of the Bombay Land Revenue Code, 1879, which declares all lands not the property of individuals, &c., &c., to be the property of Government, and gives power to the Collector to dispose of them in such manner as he may deem fit, "subject always to the rights of way, and all other rights of the public, or of individuals legally subsisting." No provision is made for any enquiry by the Collector, nor is any power given to him, to determine what is or what is not Government land, or what are the rights of individuals. All he can do is to say that certain land is in his opinion the property of Government, and so he disposes of it. He cannot, however, dispose of it absolutely, the law, it is argued, does not allow him to do this, he can only dispose of it, subject to the legally subsisting rights of individuals. This is how his order in the present case ought to be construed, not as a nullity or even as an illegal order, but as a perfectly legal and valid order granting the land to the defendant, subject to the rights of the plaintiff over it. If the order can be viewed in this light, it is clear that there would be no necessity for the plaintiff to sue to set it aside, for it does not affect him in the slightest degree. It does not purport to pass his rights to the defendant, but it transfers those of Government only, and the latter even subject to the rights of individuals such as the plaintiff. It is contended, on the other hand, that there is a flaw in this argument, because the words "other rights" in s. 37 refer back to the rights of way and mean rights *ejusdem generis*, and do not refer back to the rights mentioned in the earlier part of the section or include all rights that may be proved by individuals. I think that it makes no real difference whichever argument is held to prevail, and that supposing the section to allow the Collector to dispose of lands subject only to such limited rights, and that he purported to sell this land out and out to the defendant, the case stands just the same. If A sells the land of B to C, the sale of itself gives no immediate cause of action, and it would not be obligatory on B to sue to set it aside, but he could wait till he is disturbed in his possession and then sue on his title to maintain or recover possession. It would never be held that this latter suit was barred, because B had not filed a suit for a declaration of his **[455]** title within six years of his hearing that A had alienated his land.

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There is no reason why the same rule should not apply to a sale by the Collector to which no greater force is given by the Legislature by any provision of law that has been pointed out to me. So long as his order purporting to sell the land remains inert and on paper, it gives rise to no cause of action, and there is no more necessity at any time to sue to set it aside than there is in the case of an alienation by a private person of land which does not belong to him. The result, moreover, of a suit for possession does not depend upon setting aside the order. Assume in the present case that the plaintiff's suit succeeds and that he is awarded possession, the order is not set aside. It still stands, but the defendant takes nothing under it. As authority for this proposition, I cannot do better than quote the words of their Lordships of the Privy Council in the case of *Moti Lal* v. *Karrabuldin* (1). "Between setting aside a sale and holding that the plaintiff's rights are not affected by it, there is a wide difference."

2. It is not necessary here to discuss what the particular orders are which were contemplated by the Legislature when it repealed art. 16 of the Limitation Act of 1871, and re-enacted it as art. 14 of the Act, 1877, with the words "or order" added after the word "act," but it is, I think, obvious that it must have meant orders which, to use the words quoted apparently with approval by Candy, J., in the case of *Nagu* v. *Salu* (2), interfered with the plaintiff's possession so as to give rise to a cause of action, and not simply administrative orders which need no setting aside. I look upon the order of the Collector disposing of the land under s. 37 as an order of the latter class. It may be passed in his office and may lie there unacted upon for years as was observed in the case of *Laloo Singh* v. *Purna Chander Banerjee* (3). "In fact, the dispossession might not actually take place till more than a year after the Collector's order, and it seems to us that it would be unreasonable to hold that in such a case the aggrieved party would have no remedy if he had omitted to sue to have the Collector's order set aside." I [456] would go even further and say that it is impossible to suppose that the Legislature contemplated such orders when they passed the enactment in question, and I have no hesitation in saying that, where we find an administrative order passed which requires a subsequent act necessary not merely to complete, but to give any force at all to it, we are bound to hold that limitation must be taken to run from the date of the latter.

For these reasons, I am of opinion that the order of the Revenue Commissioner of the 12th November, 1895, is not such an order as is contemplated by art. 14, and that in itself it gives no cause of action and need not be set aside.

The cause of action in the present case was given by the act of the Collector dispossessing the plaintiff on the 16th November, 1895, and as the suit is brought within a year of this date, it is in time. The dispossession was done by the Collector; the Government, therefore, is properly made a party to the suit as liable to the plaintiff for the act of its agent.

The appeal is decided in the manner proposed by the learned Chief Justice of this Court, and it is ordered that all costs hitherto incurred be costs in the suit.

Case remanded for re-trial.

(1) 25 C. 179 (186). (2) 15 B. 424. (3) 24 C. 149 (151).

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Before Mr. Justice Parsons and Mr. Justice Ranade.

RAMDAYAL (*Original Defendant*), *Appellant v.* JANKIDAS AND ANOTHER (*Original Plaintiffs*), *Respondents.* *
[5th March, 1900.]

Civil Procedure Code (Act XIV of 1882), s. 13—Res judicata—Court of competent jurisdiction.

A brought a suit against B for Rs. 3,152, that is, for one instalment due under a bond. The suit was heard and decided by a Subordinate Judge of the Second Class, who had been deputed to assist a Subordinate Judge of the First Class. A obtained a decree for the amount claimed.

A then brought a second suit against B in the Court of a Subordinate Judge of the First Class to recover Rs. 6,526, being the amount of two instalments due [457] under the bond. In this suit B raised the same contentions as in the former suit.

Held, that the decision in the first suit did not operate as *res judicata* in the second suit, as the Court that tried the first suit had no jurisdiction to try the second suit.

[R., 35 C. 353 (358) = 7 C.L.J. 470 = 12 C.W.N. 359.]

APPEAL from the decision of Rao Bahadur K. B. Marathe, First Class Subordinate Judge at Dhulia.

On the 6th of December, 1895, defendant Ramdayal passed a bond to the plaintiffs promising to repay the amount secured by the bond by annual instalments of Rs. 3,000 each.

In 1896, plaintiffs brought suit No. 246 of 1896 in the Court of the Joint Second Class Subordinate Judge at Dhulia to recover the first instalment together with interest, amounting to Rs. 3,152.

The Subordinate Judge decreed the plaintiffs' claim.

In 1899, plaintiffs filed a second suit in the Court of the First Class Subordinate Judge at Dhulia to recover Rs. 6,525, being the amount of the next two instalments together with interest.

In this suit defendant raised the same pleas as he had urged in the former suit (No. 246 of 1896).

The First Class Subordinate Judge held that the matter was *res judicata* and could not be re-opened in the present suit.

He, therefore, awarded the plaintiffs' claim.

Against this decision defendant appealed to the High Court.

Setalwad (with *N. B. Pendse*), for appellant.

M. B. Chaubal, for respondents.

JUDGMENT.

PARSONS, J.—The First Class Subordinate Judge evidently omitted to notice the words that are used in s. 13 of the Civil Procedure Code, namely, "a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised." To satisfy the requirements of the section, it is necessary that the two Courts shall have concurrent jurisdiction as regards the pecuniary limit as well as the subject-matter, and the extent of the jurisdiction depends on that of the

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Court in which the first suit was instituted at the time the first suit was brought—see *Misir Raghobardial* v. *Rajah Sheo Baksh* [458] *Singh* (1); *Run Bahadur Singh* v. *Lucho Koer* (2); *Bholabhai* v. *Adesang* (3); *Rughunath* v. *Issur Chunder* (4). Here the first suit (No. 246 of 1896) was for a sum of Rs. 3,152, that is, for one instalment due under the bond, and it was heard and decided by the Second Class Subordinate Judge who had been deputed to assist the First Class Subordinate Judge. He was not competent to try the present suit, since it is for Rs. 6,525, that is, two instalments due under the bond, and is, therefore, beyond the limits of his pecuniary jurisdiction. For this reason his decision in the former suit cannot be *res judicata* in the present suit.

We reverse the decree and remand the suit for a trial on the merits. Costs to be costs in the cause.

Decree reversed and case remanded.

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24 B. 458 = 2 Bom. L.R. 403.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

J. W. SEAGER (*Plaintiff*) *v.* HUKMA KESSA AND OTHERS (*Defendants*).*
[18th April, 1900.]

Pledge—Husband and wife—Possession required for valid pledge—Contract Act (IX of 1872), s. 178.

The plaintiff sued to recover from the defendant the value of certain ornaments pledged with the defendant by the plaintiff's deceased wife. The plaintiff and his wife had lived together, and the latter, with the knowledge and consent of the plaintiff, had charge of the jewel-case containing the ornaments in question, which, however, belonged exclusively to the plaintiff. Without the knowledge or consent of the plaintiff his wife pledged these ornaments with the defendant as security for the re-payment of certain promissory notes passed by her in favour of the defendant. After her death the defendant claimed payment of the promissory notes from the plaintiff. The plaintiff refused to pay, and sued the defendant for the value of the ornaments.

Held, that the plaintiff's wife had not in the beginning, nor did she subsequently acquire such possession as would validate the pledge by virtue of the provisions of s. 178 of the Contract Act. To create a pledge under that section the pledgor must be in juridical possession of the goods; mere custody will not suffice.

[F., 23 Ind. Cas. 174 = 15 M.L.T. 221 = (1914) M.W.N. 319; R., 37 B. 122 = 15 Bom. L.R. 1 = 17 C.L.J. 146 = 17 C.W.N. 358 = 17 Ind. Cas. 663 = 24 M.L.J. 176 = 12 M.L.T. 646 = (1913) M.W.N. 29; 27 M. 424 (425) = 14 M.L.J. 69; 11 Bom. L.R. 926 (992); 12 Bom. L.R. 316 (335) = 5 Ind. Cas. 457.]

[459] CASE stated for the opinion of the High Court under s. 617 of the Code of Civil Procedure (Act XIV of 1882) by C. W. Chitty, Chief Judge:—

"1. This was a suit by the plaintiff to recover from the defendants a sum of Rs. 998 as the value of certain ornaments belonging to the plaintiff and pledged with the defendants by the plaintiff's deceased wife. The ornaments, with the exception of one item (two tolas of gold valued at Rs. 48), were produced in Court by the defendants. It was agreed that their value might be taken for the purpose of estimating the

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* Small Cause Court Reference, No. 18775 of 1899.

(1) 9 I.A. 197 = 9 C. 439.
(2) 12 I. A. 23 = 11 C. 301.
(3) 9 B. 75.
(4) 11 C. 153.

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costs of the suit at Rs. 950, the ornaments themselves being returned to the plaintiff in the event of decree being passed in his favour. The ornaments are still lying in Court.

"2. The plaintiff and his late wife lived together, and his wife, with the plaintiff's knowledge and consent, had charge of the jewel-case in which were kept the ornaments in question and other trinkets belonging to the plaintiff's wife. The ornaments in question belonged exclusively to the plaintiff and were never worn by his wife. The wife also kept the plaintiff's cash box and had access to both that and the jewel-case, which remained in her wardrobe under her control.

"3. In the year 1892 Mrs. Seager commenced to borrow money from the defendants, and as security for the loan she deposited with them some of her own ornaments and the ornaments in question. This was done without the knowledge or consent of the plaintiff. The loan was renewed by Mrs. Seager from time to time and further advances made. The last promissory note passed by her appears to have been one of the 22nd July, 1897, for Rs. 1,809 (Ex. B). In that all the ornaments pledged are enumerated, and the list includes those in question in this suit.

"4. Some five years ago the plaintiff wishing to see one of the ornaments, a diamond ring, asked his wife to show it to him. She then said at first that it was missing, afterwards she stated that she had sold it and the two chains in the bazaar. The plaintiff was much annoyed, but thinking that the ornaments [460] were gone beyond recovery he did not press the matter further.

"5. In May, 1899, both the plaintiff and his wife were attacked with plague. On 17th May, 1899, Mrs. Seager died. After her death and the plaintiff's recovery he went through all his wife's things and found (*inter alia*) a number of cancelled promissory notes. He also came to know, on looking into the jewel-case, that all the jewels were gone. About the middle of August, 1899, one of the defendants came to the plaintiff and showed him the promissory note (Ex. B), and he then came to know that the ornaments in question were in pledge with the defendants. The defendants called on the plaintiff to pay the amount due to them by his wife. This he refused to do, and filed this suit to recover from them the value of his ornaments which his wife had pledged. There was no question of *mala fides* in this case. That is to say, I was satisfied, on the evidence, that the ornaments belonged to the plaintiff and had been pledged by his wife for her own purposes without his own knowledge or consent. On the other hand, the defendants had no reason to suppose that the ornaments were not the property of Mrs. Seager, or that she had not a perfect right to pledge them.

"6. The sole question in the case is one of law—whether under the circumstances above set forth the pledge was valid as against the plaintiff.

"7. The question turns upon the proper construction to be put on s. 178 of the Indian Contract Act. The only direct authority on the section is the case of *Biddomoyee Dabee* v. *Sitaram* (1). That was a case of possession by a servant left in custody of his mistress' goods. A servant's possession seemed to me to be different from that of a wife, although for the purposes of the Indian Penal Code (s. 27) they are classed together. A wife has a wider authority in dealing with the property of her husband

(1) 4 C. 497.

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24 B. 458 = 2 Bom. L.R. 408.

than a servant would have, and what might amount to an offence on a servant's part would not be an offence on the part of a wife.

[461] "8. There are decisions on s. 108 of the Indian Contract Act (see *Greenwood* v. *Holquette* (1) and *Shankar* v. *Mohanlal* (2)), but, in spite of the remarks of Messrs. Cunningham and Shepherd in their commentary, I was of opinion that some force must be given to the difference of the wording in the two sections. There also must be some distinction drawn between an out-and-out sale and a pledge conveying a limited interest in the property.

"9. For these reasons I was of opinion that the question should be answered in the affirmative, and I dismissed the plaintiff's suit. As, however, the point seems to me to be of much importance, although the plaintiff did not require a reference, I determined to refer the question for their Lordships' decision under s. 617 of the Civil Procedure Code, and I made my judgment contingent on such decision. If the question is answered in the negative, there will be a decree for the plaintiff for the delivery to him of the ornaments and for payment to him by the defendants of Court costs on Rs. 950, and professional costs Rs. 90.

"10. As the reference is made by this Court *suo motu*, there is no deposit to meet the costs of reference."

Strangman (*amicus curiæ*), for plaintiff.—Apart from the Contract Act plaintiff must succeed. Marriage does not give the wife authority to pledge her husband's goods, and any pledge of his goods made by the wife would be invalid—Resolutions of the majority of Judges in *Manby* v. *Scott* (3).

Section 178 of the Contract Act will not assist defendants, for the wife in this case never had possession of the articles of jewellery. She merely had the bare custody of them, and had no authority to deal with them in any way whatever.

Her position was exactly the same as that of the servant in the only reported case on the word "possession" as used in this section—*Biddomoyee Dabee* v. *Sitaram* (4).

The term "possession" has the same meaning in s. 178 as it has in s. 108. It is the kind of possession which a factor or an agent has when the owner of the goods, although he has [462] parted with the possession, may give instructions to the person in possession what to do with the goods, and not a qualified possession as in the case when the possession is for a specific purpose: see *Greenwood* v. *Holquette* (1).

Here the possession was for a specific purpose, *viz.*, the safe custody of the articles in question. This seems to have been the extent of the authority, for apparently she had none to wear the jewels, at any rate the evidence is that she never did so. See also *Shankar Murlidhar* v. *Mohanlal Jaduram* (2).

Every person having possession of any moveable property within the meaning of ss. 108 and 178 would have a right of action against any person disturbing that possession under s. 10, Specific Relief Act (I of 1877). But supposing any person had wrongfully removed the jewellery in question from the plaintiff's house, his wife would have had no cause of action against the wrongdoer.

Section 7 of the Married Woman's Property Act (Act III of 1874) merely allows the wife to take legal proceedings in respect of her own

(1) 12 B.L.R. 42. (2) 11 B. 704. (3) 2 Sm. L. Cas. 453. (4) 4 C. 497.

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property, and in the case supposed the husband would have been obliged to sue alone: see Dicey on Parties, Rule 88, p. 394. Consequently it cannot be said that the wife had possession within the meaning of s. 178.

If the wife ever did gain possession of the jewellery, then that possession was obtained by an offence, *viz.*, theft. Section 27 of the Indian Penal Code provides that when property is in the possession of a person's wife on account of that person, it is in that person's possession within the meaning of the Code.

From the point of view of the Indian Penal Code as long as the articles of jewellery were in the box they were in the plaintiff's possession. Directly she took them from the box with the intention of possessing them she committed theft, and so her possession of the articles of jewellery at the time she possessed them was possession obtained by an offence. There is no presumption, in law, in India that husband and wife constitute one person for the purpose of the criminal law, and if the wife removes her husband's property from his house with a dishonest **[463]** intention she is guilty of theft: see Starling's Indian Criminal Law, 7th Ed., p. 472, and *Queen-Empress* v. *Butchi* (1).

The plaintiff's action is not barred by art. 48 of the Limitation Act, which gives plaintiff three years from the date when he first learnt in whose possession the property was. Here the property was lost by conversion.

Young, for defendants (*amicus curiæ*).—Three things required by section are—(1) possession on part of pawnor; (2) good faith on part of pawnee; (3) lawful acquisition by pawnor.

"Possession" may bear its legal or its popular meaning: compare Pollock and Wright on Possession, pp. 1, 2, 6.

In the Contract Act "in possession" differs from "having possession"; cf. cognate s. 108, where the 1st exception speaks of a person being in possession and the 2nd and 3rd speak of persons having or having obtained possession. The words "in possession" are also used in the 2nd and 3rd exceptions, but only to include the possibility of the person having possession putting another in possession for the purposes of the sale.

If "to be in possession" differs from "to have possession" the difference must be that expressed by the Roman law "*non possidet, est tantum in possessione*;" and to be in possession would be equivalent to being in lawful custody. If so the terms of the section are complied with, since the second requirement of the section is found as a fact, and it is admitted that the original custodianship was lawfully acquired.

If it be urged that different words when used in the same section indicate a difference of meaning, and that, therefore, "in possession" cannot equal "in custody" since in custody is used at the end of the section, why should the same rule not be applied to the different phrases—"having possession" and "in possession" in s. 108?

The pawnor had from the first possession in the legal sense of the term.

Husband and wife, to whom Succession Act, s. 4, applies, have full freedom to contract *inter se*.

[464] That being so, the pawnor received the goods as a bailee and not a servant: compare Pollock and Wright on Possession, p. 163. Section 27 of the Indian Penal Code is confined to the Indian Penal Code.

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(1) 17 M. 401.

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In India a bailee is "in possession"—Contract Act, ss. 148, 149, and it would seem to be the better opinion that the same is the law in England notwithstanding Lord Ellenborough's dictum (delivered in argument) referred to in *Shankar* v. *Mohanlal* (1) : compare Dicey on Parties, 352, 358 ; Pollock and Wright on Possession, 58, 59, 166 ; *Queen* v. *Cooke* (2).

The case of *Johnson* v. *Credit Lyonnais*, also referred to in *Shanker* v. *Mohunlal*, turned upon the question whether the vendor had possession under the Factors Act, and is not applicable.

Possession as a bailee may be determined, and the possession rendered trespassory, by showing an original *animus furandi* on the part of the bailee or by the bailee having broken bulk. It is not contended that there was any original *animus furandi* on the part of the pawnor, and it is found as a fact that she pledged all the articles in suit at one and the same time, and if so there was no breaking of bulk—Pollock and Wright on Possession, p. 222.

JUDGMENT.

JENKINS, C. J.—I desire to thank the learned counsel, who have argued this case as *amici curiæ*, for the great assistance they have afforded us by their able and lucid arguments.

I am of opinion, notwithstanding Mr. Young's ingenious argument, that, to create a pledge under s. 178 of the Indian Contract Act (IX of 1872), the pledgor must be in juridical possession of the goods, and that mere custody will not suffice.

This view is supported by the previous decisions on the Contract Act, to which we have been referred, and also by the words of the section, which mark a clear distinction between possession and custody.

On the facts stated I have no doubt that Mrs. Seager simply had charge of the articles of jewellery as custodian on behalf **[465]** of her husband ; that she held the articles subject to her husband's directions and control ; and that the circumstances under which they came into her charge exclude the inference that she intended to deal with the articles otherwise than in accordance with her husband's directions, or to act in breach of the confidence reposed in her. Therefore, I hold she had not in the beginning, nor did she subsequently acquire such possession as would validate the pledge by virtue of the provisions contained in s. 178. But then it has been argued that even if Mrs. Seager had not the requisite possession, still by the plaintiffs' negligence a title by estoppel has been created in the defendants' favour. An estoppel of this character and with this result can only arise out of the negligent breach of a duty due from the one party to the other ; but I cannot find, in the facts stated for our consideration, anything to justify us in attributing this to the present plaintiff.

For these reasons the question formulated in the case must be answered in the negative, and there will be a decree in the plaintiff's favour in the terms set forth in the 9th paragraph of the case.

CANDY, J., concurred.

(1) 11 B. 704 (707).

(2) (1871) L.R. 1 C.C.R. 295.

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Before Mr. Justice Russell.

MOTIBAI AND ANOTHER (*Plaintiffs*) *v.* MOTIBAI AND OTHERS (*Defendants*).* [21st June, 1900.]

Parsi Marriage and Divorce Act (XV of 1865)—Alimony—Charge on husband's immoveable property—Widow—Distributive share.

By an order of the Parsi Matrimonial Court the deceased was directed to execute a proper instrument charging his immoveable property with the payment of Rs. 70 per mensem by way of permanent alimony to his wife during her life. The instrument was executed accordingly. On his death his widow was held entitled, in addition to the Rs. 70 per mensem charged on her deceased husband's immoveable property, to a distributive share in his estate.

In chambers.

This was an originating summons.

[466] The facts as stated in the plaint were as follows :—

One Muncherji Hormusji Darukhanawalla died intestate at Bombay on or about the 3rd May, 1899, leaving property, both moveable and immoveable, of the aggregate value of about Rs. 42,000.

The said deceased left him surviving, as his only next of kin and heirs according to the Parsi law of succession, his widow Motibai, the first defendant, Dossabhoy Muncherji and Heerjibhai Muncherji, the second and third defendants, sons by his first predeceased wife Mithibai, and Sonabai, the fourth defendant, his daughter by his second wife Motibai.

By a consent decree in Testamentary Suit No. 15 of 1899 it was ordered that letters of administration to the estate of the deceased should be granted to the plaintiffs jointly, and accordingly such letters of administration were granted by this High Court on the 13th December, 1899.

The said deceased was married to the first defendant on or about the 29th March, 1875, and during his co-habitation with his said wife had treated her with great cruelty, until finally, on or about the 16th of June, 1891, he turned her out of his house together with her daughter, the fourth defendant.

Thereupon, in February, 1893, the first defendant filed a suit against her said deceased husband in the Parsi Chief Matrimonial Court, being Suit No. 2 of 1893, praying (*inter alia*) for judicial separation from her husband and for permanent alimony. On the 5th August, 1893, the Parsi Chief Matrimonial Court passed a decree *nisi* for judicial separation in favour of the first defendant, which decree was made absolute on the 5th of April, 1894.

On the 25th of August, 1893, the said Matrimonial Court by an order of that date directed that the said deceased should pay to his wife, the first defendant, permanent alimony, at the rate of Rs. 70 per mensem during her life, and that on the decree for judicial separation being made absolute he should execute a proper instrument charging his immoveable property at Abdul Rehman Street with payment of the said sum to the first defendant during her life. This order was embodied in the said final decree absolute, and the said instrument of charge was accordingly executed on the 12th of July, 1894, and duly registered.

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* Suit No. 17 of 1900.

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[467] The deceased had also applied for a review of the said order of 25th August, 1893, but the application was rejected. He thereupon filed an appeal to the High Court against the decree of the 5th August, 1893, but the said appeal was also dismissed.

After the death of the deceased, disputes arose, between the first defendant on the one hand and the second and third defendants on the other, as to the mode of distribution of the deceased's estate. The first defendant contended that she was entitled to receive out of the estate of the deceased permanent alimony during her natural life at the rate of Rs. 70 per month pursuant to the terms of the said order and decree of the Parsi Chief Matrimonial Court and the said deed of charge executed by the deceased in her favour, and that she was further entitled to her distributive share out of the remaining estate of the deceased, and the fourth defendant supports her contention. The second and third defendants contend that the first defendant is only entitled to her distributive share in the estate, and that the payment of permanent alimony should cease entirely as from the day of the death of the deceased.

To avoid unnecessary and prolonged litigation it was agreed between all parties, and ordered by the said consent decree in the said Suit No. 15 of 1899, that the plaintiffs as administratrix and administrator of the estate of the deceased should obtain the decisive opinion or direction of the Court upon the right or claim of the first defendant to receive permanent alimony after her husband's death out of his estate in addition to her distributive share in the said estate.

On this summons the plaintiffs desired to have the following questions determined :—

(1) Whether the first defendant is entitled to receive permanent alimony during her life at the rate of Rs. 70 per month cut of the estate of the deceased Mancherji Hormusji Darukhanawalla ?

(2) Whether the first defendant is entitled to receive her distributive share in the estate of the said deceased in addition to the payment of the said permanent alimony to her during her natural life ?

[468] (3) If the payment of permanent alimony to the first defendant is stopped either in whole or in part, is she entitled to receive any and what sum as compensation for the loss or deficiency so occasioned in addition to receiving her distributive share in the estate of the deceased ?

Davar, for plaintiff.

Lang (Advocate General) for first and fourth defendants.

Raikes, for second and third defendants.

JUDGMENT.

RUSSELL, J.—The question raised on this originating summons is a novel one. It appears that one M. H. Darukhanawalla died intestate in Bombay on the 3rd of May, 1899, leaving property, moveable and immoveable, of the value of about Rs. 42,000. The deceased left him surviving the first defendant, his widow Motibai, Dossabhoy and Heerjiboy, the second and third defendants, his sons by his first predeceased wife Bai Mithibai, and Sonabai, the fourth defendant, his daughter by his second wife, the said Motibai. The plaintiffs, the said Motibai, his widow, and Dossabhoy, his son, were granted letters of administration to his estate on the 13th of December, 1899.

The deceased married his said wife on the 29th of March, 1875, but having treated her cruelly, she in February 1893, filed the suit No. 2 of

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1893, against him in the Parsi Chief Matrimonial Court praying *inter alia* for judicial separation and for permanent alimony. On the 5th of August, 1893, the Court passed a decree *nisi* for judicial separation, which was made absolute on the 4th April 1894. By the said decree it was further ordered that the said M. H. Darukhanawalla should from that day pay to Motibai, during her life, permanent alimony at the rate of Rs. 70 a month; and it was further ordered that the said M. H. Darukhanawalla should forthwith execute a proper instrument, so charging his immoveable property with the payment to the said Motibai of the said sum of Rs. 70 a month during her lifetime. Accordingly, on the 4th July, 1894, by a deed duly registered, he charged his immoveable property therein described, and all his estate, &c., therein with the payment to Motibai, her executors, administrators and assigns, of the sum of Rs. 70 a month from the 5th of April, 1894, during the lifetime of the said Motibai, to be paid by equal **[469]** monthly payments of Rs. 70 every month, and the said M. H. Darukhanawalla thereby for himself, his heirs, executors, administrators, and assigns covenanted with Motibai, her heirs, executors, administrators and assigns, that he, his heirs, &c., would pay or cause to be paid to Motibai, her executors, &c., the said monthly sum of Rs. 70 at the time and in the manner therein appointed. The said M. H. Darukhanawalla also covenanted that he had power to charge the premises as thereinbefore expressed and for further assurance.

The question now arises whether Motibai, as she contends, is entitled to receive out of the estate of the deceased permanent alimony at Rs. 70 a month, and also to her distributive share out of the remaining estate of the deceased, in which contention the fourth defendant supports her, or whether, as the second and third defendants contend, Motibai is only entitled to her distributive share in the estate, and that the payment of permanent alimony should cease entirely from the day of the death of the deceased.

It is to be observed that the Parsi Marriage and Divorce Act, XV of 1865, s. 34, which deals with permanent alimony, does not contain the proviso for varying, &c., orders for permanent alimony which is contained in s. 37 of the Indian Divorce Act IV of 1869, and s. 34 of the Parsi Act corresponds with s. 32 of 20 and 21 Vict. Chap. 85, under which it has been held that the order for permanent alimony is permanent and incapable of being varied: see *Rawlins* v. *Rawlins* (1). I mention this because, if it were not so, it appears to me that the Parsi Matrimonial Court might, under the circumstances, be moved to vary the decree absolute.

The rule is that if a person covenants to leave, or that his executors shall pay to another a sum of money or part of his personal estate if he dies intestate, and such person becomes entitled to a portion of his personal property of equal or greater amount, under the statute, such distributive share will be a performance of the covenant, and he cannot claim both: see *Blandy* v. *Widmore* (2) and *Thacker* v. *Key* (3). If the distributive share, as for **[470]** instance in the case of a widow, be less than the sum which her husband covenants to leave, it will be taken to be a part performance, and it does not depend upon the accident of the wife taking out administration or not; see *Garthshore* v. *Chalie* (4). But where the covenant is not to pay a gross sum, but the interest of a sum of money for life or a mere life annuity, this principle will not apply; see *Couch* v. *Stratton* (5);

(1 (1865) 4 Sw. and Tr. 158.
(2) (1716) 2 Wh. and T. L. C. 407.
(3) (1869) L.R. 8 Eq. 408.
(4) (1804) 10 Ves. 1 (14).
(5) (1799) 4 Ves. 391.

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James v. *Castle* (1) and *Salisbury* v. *Salisbury* (2) where the Vice-Chancellor says he must follow the authorities, although he cannot understand why the rule, which is applied in the case of a gross sum, should not also be applicable to an annuity. In the present case the decretal order was for payment of Rs. 70 per month.

The explanation, however, is given by the Vice-Chancellor in *Young* v. *Young* (3), where he says (p. 618) "the principle is that where a husband covenants that at his death his widow shall have a specified sum of money out of his estate, his covenant is deemed to be performed, in whole or in part, by her becoming entitled, in case of his total or partial intestacy, to a distributive share of his personal estate. The covenant in this case is not for the payment of a specific sum of money, but that all the husband's personal estate shall be vested in a trustee to pay his wife the interest for her life. The covenant will be in its terms performed under the decree in this cause, and still the *corpus* of the fund will be distributed under the statute on the death of the widow. As, therefore, her share is not to be applied to performance of the covenant, it is free to go under the statute." The case of *Slatter* v. *Slatter* (4) also supports this conclusion. Moreover, it appears to me that the provisions of the deed of charge were not intended to apply to any right arising from intestacy which was not contemplated by the terms of the deed at all: see *Naismith* v. *Boyes* (5). With regard to the argument that there was no consideration for the covenant in the deed, it appears to me that, having regard to the terms of s. 34 of the Parsi Divorce Act, there was ample consideration. I do not see that the doctrine of election **[471]** can be held applicable to the present case. I must, therefore, hold that Motibai is entitled to be paid out of the immoveable property comprised in the deed of charge the sum of Rs. 70 per month during her life, and is also entitled to her distributive share in the estates of the deceased. Costs of all the parties as between attorney and client should, I think, come out of the estate, and I certify for counsel.

Attorneys for plaintiffs and defendants Nos. 1 and 4:—Messrs. *Jehangir and Seervai.*

Attorneys for defendants Nos. 2 and 3:—Mr. *K. B. Mehta.*

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24 B. 471 = 1 Bom. L.R. 840.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

In re RATTANSEE PURSHOTTUM.* [6th December, 1899.]

Muscat—Court of Her Majesty's Consul at Muscat—High Court's criminal revisional jurisdiction over the Consular Court—Order in Council dated 4th November, 1867—*Criminal Procedure Code* (*Act V of* 1898), *s.* 435—*Jurisdiction.*

The High Court at Bombay has no criminal revisional jurisdiction over the proceedings of Her Majesty's Consul within the dominions of the Sultan of Muscat.

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* Criminal Revision No. 191 of 1899.

(1) (1875) 33 Law Times, 665.
(2) (1848) 6 Hare, 526.
(3) (1871) 5 Ir. Rep. Eq. 615.
(4) (1834) 1 Y. and C. 28.
(5) (1899) Ap. Ca. 495.

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DEC. 6.

CRIMINAL REVISION.

24 B. 471 = 1 Bom. L.R. 840.

THIS was an application under s. 435 of the Criminal Procedure Code (Act V of 1898).

The accused was convicted by C. G. F. Fagan, Her Majesty's Consul at Muscat, of an offence under s. 176 of the Indian Penal Code, and sentenced to seven days' imprisonment and a fine of Rs. 200.

Against this conviction and sentence the accused moved the High Court under its criminal revisional jurisdiction.

The accused contended that the High Court had jurisdiction to revise the proceedings of Her Majesty's Consul at Muscat under the Order in Council dated 4th November 1867.

P. M. Mehta (with *A. R. Bakhle*), for accused, referred to ss. 14, 15, and 23 of the Muscat Order in Council, dated 4th [472] November, 1867 (1) and s. 15 of the Letters Patent, and argued that under s. 14 the High Court of Bombay was a Court of reference in criminal matters, and under ss. 15 and 23 the High Court had original criminal jurisdiction, and consequently by virtue of s. 15 of the Letters Patent (the Charter Act) the Consular Court at Muscat was subject to the supervision of the Bombay High Court.

Scott (with Acting Advocate General) for the Crown.

JUDGMENT.

PARSONS, J.—We are clearly of opinion that we have no criminal revisional jurisdiction over the proceedings of Her Majesty's Consul

(1) Sections 14 and 23 of the Muscat Order in Council, dated 4th November, 1867.

"14. And it is further ordered that if the crime or offence whereof any person being a British subject may be accused before Her Majesty's Consul as aforesaid shall appear to such Consul to be of such a nature as, if proved, would not be adequately punished by the infliction of such punishment as aforesaid, it shall be lawful for such Consul to summon not less than two, or not more than four, disinterested British subjects of good repute to sit with him as Assessors for inquiring into, trying and determining the charges against such person; and the Consul when he shall try any such charge with the assistance of Assessors as aforesaid shall, if he is himself convinced of the guilt of the party accused, have power to award any amount of punishment not exceeding imprisonment for twelve calendar months, or a fine of 1,000 dollars; and the Assessors aforesaid shall have no authority to decide on the innocence or guilt of the party accused, or on the amount of punishment to be awarded to him on conviction, but in the event of the said Assessors, or any of them, dissenting from the conviction of, or from the amount of punishment awarded to, the accused party, the Assessors or Assessor so dissenting shall be authorised to record in the minutes of the proceedings the grounds on which they and he may so dissent, and the Consul shall forthwith report to the High Court of Bombay the fact of such dissent, and of its having been so recorded in the minutes of the proceedings, and shall, as soon as possible, lay before the said Court copies of the whole of the depositions and proceedings with the dissent of the Assessor or Assessors recorded therein; and it shall be lawful thereupon for the Court, by warrant under seal addressed to the Consul, to confirm or vary, or remit altogether, as to the Court may seem fit, the sentence and punishment awarded to the party accused, and such Consul shall give [473] immediate effect to the injunction of any such warrant: Provided always, that in any case, in which," &c.

"23. And it further ordered that it shall be lawful for Her Majesty's Consul to cause any British subject charged with the commission of any crime or offence, the cognizance whereof may at any time appertain to him, to be sent in any of Her Majesty's ships of war, or in any British vessel, to Her Majesty's territory of Bombay or before the High Court of the said territory: and it shall be lawful for the Commander" .....[the section then provided for delivery to safe custody by the keeper of the common jail of such person, and continued:—] "and it shall be lawful for the keeper of the said common jail to cause such party to be.....produced upon the order of the said High Court, and the High Court at the sessions to be holden next after such committal shall proceed to hear and determine the charge against such party and to punish him for the same if found guilty, in the same manner as if the crime with which he may be charged had been committed within Her Majesty's said territory of Bombay."

within the dominions of the Sultan of Muscat. The order of Her Majesty in Council, dated 4th November, 1867, gives this Court no appellate jurisdiction over his Court, and, therefore, s. 15 of the Act establishing High Courts has no application.

We must dismiss the application.

Application dismissed.

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CRIMINAL REVISION.

24 B. 471 = 1 Bom. L.R. 840.

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24 B. 473* = 2 Bom. L.R. 163.

[473] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

VYAS CHIMANLAL AND OTHERS (*Original Defendants*), *Appellants* v. VYAS RAMCHANDRA (*Original Plaintiff*), *Respondent.*†

[21st December, 1899.]

Hindu law—Adoption—Gift and acceptance—Ceremonies of adoption—Sapinda relationship, limitation of.

In the case of an adoption under the Hindu law, if there is evidence of gift and acceptance, and it is further shown that the adoptee has been recognized for a number of years and placed in possession of property, the Court may dispense with the formal proof of the performance of the ceremonies of adoption.

Where the natural mother of an adopted son was seven degrees removed from the common ancestor and the adoptive father five degrees removed *ex parte paterna*.

Held, that the adoption was valid.

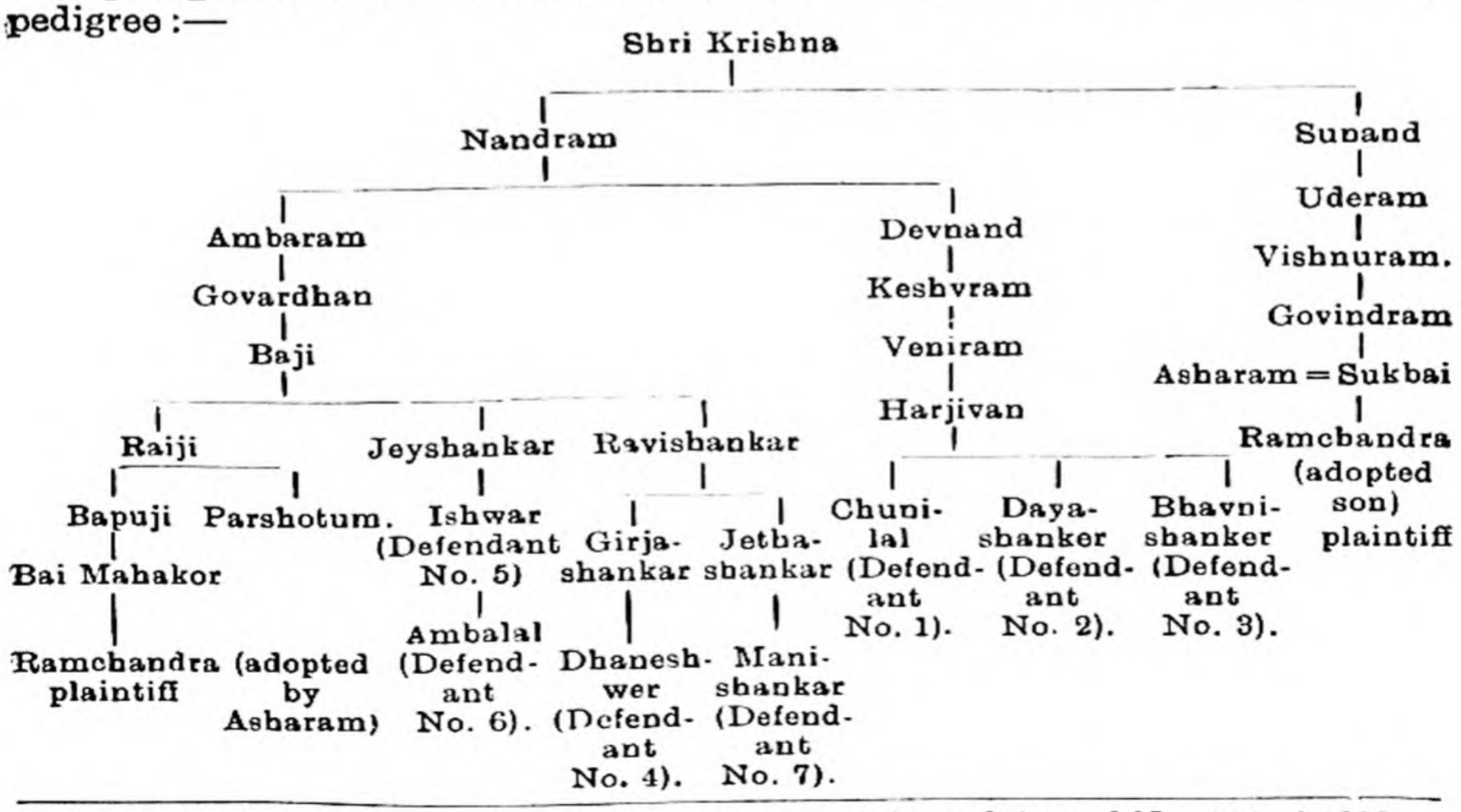
Quære—whether, when the relationship is more than six degrees removed, sapinda relationship between the natural mother and the adopter does not cease.

[R., 32 B. 619 (633) = 10 Bom. L.R. 948.]

SECOND appeal from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge, A. P., at Ahmedabad.

The parties to the suit were Audich Brahmins by caste.

[474] The relationship of the parties will appear from the following pedigree:—



* See in this connection 24 B. 367, *supra*.

† Second Appeal No. 694 of 1898.

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All the branches of the family were divided in estate.

Asharam had a third share in the inam village of Mataria. He died leaving behind him a widow Sukbai, who in the year 1871 A.D. adopted the plaintiff. But the *datta hom* and other religious ceremonies connected with the adoption were not performed till 1881 A.D.

In 1882 A.D. a suit was brought to set aside plaintiff's adoption by Harjivan (father of defendants Nos. 1, 2 and 3), by Girjashankar (father of defendant No. 4), by Ishwar (father of defendant No. 6), and by Parshotum, as reversionary heirs of Asharam.

The Court of first instance held that Harjivan alone was entitled to sue as the nearest reversionary heir. It, therefore, ordered the names of the other plaintiffs to be struck off. On the merits it declared the adoption to be invalid.

On appeal the District Court reversed the decree of the original Court and dismissed the suit on the ground that Harjivan had **[475]** acquiesced in the adoption, and was, therefore, estopped from disputing it.

The District Judge, however, refrained from recording any finding as to the validity of the adoption.

This decision was upheld by the High Court in second appeal.

On 25th December, 1895, Sukbai, the widow of Asharam, died.

Thereupon Ramchandra, the adopted son of Asharam, was obstructed by defendants from receiving the income of the village Mataria, which was enjoyed by the different branches of the family by rotation.

This led to the present suit.

Plaintiff sought as the adopted son of Asharam to recover back from the defendants the produce of the village for the year 1896-97 A.D. which they had illegally taken.

Defendants pleaded (*inter alia*) that plaintiff was not the legally adopted son of the deceased Asharam, that they were the reversionary heirs of the deceased, and as such entitled to succeed to his property on his widow's death.

The Court of first instance held that the defendants were estopped from disputing plaintiff's adoption, and that the decision in the previous litigation operated as *res judicata*.

The Court, therefore, awarded the plaintiff's claim.

This decision was upheld on appeal.

Defendants thereupon preferred a second appeal to the High Court.

Ganpat Sadashiv Rao, for appellants.—Plaintiff's adoption is open to several objections. It is found as a fact that the natural father was not present at the adoption. The lower Court holds, however, that he had given his consent to the adoption, and that such consent was sufficient to validate the adoption. This is a mistake. Mere consent will not do. There must be a formal gift, manifested by an overt act. The natural father must hand over the child to the adoptive father or mother, and the latter must accept the child in adoption. In other words, an actual giving and taking is requisite to constitute a valid adoption; a constructive giving or taking will not do—*Srinarayan Mitter* v. **[476]** *Krishna Sundari*(1); *Sohshinath Ghose* v. *Krishnasunderi Dasi*(2); *Ranganayakamma* v. *Alwar Setti* (3); *Govindayyar* v. *Dorasami* (4). There was no actual gift in adoption in the present case. The adoption is, therefore, bad *ab initio*.

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(1) 2 B.L.R. A. C. J. 279.
(2) 6 C. 381=7 I. A. 250.
(3) 13 M. 214.
(4) 11 M. 5.

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The next objection is that the natural mother and the adoptive father were sagotra sapindas. The former was seven degrees removed from the common ancestor, while the latter was five degrees removed. They were, therefore, within the rule of prohibited connection, and no legal marriage was possible between the two. That being so, there could be no valid adoption, as there could be no valid marriage between the natural mother and the adoptive father—*Minakshi* v. *Ramanada* (1); West and Buhler's Digest, pp. 120, 121; Mayne's Hindu Law, s. 81; Bhattacharya, pp. 89 and 90.

Lastly, there is no evidence to show that the *datta homa* was performed on the occasion of the alleged adoption. As to the necessity of *datta homa* among Brahmins, see *Govindayyar* v. *Dorasami* (2).

Bhaishankar Nanabhai, for respondent.—The appellants are estopped from disputing the adoption. They are bound by the decision in the former litigation between the same parties or those through whom they claim. All the objections that are now taken to the adoption were taken in the former suit, and decided in plaintiff's favour. But assuming that it is competent to the appellants to re-open these questions, the fact remains that the adopted son has been in uninterrupted possession of his adoptive father's property ever since the date of his adoption,—that is, for a period of nearly thirty years. His possession, *ex hypothesi*, was adverse to the reversioners, and the suit is barred by limitation. The adopted son was recognised by the whole family including some of the appellants; thirty years have elapsed since the adoption took place; after the lapse of so many years the law will presume that the essential ceremonies of adoption were duly performed, and that the adoption is a valid adoption. The **[477]** natural mother of the adopted boy was more than seven degrees removed from the common ancestor. She was, therefore, not a sapinda of the adoptive father. He could have legally married her. If so the adoption is valid—Mandlik's Hindu Law, pp. 353 and 354.

As to the giving of the boy in adoption by his natural father, the finding of the lower Court is not very clear; but the evidence shows that the boy was actually given in adoption in 1871, though the ceremonies of adoption were not performed till 1881. The postponement of the ceremonies does not invalidate the adoption.

JUDGMENT.

RANADE, J.—The factum and validity of the adoption in this case were impeached by the appellant-defendants on five grounds: (1) that the respondent-plaintiff's natural father was not present in person at the time of adoption, and there was, therefore, no proper gift and acceptance; (2) that the adoptive father could not legally have married the natural mother of the respondent-plaintiff; (3) that the alleged custom of taking daughter's or sister's son in adoption was not proved; (4) that the respondent plaintiff was the only son of his natural father at the time of the alleged adoption; and (5) that the consent of Harjivan, the father of appellants Nos. 1, 2 and 3, did not bind the other appellants, and could not validate the adoption, which was void *ab initio*. Of these five grounds mentioned in the memorandum of appeal, Mr. Rao, the appellants' pleader, chiefly relied on points 1 and 2, though he also referred to point 4, contending that the recent decision of the Privy Council did not affect

(1) 11 M. 49.

(2) 11 M. 5.

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the law in this Presidency. The other two points were not noticed by him, and they may, therefore, be passed over.

The first objection noted above assumes that the respondent-plaintiff's adoption took place in May, 1881, and not, as stated by the respondent, in Samvat 1927 (1871 A.D.). It is necessary in this connection to set forth briefly the history of the previous litigation between the parties. As far back as 1882, the deceased father of the present appellants Nos. 1, 2 and 3, the deceased father of appellant No. 4, the father of appellant No. 6, and one Parshotum, brought suit No. 38 of 1882 against the present respondent-plaintiff [478] and his adoptive mother to set aside the adoption, which was stated in that plaint to have taken place in 1881 without the consent of the plaintiffs in that case. The respondent-plaintiff was then a minor, but his mother stated that the adoption took place at the time of the thread ceremony which was performed in 1871 by Harjivan, the father of the first three appellants in this case, and that religious ceremonies were not performed at that time, but were celebrated in 1881. The Court of first instance found that the sacred thread ceremony was performed in Samvat 1927, as stated by the adoptive mother of the respondent, and at that time the natural father of the respondent was present. The Court further held that the adoption ceremony was not performed at that time, and when the adoption was performed in 1881, the respondent's natural father was not present, and the present appellants-plaintiffs in that case had not given their consent, and there was no proper gift and acceptance at that time. The Court finally decided that, excepting Harjivan, the other plaintiffs who had joined with him in the plaint had no right to bring the suit, as they were more distant relations. Their names were, therefore, struck off, and Harjivan's claim was allowed. The matter then went up in appeal, and the District Court, in appeal No. 49 of 1883, reversed the decree of the first Court. It held (1) that the actual adoption took place when the thread ceremony was performed by Harjivan on behalf of the adoptive mother; (2) that at that time the natural father was present, and the giving and receiving were then completed; (3) that the adoption deed, which took place in 1881, was intended only to record the fact of the adoption, which had been already completed in Samvat 1927; and (4) that as Harjivan, the father of appellants Nos. 1, 2 and 3, had joined in the ceremony, he was estopped from questioning the adoption. The District Judge accordingly reversed the first Court's decree, and the High Court confirmed the decision of the District Judge (Ex. 101). It was on the strength of these decisions that, when the present suit was brought by the respondent-plaintiff, both the Courts held that the adoption took place in Samvat 1927 (1871 A. D.), and not in May, 1881. Mr. Rao's contention, therefore, appears to be based on the position that the Courts below were in error in holding that the [479] respondent-plaintiff's adoption took place in 1881, and not, as found both in the previous litigation as also in the present case, in Samvat 1927, when the thread ceremony was performed. The authorities cited by him would be of use if, as a matter of fact, the adoption had taken place in 1881. On this point of fact, however, we see no reason to differ from the decisions of the Courts below. If there had been no adoption at the time of the thread ceremony, Harjivan would not have performed that ceremony which he admittedly did on that occasion. The plaintiff's natural father was proved to have been present at the time, and he would have performed the thread ceremony himself if there had been no adoption. The adoptive mother has

all along been consistently maintaining that the adoption and the thread ceremony took place together. Her words in her deposition in 1883 (Ex. 52) were "*janoi lidhu tyarthi dattaka lidhelo chhe.*" In her written statement (Ex. 84) in the same case she was still more explicit, saying '*datta lai janoi didhelu,*' *i.e.*, after the adoption the thread was put on. The direct evidence of the priest (Ex. 128) is to the same effect. The cases, therefore, cited by Mr. Rao have no application. The decision in *Sabo Bewa* v. *Nahagun Maiti* (1) is more in point. It decided that where there was evidence of gift and acceptance, and it was further shown that the adoptee was recognized for a number of years, and placed in possession of property, the Court may dispense with the formal proof of the performance of the ceremony. From the fact that the respondent plaintiff lived with the adoptive mother with the express consent of his natural father, and that the natural father allowed his thread ceremony to be performed by the relations of the adoptive mother, it is obvious that there was an overt act of gift and acceptance. The subsequent execution of the deed only recorded the fact of giving and accepting. The cases, therefore, where there was no gift and acceptance, but only deeds were passed, have no bearing on the present case—*Srinarayan Mitter* v. *Krishna Sundari* (2); *Siddessorry Dossee* v. *Doorgachurn Sett* (3). The giving and taking in this case would have satisfied the conditions laid down in *Shoshinath Ghose* v. *Krishnasundari Dasi* (4). As regards other **[480]** ceremonies, the performance of *hom* is not necessary even among Brahmins in Southern India, if the adoptive father and the adopted son belong to the same gotra—*Singamma* v. *Ramanuja Charlu* (5); *Govindayyar* v. *Dorasami* (6); *Chandramala* v. *Muktamala* (7). Among the Marathas, the same principle was laid down in *Atma Ram* v. *Madho Rao* (8). There was no compulsion or pollution in this case which vitiated the adoption in *Ranganayakamma* v. *Alwar Setti* (9). The omission about the ceremonies was made good in 1881, and we, therefore, overrule this objection.

The second objection relates to the point that, as the natural mother of the respondent-plaintiff was one with whom marriage by the adoptive father was forbidden by reason of her being a sapinda, the adoption was not valid. The respondent-plaintiff's natural mother was Bai Mahakor, the daughter of one Bapuji. This Bapuji was sixth in descent from Shrikrishna, who was the common ancestor of Bapuji and Asharam, the adoptive father. The relation thus shown between Asharam and Mahakor was that Asharam was five degrees removed from the common ancestor, and Mahakor seven degrees removed. It is contended that marriage was prohibited to the parties by this relationship. In the original text of Shakal, on which this prohibition is sought to be based, the only near relations of this kind whose adoption is prohibited are the daughter's son, sister's son and the son of the mother's sister. The text of Shaunak, which is the only other authority on the point, mentions daughter's son and sister's son as permissible among Sudras, but not eligible among the higher castes. West and Buhler, p. 886, notices, however, that among some of the higher castes, the daughter's son as also the sister's son are, under a special custom, deemed fit for adoption. The Sanskar Kaustubha and the Nirnaya Sindhu approve the adoption, failing a sagotra sapinda, of a daughter's or a sister's son. The

(1) 2 B. L.R. App. 51. (2) 2 B. L.R., A C.J. 279. (3) 2 Ind. Jur. 22.
(4) 6 C. 381. (5) 4 M. H. C. R. 165. (6) 11 M. 5.
(7) 6 M. 20. (8) 6 A. 276. (9) 13 M. 214.

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Vyavahar Mayukha is no doubt opposed, and the decisions on our side follow the Mayukha in this respect as regards daughter's and sister's sons—*Gopal* v. *Hanmant* (1).

Rao Saheb Mandlik has construed the original texts differently, and argued that the rules of prohibition, both positive and [481] negative, expanded by Nandapandit, are only recommendations. In *Bai Nani* v. *Chunilal Jeshankar* (2), we have discussed the question of negative prohibitions at some length. The point is not of moment in the present case, where the relationship is more than six degrees removed, and it is doubtful whether sapinda relationship in such cases does not cease. The positive directions about the choice of adopted sons from near relations have been held by the Privy Council to be recommendatory only—*Wooma Daee* v. *Gokoolanund Dass* (3). The essential idea is that the boy should have the resemblance of a son, which really means that he should be of the same class and gotra, if possible, but just as more distant and even as a gotra sons may be adopted, the son of Mahakor, who was the daughter of a distant cousin seven degree removed, was not ineligible for adoption by the widow of Asharam. None of the cases decided have gone the length of prohibiting adoption, except as stated above, in the case of direct relations as daughter's and sister's sons, &c., among the higher castes. There is, therefore, no authority for extending the prohibition to the adoption in this case, more especially when the parties interested are shown to have taken part in the adoption or to have acquiesced in it. Harjivan admittedly took part, and the more distantly related plaintiffs did not appeal against their names being struck off in the suit of 1881. There is evidence to show that they took part in the caste dinners given by the respondent, and he was allowed to remain in possession all this time. It may, therefore, safely be held that they are estopped from raising the question at this stage—*Raja* v. *Subbaraya* (4) ; *Sadashiv* v. *Hari* (5). We, therefore, overrule the objection.

The third objection is disposed of by the decision of the Full Bench (6).

We, therefore, confirm the decree of the lower Court.

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24 B. 482=2 Bom. L.R. 211.

[482] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BHIMA (*Original Plaintiff*), *Appellant v.* RAGHAVENDRACHARYA (*Original Defendant*), *Respondent.** [8th February, 1900.]

Service tenure—Non-performance of service—Payment of assessment by mortgagee—Change of title—Redemption—Resumption.

Plaintiff was the holder of certain inam lands, which were exempted from payment of assessment in consideration of his rendering certain services to Government.

In 1873 the lands were mortgaged to defendant, on condition that he was to enjoy the usufruct in lieu of interest.

In the famine of 1876 plaintiff left the village, and as no service was rendered, Government appointed another person to perform the service and damanded

* Second Appeal No. 548 of 1899.

(1) 3 B. 279. (2) 22 B. 973. (3) 3 C. 587.
(4) 7 M. 253. (5) 11 B.H.C.R. 190. (6) 24 B. 367.

payment of the full assessment from defendant. Defendant paid the assessment and continued in possession. But Government did not forfeit the holding, and the lands continued, as before, in plaintiff's name in the vatan register.

In 1896 plaintiff filed a suit to redeem the lands.

Held, that, in the absence of a declaration of forfeiture of the holding, the steps which Government took to recover the assessment in lieu of service had not the effect of creating any change of title, and that the plaintiff was, therefore, entitled to redeem.

[R., 36 B. 539=14 Bom. L.R. 563 ; 37 B. 81=14 Bom. L.R. 797.]

1900
FEB. 8.

APPELLATE CIVIL.

24 B. 482=
2 Bom. L.R.
211.

SECOND appeal from the decision of B. C. Kennedy, Assistant Judge, F. P., at Bijapur.

The facts of the case are fully stated in the judgment of this Court.

G. S. Mulgaokar, for appellant.

N. V. Gokhale, for respondent.

JUDGMENT.

PARSONS, J.—The lands in suit, Survey Nos. 137 and 156, were mortgaged by the plaintiff to the defendant for Rs. 160 in 1873, the defendant was placed in possession, and he was to enjoy the profits in lieu of payment of interest. The lands were to be restored to the plaintiff on payment of principal. The lands stood entered in the Survey register in the name of the plaintiff, and he was relieved from the payment of assessment in consideration of his performing the service of a *walikar*. In the famine of 1876 [483] the plaintiff left his village, and as no service was performed by him, the Government appointed some one else to perform the service and demanded from the defendant payment of the full assessment of the lands. This the defendant paid, and he has since continued in possession paying it. The plaintiff has now brought this suit to redeem the mortgage, and the question is whether the equity of redemption is still owned by him or not. The Judge of the first Court thought that it was, while the Judge of the appeal Court held the contrary, the decision of each being based upon a consideration of the result of the action of Government in recovering the full assessment on the land. If, in consequence of the plaintiff's failure to perform service, Government forfeited his tenure of the land and granted it to the defendant, which is the decision of the appellate Court, then no doubt the plaintiff would not own the equity of redemption, but if the Government merely demanded the payment of assessment in lieu of the performance of service, then there would be no change of title, and the plaintiff would have the right to redeem. It appears to us that the latter is all that was done. The lands in suit still stand in the plaintiff's khata in the vatan register (Ex. 23) and no declaration of forfeiture is exhibited. The tenure of the plaintiff, therefore, cannot be said to have been extinguished, while the fact that the defendant has no document of title from the Government shows that no grant of the lands has been made to him.

We find upon the first point raised in the lower appellate Court that the steps which Government took with reference to this inam land have not the effect of creating an ownership by the defendant of the land. We must ask the Judge to record a finding on the second point raised by him and certify it to this Court within a month.

Case remanded.

1900
FEB. 19.

APPELLATE CIVIL.

24 B. 484=
2 Bom. L.R.
276.

24 B. 484=2 Bom. L.R. 276.

[484] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

KRISHNAJI TAMAJI (*Original Defendant*), *Appellant v.* TARAWA AND ANOTHER (*Original Plaintiffs*), *Respondents.** [19th February, 1900.]

Vatan—Succession to a vatan—Bombay Act V of 1886, *s.* 2—*Widow—Rights of succession of a widow other than the widow of the last holder—Adoption by such widow—Collateral male member.*

Under s. 2 of Bombay Act V of 1886, if there is a male member of a vatandar family, the succession goes to him in preference to a female member, and on his death the succession will go to his heirs with a similar provision. Where there is a male member qualified to inherit vatan property he inherits, and a widow other than the widow of the last male member acquires no right to the vatan by succession or inheritance, and consequently she cannot create, transfer or revive any rights by adoption.

A kulkarni vatan was owned by two brothers A and B. B died first and A became the last male holder. A died in 1887 leaving a widow who held the vatan until her death in 1892. On her death, B's widow took a son in adoption. The adopted son filed a suit to establish his title to the vatan against the defendant, who was a male member of the family and had been registered by the Revenue authorities as the vatandar on the death of A's widow.

Held, that the plaintiff could not succeed, the defendant having a better title to the vatan than the plaintiff or his adoptive mother, under s. 2 of Bombay Act V of 1886.

[R., 3 N.L.R. 40 (45).]

SECOND appeal from the decision of B. C. Kennedy, Assistant Judge, F. P., at Bijapur.

Rango and Bhimaji were brothers belonging to a kulkarni vatandar's family of the villages of Gorinal and Tallikeri in the Bijapur District.

Bhimaji died first and Rango succeeded him in the kulkarni vatan.

Rango died in 1881 and his widow Lakshmibai held the vatan until her death, which took place in 1892.

On the death of Lakshmibai, Bhimaji's widow, Tarawa, applied to the Revenue authorities to enter the vatan in her name. This application was opposed by the defendant, who was the nearest male member of the family.

Thereupon Tarawa adopted Krishnaji in 1893.

[485] In 1895 the Revenue authorities ordered the vatan to be entered in defendant's name.

Thereupon Tarawa and her adopted son Krishnaji filed a suit for a declaration that defendant was not a member of the kulkarni vatandar's family and that he was not entitled to succeed to the vatan in preference to the plaintiffs.

Defendant pleaded that he was the nearest male member of the vatandar's family entitled to inherit the vatan; that as such he had been recognised by the Collector as a representative vatandar on the death of the last holder and that neither Tarawa nor her adopted son had any right to the vatan.

The Court of first instance rejected plaintiff's claim, holding that the defendant was a member of the vatandar's family and as the nearest

* Second Appeal No. 610 of 1899.

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APPELLATE CIVIL.

24 B. 484 = 2 Bom. L.R. 276.

male member of the family he was entitled to succeed to the vatan in preference to the plaintiffs, under s. 2 (1) of Bombay Act V of 1886.

On appeal the Assistant Judge, F. P., reversed this decision, holding that Krishnaji (plaintiff No. 2) as the adopted son of Tarawa had a better title to the vatan than the defendant, who was a remoter heir.

He, therefore, awarded plaintiff's claim.

His reasons were as follows :—

"Now, the first claim of the defendant is, that under s. 2 of Act V of 1886 the vatan vested in him after the death of the last male holder, *viz.*, Rango; and that Laksbmibai had only a life interest, and that consequently his consent was necessary to validate an adoption by the plaintiff.

"This is very plausible objection. In order to appreciate its value it is necessary to see what sort of vested interest is given [486] the male member, who is to be preferred to the female, and those claiming through them. The object of the section is to prevent vatans, when the vatan families were divided, passing into the hands of females, and so by marriage into alien families, foreign to the original grantees, and to the depriving Government of its rights of lapse. It is clear that for special reasons a departure was made from the ordinary rules of inheritance, and *cessante causa cessat ipso lex*. If the inconvenience could be avoided in another way, the special divergence from the ordinary law would not be made. The ordinary law is only modified to a limited extent, just enough to prevent the arising of the said inconveniences. Now neither of these inconveniences arises when adoption is made. The vatan is preserved in the original family and no claim arises to the State for escheat.

"Accordingly, I hold that the interest that vests in the male members of the vatan family is not of a nature that makes it necessary to obtain the consent of that male member in cases where, by the ordinary laws of inheritance, his consent would not be necessary.

"Accordingly, if I find that this was a case where, by the ordinary law, the plaintiff could adopt without any one's consent, and that she did so adopt, I shall find that her adoption was valid.

"The next point taken by the defendant, is that Tarawa could not adopt under the peculiar circumstances of the family. As the estate had, after the death of her husband, vested in the brother of Rango, she is precluded from adopting at all. In support of this opinion, I. L. R., 17 Bom., p. 164, is quoted, also 14 Bom., 463, and 19 Bom., 331.

"On a consideration of these authorities, I come to the conclusion that no such broad principle as is maintained can be deduced from them. What they appear to me to lay down, is that where a descendant could have adopted, and did not, an ascendant cannot adopt, and the reason of this is two-fold : to limit the number of adoptions, because if the grandson does not adopt without this rule, the father and grandfather might both adopt, and in order to prevent the confusion of heritages which would [487] arise if adoptions could be made into previous generations;

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(1) Section 2 of Bombay Act V of 1886 provides as follows :—

"Every female member of a vatan family other than the widow of the last male owner, and every person claiming through a female, shall be postponed in the order of succession to any vatan, or part thereof, or interest therein devolving by inheritance after the date when this Act comes into force, to every male member of the family qualified to inherit such vatan, or part thereof, or interest therein."

"The interest of a widow in any vatan or part thereof shall be for the term of her life or until her marriage only."

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but neither of these inconveniences arise when one collateral adopts after another. I do not, therefore, think that the adoption by Tarawa is invalid, because she came into the property as a widow after it had already vested in two persons."

Against this decision defendant preferred a second appeal to the High Court.

Setlur (with *B. A. Bhagwat*), for appellant.

Setalwad (with *B. N. Bhajekar*), for respondents.

JUDGMENT.

PARSONS, J.—The vatan in question was owned by the brothers Rango and Bhimaji. Bhimaji died first and thus Rango became the last male holder. Rango died in 1881 leaving a widow Lakshmi, who held until her death in 1892. The widow of Bhimaji, Tarawa, who was still surviving, adopted the plaintiff No. 2 in 1893, and the latter claims the vatan as against the defendant, who is a male member of the family and had been registered by the Revenue authorities as the vatandar on the death of Lakshmi. It was ingeniously argued by Mr. Setalwad for the plaintiff No. 2 that s. 2 of Bombay Act V of 1886 only postpones the female members to the male members, and does not vest the inheritance in the latter, but that the inheritance is still vested in the female members and comes back to them when the male members are exhausted. We do not think that this argument is sound. The Act says distinctly that, if there is a male member, the succession goes to him in preference to a female member; and, on his death, the succession will go to his heirs with a similar provision. In a case where there is a male member qualified to inherit, he inherits, and a widow other than the widow of the last male owner acquires no rights by succession or inheritance, and consequently she cannot create, transfer or revive any by adoption.

We, therefore, reverse the decree of the lower appellate Court and restore that of the Court of first instance with costs throughout on the respondents.

RANADE, J.—The facts found in this case were that respondent No. 1, Tarawa, was admittedly not the widow of the last male owner, but was the widow of his predeceased brother. It has **[488]** been also found that the appellant is the nearest male member of the family qualified to inherit the vatan on the death of Tarawa's brother-in-law, the last male owner. Under these circumstances, s. 2 of Bombay Act V of 1886 applies to the case. That section provides that "every female member of a vatan family other than the widow of the last male owner, and every person claiming through a female, shall be postponed, in the order of succession to any vatan, * * devolving by inheritance, after the date when this Act comes into force to every male member of the family qualified to inherit such vatan, &c." Respondent No. 1, Tarawa, and respondent No. 2 claiming through her by adoption, must, therefore, be postponed in the order of succession to the appellant, who is shown to be the nearest male member qualified to inherit. Respondents' counsel, however, urged that as s. 2 only postponed respondents' rights, but did not take them away, those rights vested in Tarawa, and she could, therefore, transfer them by adoption to respondent No. 2. The only effect of the Act, according to this argument, was to prevent Tarawa and her adopted son from coming into possession till the extinction of the appellant's branch, or rather the male members of that branch. Such a construction appears to me to be untenable. Under the old Regulation XVI of 1827, as

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interpreted by the Sadar Divani Adalat, a female heir was ineligible to hold any vatan. Under Bombay Act XI of 1843, s. 10, a female was declared to be incapable of performing in person the duties of any hereditary office, but the subsequent s. 11 permitted deputies to be appointed by female heirs, and the right of females to inherit under certain circumstances gradually obtained recognition in Civil Courts, and this right was expressly affirmed by s. 51 of Bombay Act III of 1874. This freedom led to certain abuses by which vatans were diverted to the families of strangers, and it was to check these last abuses that Act V of 1886 was passed by the local Council. It appears from the proceedings of the Council that it was at first proposed that females should be altogether excluded from inheritance to vatan property. Later on, before the bill was finally passed, the proposal of total exclusion was modified, and female heirs other than the widow [489] were only postponed in the order of inheritance to more distant males. The express object kept in view was to prefer even remote male heirs to females in the order of succession, and female heirs were allowed to come in as heirs with a view to avoid escheat. The effect of the Act is, therefore, obviously not a mere postponement in the order of time, but a preference of one set of heirs to others. There is, therefore, no vested right created as regards vatan property in the female heir other than the widow of the last owner. In her case, also, the Act provides expressly that her interest shall be for life or until marriage. The other female heirs could not, therefore, claim any interest of the kind claimed for the respondent Tarawa, who is not the widow of the last male owner. The Assistant Judge has been led to think that the object of the provision was only to prevent lapses to the State. The history of the previous legislation, however, shows that this was only a secondary object. The chief object was to ensure that vatan property should be in the hands of male heirs who can render personal service in preference to females. I would, therefore, reverse the decree of the lower appellate Court, and restore that of the Court of first instance with costs throughout on the respondents.

Decree reversed.

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24 B. 489=2 Bom. L.R. 376.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BAPUJIRAO AND OTHERS (*Original Plaintiffs*), *Appellants v.*
GANU AND OTHERS (*Original Defendants*), *Respondents.**
[23rd February, 1900.]

Khoti Act (Bombay Act I of 1880) s. 33—Khot—Occupancy tenants—Thal—Thal *to be determined by survey officer and not by Civil Court—Rent-suit.*

Under s. 33 of the Bombay Khoti Act (Bom. Act I of 1880) it is the duty of the survey officer to determine the *thal* or customary rent payable to a khot by an occupancy tenant.

Until a new determination has been made by the survey officer, under s. 33, of the rent payable to the khot, a Civil Court must award rent at the old rate legally fixed.

[490] SECOND appeal from the decision of Thakurdas Mathuradas, Assistant Judge at Ratnagiri.

* Second Appeal No. 641 of 1899.

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Plaintiffs were khots and defendants occupancy tenants holding certain khoti lands.

At the survey of 1887, the *botkhat* or record prepared by the survey officer, under s. 17 of the Khoti Act, specified that the rent payable to the khot by the defendants was the Government assessment and grain at 8 *pailis* per rupee on the amount of the assessment.

The *botkhat* further stated that this settlement was to remain in force until the revision of the survey.

In 1897 a new survey settlement was introduced into the village. But the survey officer did not either re-assess the lands or alter the nature and amount of rent payable by the defendants to the khot on the ground that there were no means to ascertain what share of produce the tenants used to pay formerely as *thal* (or customary rent).

In 1898, plaintiffs sued for a declaration that they were entitled to levy *thal* from the defendants and to recover the same for the year 1896-97 A. D.

Defendants contended that they were not liable to pay *thal*, but only *makta* or fixed rent; that they had not paid *thal* for more than thirty years; and that the plaintiffs were only entitled to rent at the old rates.

The Court of first instance held that the plaintiffs were not entitled to recover *thal*, and rejected the claim.

On appeal the Assistant Judge reversed this decision, holding that plaintiffs were entitled to levy *thal* at the rates prevailing before the new survey of 1897.

His reasons were as follows:—

"The survey officer has not determined the *thal*. Section 33 of the Khoti Settlement Act imposes upon him the duty of determining the *thal*. The settlement is to be made, not for each holding but for the whole village. The survey officer has to settle the *thal* on hearing the whole body of tenants. It is not for the Court to determine it in every case that comes before it. **[491]** For the purpose of securing uniformity, and in order to bind the whole village with the settlement, it is necessary that the enquiry should be full and thorough. All the tenants should be heard. This cannot be done in an individual case. On a consideration of these circumstances, and on reading s. 33 of the Khoti Settlement Act, I find that it is the duty of the survey officer to settle the *thal* or customary rent, and that this Court has no power to do so (compare *Antaji* v. *Antaji* (1), *Krishnaji* v. *Krishnaji* (2) and *Hari* v. *Balaji* (3)).

"In the present case the survey officer has not determined the customary rent, saying that there are no means to do so. If the survey officer failed to do what the law required him to do, the proper course for the plaintiff was to make an appeal to the Commissioner and finally to Government. But he cannot ask the Court to determine the *thal*. So long as the *thal* has not been determined, the plaintiff is entitled to get profits at the rate at which he used to receive them immediately before the new survey of 1897, or rather at the rate at which the defendant admits he is liable."

Against this decision plaintiffs preferred a second appeal to the High Court.

N. V. Gokhale, for appellants.

D. A. Khare, for respondents.

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(1) 21 B. 480 (491, 493 and 494). (2) 21 B. 467 (475). (3) P.J. (1895), p.519.

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JUDGMENT.

PARSONS, J.—The plaintiff sues to recover from the defendants, who are occupancy tenants, *thal* rent for the lands in their occupation at the rate of one-half share of the rice produce with a proportionate amount of straw. The Assistant Judge finds that the plaintiff is entitled to *thal*, but he adds: "The survey officer has not determined the *thal*. Section 33 of the Khoti Settlement Act imposes upon him the duty of determing the *thal*. The settlement is to be made, not for each holding, but for the whole village. The survey officer has to settle the *thal* on hearing the whole body of tenants. It is not for the Court to determine it in every case that comes before it. For the purpose of securing uniformity, and in order to bind the whole village with the **[492]** settlement, it is necessary that the enquiry should be full and thorough. All the tenants should be heard. This cannot be done in an individual case. On a consideration of these circumstances, and on reading s. 33 of the Khoti Settlement Act, I find that it is the duty of the survey officer to settle the *thal* or customary rent, and that this Court has no power to do so (compare *Antaji* v. *Antaji* (1)), *Krishnaji* v. *Krishnaji* (2) and *Hari* v. *Balaji* (3). In the present case the survey officer has not determined the customary rent, saying that there are no means to do so. If the survey officer failed to do what the law required him to do, the proper course for the plaintiff was to make an appeal to the Commissioner and finally to Government. But he cannot ask the Court to determine the *thal*. So long as the *thal* has not been determined, the plaintiff is entitled to get profits at the rate at which he used to receive them immediately before the new survey of 1897, or rather at the rate at which the defendant admits he is liable." It is argued that this decision is incorrect, and that the Civil Court ought, in the absence of a determination by the survey officer, to determine itself the customary amount payable by occupancy tenants. We think that the actual decision itself cannot be found fault with. The Assistant Judge has not expressed himself perhaps as clearly as he might, but his decision merely is that until a new determination has been made by the survey officer, under s. 33, of the rent payable to the khot, a Civil Court must award rent at the old rates legally fixed. In the present case, at the survey of 1887, the *botkhat* or record prepared on the 12th July, 1887, by the survey officer under s. 17 of the Khoti Act, specified that the rent payable by the defendants was the Government assessment and grain at 8 *pailis* per rupee on the amount of the assessment, and it was also stated therein that this settlement was to remain in force until the revision of the survey (Ex. 48). These were, therefore, for this period the only rents that could legally be recovered by the khot. In 1897 a new survey settlement was introduced into the village. It was then competent to the survey officer to re-assess the lands and alter the nature and amount of rent payble according **[493]** to the provisions of s. 33 of the Act and prepare the record under s. 17 accordingly. Apparently, however, that officer did neither of these things. The decision arrived at by him as to the *thal* is thus quoted by the Assistant Judge: "There was no agreement in force as to the rice land and fruit trees between the khots and the tenants, nor were there means to ascertain what share of produce the tenants used to pay formerly as *thal*; so no *thal* could be fixed." No entry from the *botkhat* is exhibited in the case. We must, therefore, conclude that there has been no

(1) 21 B. 480, (488, 491, 493 and 494). (2) 21 B. 467 (475).
(3) P. J. (1895), p. 519.

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fresh determination of rents and no substitution of any new rates for the old rates. Under these circumstances, the Civil Court can only act upon the record of 1887 and award the rents therein specified. This is just what the Assistant Judge has done, and his decision must be upheld. If the khot on the one hand or the occupancy tenants on the other think that a revision of the rents ought to be made by determination of the survey officer under s. 33, they can apply to him, and in case of his failure to perform the duty which the law casts on him, they have a remedy open to them, not only under the Act itself, but in the ordinary course of law.

We confirm the decree with costs.

Decree confirmed.

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Before Mr. Justice Parsons and Mr. Justice Ranade.

KARIYAPPA AND ANOTHER (*Original Defendants Nos.* 1 *and* 2), *Appellants v.* RACHAPA AND OTHERS (*Original Plaintiffs*), *Respondents.** [26th February, 1900.]

Limitation Act (XV of 1877), s. 20—Payment of interest as such—Interest—Settlement of accounts.

To satisfy the requirements of s. 20 of the Limitation Act (XV of 1877) the payment of principal or interest, as such, need not be in money. It may be in goods or by a settlement of accounts between the parties; but the payment must be of such a nature that it would be a complete answer to a suit brought by the creditor to recover the amount.

Where a debtor consents that money due by him for interest should be credited to the account of the principal, and the interest balance reduced by [494] that amount, such a consent is really tantamount to a payment of interest, it is as if the debtor makes the payment and the creditor advances it again. When both parties agree to such a settlement, and the accounts are so adjusted, the adjustment operates as a payment of interest under s. 20 of the Limitation Act (XV of 1877).

Plaintiffs used to lend moneys to the defendants' firm. The accounts of the dealings between the parties were settled from time to time. On the occasion of each settlement, the interest was calculated up to the date of the settlement, and the amount found due was credited to the interest account, and debited to the account of the principal in the creditors' books, and the amount so debited was thenceforward treated as principal for calculation of future interest. Corresponding entries were made in the debtors' books.

Held, that such a settlement of accounts constituted a payment of interest, as such, within the meaning of s. 20 of the Limitation Act (XV of 1877).

[F., 9 O.C. 221 (224); R., 29 M. 234 (235) = 16 M.L J. 99; 13 Bom.L.R. 482 (484) = 11 Ind. Cas. 552.]

APPEALS from the decision of Rao Bahadur V. V. Wagle, First Class Subordinate Judge at Dharwar.

The defendant carried on business in partnership at Gadag, in the Dharwar District, with funds supplied by plaintiffs.

The accounts of the moneys lent to the partnership were settled from time to time. On the occasion of each settlement the interest payable to the plaintiffs was calculated up to the date of the settlement. The amount of interest so found due was debited in the partnership books to the profits and loss account, and credited to the plaintiffs' account.

* Appeals Nos. 110 and 111 of 1899.

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At the same time the plaintiffs credited the amount to the account of interest and debited it to the partnership. The amount so debited were thenceforward treated as principal for calculation for future interest.

The last adjustment of accounts was made on 21st January, 1894, when a sum of Rs. 8,521 was found due to the plaintiffs from the partnership.

On the 19th January, 1897, plaintiffs sued to recover from the defendants the sum of Rs. 8,521 as principal and Rs. 2,299 as interest.

Defendants pleaded (*inter alia*) that the suit was barred by limitation.

The First Class Subordinate Judge of Dharwar held that the suit was within time, and he awarded the plaintiffs' claim, by directing that plaintiffs should recover the amount claimed, in **[495]** the first instance, from the partnership assets, and the deficit, if any, from the defendants personally.

Defendants Nos. 1 and 2 preferred separate appeals to the High Court.

Branson (with *G. S. Mulgaokar*) for appellant (defendant No. 2).

Macpherson (with *Manekshah Jehangirshah*), for appellant (defendant No. 1).

Lang, Advocate General (with *N. G. Chandavarkar*) for respondents (plaintiffs).

The following authorities were cited in argument :—*Ichha Danji* v. *Natha* (1) ; *In re Spargo* (2) ; *Kollipara* v. *Maddula Tatayya* (3) ; *Amos* v. *Smith* (4) ; *Maber* v. *Maber* (5) ; *Hart* v. *Nash* (6) ; *In re Ferrao* (7).

JUDGMENT.

PARSONS, J.—The points of facts argued in this appeal, namely, (1) that though the settlement was made down to the 21st January, 1894, the actual transaction took place on the 4th January, and (2) that on the 14th January the partnership was dissolved, and that after that date the defendant No. 1 had no authority to bind the other partners by his acts, can be briefly disposed of in favour of the respondents. The reasoning of the Subordinate Judge on both of them is conclusive, and it is sufficient to say that we adopt it as our own.

The remaining point is one of law and may be thus stated. In the adjustment of the accounts in question, was the settlement made one that amounted to payment of interest as such ?

What actually took place is thus succinctly stated by the Subordinate Judge : "On the occasion of each settlement the interest payable to the plaintiffs was calculated up to the date of the settlement. The partners debited that amount to *pada* khata (khata of profits and loss) and credited it to the plaintiffs' khata—*vide* Exs. 94, 95. The plaintiffs credited the amount to their khata of interest and debited it to the partners—*vide* **[496]** Ex. 88, 89 and 93. The amounts so debited were thenceforward treated as principal for calculation of the future interest. This practice seems to have been followed since the commencement of money-dealings between the parties."

In the case of *Ichha Dhanji* v. *Natha* (1) the entry of interest was made in the defendant's books only, so that that case is distinguishable. The citation of *Spargo's* case (2) is important as showing that, if the

(1) 13 B. 338.
(2) (1873) L.R. 8 Ch. 407.
(3) 19 M. 340.
(4) (1862) 1 H. and C. 238.
(5) (1867) L. R. 2 Ex., 153.
(6) (1835) 2 C. M. and R. 337.
(7) (1874) L. R. 9 Ch. 355.

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circumstances would support a plea of payment, they would be such as to satisfy the requirements of s. 20 of the Indian Limitation Act. In *Kollipara* v. *Maddula Tatayya* (1) there was also only a credit of the sum entered by the defendants in their books to the plaintiffs' account with them. The rule deducible from the cases of *Amos* v. *Smith* (2) and *Maber* v. *Maber* (3) and *Hart* v. *Nash* (4) was laid down to be that though the payment need not be in money, but may be in goods, or even by a settlement of account between the parties, yet the payment must be of such a nature that it would be an answer in a suit brought by the plaintiff to recover the amount, and it was held that the credit of the sum by the defendants in their books to the plaintiffs' account with them would not be such payment to her as would be an answer in a suit brought by her to recover the money and the interest.

Applying this rule to the present case, we ask the same question, and the answer, we think, must be in the affirmative. By crediting the defendants in their own books with the payment of the interest, the plaintiffs acknowledged its receipt and could not afterwards sue for it as such. It is not necessary, in order to constitute a payment, that money shall actually be tendered and accepted ; it is sufficient if the same result is obtained in some other way. That is the case here. If we suppose that the defendants had on this day gone to the plaintiffs with the money for interest in their hands and had paid it and had then taken it again from the plaintiffs by way of loan, that transaction would have appeared in the books of account in exactly the same way as what was actually done now appears. The plaintiffs are represented **[497]** as receiving the interest from and lending it again as principal to the denfendants. The decision in the case of *Ferrao* (5) is useful on this point, and I will quote the words of Bacon, V. C. (p. 356 f.n. 1) : "If Webb had taken the whole sum which they were bound to pay him and handed it to Ferrao, and he had paid the calls, nobody could dispute that there was a payment in cash. What was done was equivalent in every respect ;" and Mellish, L.J., says (pp. 357-8) : "The moment the company...did credit the shares...with the £700, that moment the £700 was paid by the company to Webb just as much as if it was paid in cash...Writing it off in the books is perfectly equivalent to payment." So here the writing off of this interest by the plaintiffs in their books is just the same as payment, and they could not, therefore, after that have sued for it as such. If the interest had been guaranteed, or if it had been due under a mortgage, it is, I think, clear that the plaintiffs after acknowledging its payment in this way could neither have sued the surety for it, nor included it in their claim under the mortgage. They could only sue for it under the new jural relations created by their acceptance of the interest and their lending it out afresh to the defendants, not as interest but as principal under the fresh contract thereby created.

We, therefore, confirm the decree. The appellants to bear the costs in their respective appeals.

RANADE, J.—These two appeals were preferred by the original defendants No. 2 and No. 1, who, along with defendant No. 3, and a fourth partner Shankarappa, (brother of the deceased respondent-plaintiff and subsequently made plaintiff No. 2), formed a partnership carried

(1) 19 M. 340. (2) (1862) 1 H. and C. 238. (3) (1867) L. R. 2 Ex. 153.
(4) (1835) 2 C. M. and R. 337. (5) (1874) L.R. 9 Ch. 355.

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on in the names of defendants Nos. 1 and 2 in shroff business, with moneys borrowed from the deceased father of the original plaintiffs. The suit was brought on a khata account which was last settled on 21st January, 1894, when the interest due up to that date was debited and credited in the partnership accounts, and corresponding entries were made in the respondent-plaintiffs' accounts, and the balance of Rs. 8,521 principal, and Rs. 2,299 as interest, in all Rs. 10,820, with further interest was claimed.

[498] The plaint was filed on 19th January, 1897. The principal contentions raised by the appellant-defendants were(1) that the settlement of accounts was made on the 4th of January, and not on 21st of January, 1894; (2) that the debit and credit entries were hollow entries, and did not save the limitation of three years, which barred the claim; and (3) that the settlement by defendant No 1 did not bind the other defendants who were not parties to it. The lower Court found (1) that the settlement was made on the 21st January, and not on the 4th January; (2) that the debit and credit entries were made in the partnership accounts and in plaintiffs' accounts on that date, transferring the interest balance to the principal, and that they were not hollow but real transactions and brought the suit within the period of limitation; and (3) that the settlement bound all the defendants. Respondent-plaintiffs' claim was accordingly allowed for the whole amount as against the partnership assets, and as one of the respondent-plaintiffs was a partner with the appellants, the deficit, if any, was ordered to be recovered from the other three partners to the extent of one-fourth each. In appeal, the principal points raised are the same as in the Court below, *viz.*, one of law and the other of fact: the question of law being whether the claim was time-barred by reason of the adjustment of the accounts not being equivalent to a payment of interest within the terms of s. 20 of Act XV of 1877, and the other of fact, *viz.*, whether the last adjustment took place on the 21st of January, and not on the 4th of January. A third point was raised by the appellant-defendant in appeal No. 110 as to the settlement made by his brother not being binding upon him under s. 21, as he was not a party to the same. This last point was not much pressed in argument before us. Of the two principal contentions the question of law must be first considered, as, if the adjustment did not constitute a payment of interest under s. 20, it was of no consequence whether the adjustment was made on the 4th or 21st January.

Taking the point of law first, it appears from the accounts that there were three settlements of accounts between the parties: first on the 31st December, 1890; second on 31st June, 1892; and third on 21st of January, 1894. The first two adjustments would not save limitation, and they need only be considered as showing the **[499]** nature of the dealings between the parties. On each of these occasions, the interest was calculated up to the date of adjustment, and the partners debited the balance of interest so found due in their books to the khata of profits and loss, and credited it to the respondent-plaintiffs' account in the partnership books, and corresponding credits were made in the plaintiffs' book in the interest account and debits made in the partnership account. The result of the adjustment was that the interest balance was reduced, and the principal amount was increased for the calculation of future interest. The question for consideration, therefore, is whether this adjustment, attended with the result stated above, constituted a payment of interest under s. 20 of the Limitation Act.

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That section provides that "when interest on a debt is, before the expiration of the period prescribed for the suit, paid, as such, by the person liable to pay the debt, the new period of limitation shall be computed from the time when the payment was made." The important words are at the commencement—"the interest paid, as such, by the person liable to pay," and the final words—"when the payment is made." The payment, as such, need not be in money—*Hart* v. *Nash* (1); it may be in goods, or it may be in the shape of a new bond passed for interest—*Doming Isteb* v. *Antone Kaitan Pirel* (2), *Bodger* v. *Arch* (3), or it may be a set-off against a claim or settlement of accounts—*Kollipara Pullamma* v. *Maddula Tatayya* (4). All these different forms are prescribed by the s. 50 of the Contract Act and the illustration attached hereto. While the forms of payment may differ, the section provides that it must be a payment made as interest by the debtor to the creditor. Mere crediting by the debtor in his own account books of interest is not enough to satisfy the statute. It must be interest paid as interest and distinctly stated to be so at the time of payment, or there must be evidence from which payment as interest may be distinctly inferred.

It was held in *Ichha Dhanji* v. *Natha* (5) that the mere entry of interest in defendant's books even when made in the presence of the plaintiff, did not amount to a payment. To constitute it a payment [500] there must be demands on both sides to set off against one another. The test proposed in *Kollipara Pullamma* v. *Maddula Tatayya* (4) is that though the payment need not be in money, but may be in goods or even by a settlement of accounts, yet the payment must be of such a nature that it would be an answer in a suit brought by the plaintiff to recover the amount. On the strength of these rulings it was contended that the settlement of accounts in this case did not constitute a payment, because, as in the Bombay case, there were no demands on both sides to set off against one another, or, as in the Madras case, the adjustment would not have been a good answer in a suit.

The lower Court, however, appears to have correctly distinguished these cases from the facts of the present case. It is true there was no actual cash payment in the present case. There was only an adjustment; but the adjustment here was of a double character not to be found in the cases noted above. The present case more correctly resembles the adjustment in *Amos* v. *Smith* (6), where the trustees of a marriage settlement paid to the husband the moneys due to the wife, and subsequently the wife gave receipts for the interest so received, and no payment was really made to the wife, and yet it was held that the receipts must be considered as payments made, and the settlement of accounts was held to be sufficient to remove the bar of the statute. Settlement of accounts by persons mutually indebted is not merely a settlement, but is a payment, as in the case of *Bodger* v. *Arch* (3). In this last case, defendant was plaintiff's wife's brother, who had borrowed money from his sister and passed a note to her. She died leaving a child, and plaintiff gave the child to be maintained by the brother, and it was agreed that interest on the note should be regarded as paid and discharged on account of the maintenance of the child, and such maintenance was held to be a payment which took the case out of the statute. The case of *Maber* v. *Maber* (7) is,

(1) (1835) 2 C. M. & R. 337. (2) P.J. (1889), p 39. (3) (1854) 10 Exch. 333.
(4) 19 M. 340 (342). (5) 13 B. 338. (6) 1 H. and C. 238.
(7) (1867) L. R. 2 Ex. 153.

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still stronger. In this case, the defendant owed money to the plaintiff. At an interview with the creditor, the defendant and his son went to his shop, and the son put his hand into his pocket as if to pay the money due; then plaintiff stopped **[501]** him, saying that he had not paid any thing to his son's wife, wrote a receipt acknowledging the receipt of money from the defendant as interest for seven years, and gave it to his son's wife. Here though no money was paid, yet when a man proposed to pay a debt, and the creditor interferes, and says he need not pay, and gives a receipt, it was held that such a receipt operated as payment. In this last case, three of the Judges differed from one of their colleagues who held that the evidence did not support the plea of payment, because the creditor had not asked the debtor to pay the money to his wife or another person to whom the creditor owed some money. These English cases show clearly enough that if a debtor consents that some money due by him for interest should be credited, to the account of the principal in favour of the creditor, and the interest balance reduced to that amount, such a consent is really tantamount to a payment of interest. It is as if the debtor makes the payment and the creditor advances it again. Where all parties agree to such a settlement, there is no particular reason why such an adjustment should not operate as a payment of interest under s. 20. If the debt had been a mortgage-debt, and the interest balance had been, with the consent of parties, reduced by a certain amount and credited in the principal account, such adjustment would make a very significant alteration in the state of the accounts. It would be likewise the case if the damdupat rule were applied under the general law. Such a settlement would be an answer to a claim for the interest balance made after the adjustment; and it was, therefore, correctly held to be a payment of interest under s. 20.

As regards the contention on the question of fact, I feel satisfied that the adjustment of the interest balance of 1,050 rupees made up of two items of Rs. 506-2-0, of 18th March, 1893, and Rs. 543-14-0, of 23rd January, 1894, was made on the 21st January and not on the 4th January. It is true, in defendants' books, the entries appear under Margashirsha Vadya; but this is clearly due to inadvertence. Up to Margashirsha Vadya the amount did not come up to that figure, and we have to assume that defendants consented to a larger figure than what was due. Plaintiffs' account books and the direct oral evidence of the witnesses are more reliable than defendants' accounts. One of these **[502]** witnesses is defendant No. 1's nephew (Ex. 76), and two others are strangers. Even defendants' books mention the date corresponding to 21st January in regard to other creditors in whose favour similar credits were made at the same time. The fact that the partnership came to a sudden termination about this time in consequence of a theft, and that it was held to have ceased to be a partnership on 14th January, do not discredit the evidence relied on by the lower Court. I, therefore, see no reason to differ from the findings of the lower Court both on the question of law and of fact.

The objection under s. 21 raised by appellant in appeal No. 110 calls for no special notice. The section, no doubt, makes partners not liable for any written acknowledgments or payments by one or other of them—*Premji Ludha* v. *Dossa Doongersey* (1), but the use of the word 'only' shows that while a partner cannot thus make another partner liable merely by

(1) 10 B. 358.

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his signature, there is nothing to prevent such liability from falling on partners, if, as in the present case, they are shown to have all joined in the settlement made by one of them. I would, therefore, dismiss both the appeals and confirm the decree.

Appeal dismissed.

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24 B. 502 = 2 Bom. L.R. 414.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

DAGDU (*Original Judgment-Debtor*), *Appellant v.* VANJI AND OTHERS (*Original Assignee of the Decree-holder, &c.*), *Respondents.**

[1st March, 1900.]

Transfer of Property Act (IV of 1882), s. 131—"Debt"—Transfer of a debt—Decree not a debt—Assignment of decree—Notice of assignment—Civil Procedure Code (Act XIV of 1882), s. 232.

A decree is not a "debt" within the meaning of that word as used in s. 131 of the Transfer of Property Act (IV of 1882), so as to make a transfer thereof void without express notice.

When a decree is assigned, a notice given under s. 232 of the Civil Procedure Code (Act XIV of 1882) is sufficient.

SECOND appeal from the decision of R. S. Tipnis, District Judge of Khandesh.

[503] One Gulabchand obtained a money decree against Dagdu and two other persons.

In execution of the decree a sum of Rs. 1,000 was recovered in part satisfaction thereof.

Subsequently Gulabchand assigned the decree to Vanji *alias* Tulsiram and Habibulla, who presented a darkhast to recover the balance due under the decree.

A notice was issued to the judgment-debtor under s. 232 of the Civil Procedure Code (Act XIV of 1882).

Dagdu resisted the darkhast mainly on the ground that no notice of the transfer of the judgment-debt had been given to him as required by s. 131 of the Transfer of Property Act (IV of 1882).

This objection was overruled by the Court of first instance on the ground that the debt due under a decree did not fall under s. 131 of Act IV of 1882, and that, therefore, no notice was necessary.

The Court, therefore, ordered execution to proceed.

This order was upheld, in appeal, by the District Judge. He held that under s. 232 of the Civil Procedure Code the judgment-debtor had got the requisite notice through the Court.

Against this decision, Dagdu appealed to the High Court.

S. R. Bakhale, for appellant.

B. N. Bhajekar, for respondents.

JUDGMENT.

PARSONS, J.—We agree with the decision of the High Court of Calcutta in *Afzal* v. *Ram Kumar* (1) that a decree is not a debt within

* Second Appeal No. 796 of 1899.

(1) 12 C. 610.

the meaning of that word as used in s. 131 of the Transfer of Property Act, 1882, so as to make the transfer void without express notice. The notice required by s. 232 of the Civil Procedure Code has been given, and that is sufficient.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

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24 B. 504=2 Bom. L. R. 491.

[504] APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice and Mr. Justice Candy.

CHANDRI (*Original Plaintiff*), *Appellant v.* DAJI BHAU (*Original Defendant*), *Respondent.** [28th March, 1900.]

Limitation Act (*XV of* 1877), *sch. II, arts.* 139 *and* 144—*Landlord and tenant—Rent-note—Expiration of the term—Tenant holding over—Tenancy at sufferance—Want of privity between landlord and tenant—Suit to recover possession—Limitation.*

A tenant holding over after the expiration of the term mentioned in his rent-note is a tenant by sufferance and there is no such relationship between the landlord and such tenant as is contemplated by art. 139, sch. II of the Limitation Act (XV of 1877). A tenant by sufferance is only in by the laches of the owner, so that there is no privity between them.

CANDY, J. —The possession of a tenant holding over is wrongful, and if there is no evidence from which a fresh tenancy can be inferred in the strict sense of that term, time begins to run against the landlord when the period of the fixed lease expires.

[F., 31 A. 514 (518)=6 A.L.J. 584=3 Ind. Cas. 566 ; 7 C.L.J. 615 (626) ; R., 27 B. 262 (264)=4 Bom. L.R. 972 ; 37 C. 664=6 Ind. Cas. 339 ; 31 M. 163=18 M.L.J. 26 (29)=3 M.L.T. 256 ; 6 N.L.R. 95 ; 90 P.R. 1906=91 P.L.R. 1907.]

SECOND appeal from the decision of Rao Bahadur R. R. Gangolli, Additional First Class Subordinate Judge of Thana, with appellate powers, reversing the decree of Rao Saheb H. V. Kane, Acting Subordinate Judge of Alibag.

The plaintiff sued the defendants (suit No. 159 of 1895) to recover possession of the house in dispute, alleging that the defendants had on the 25th June, 1877, passed a rent-note for one year to her deceased mother to whom she had succeeded as heir, and that after the expiration of the term the defendants continued to live in the house as monthly tenants. The defendants contended that the suit was time-barred. The Subordinate Judge decreed that possession of the house should be restored to the plaintiff. The defendants preferred an appeal to the District Judge, and while the appeal was pending, the plaintiff executed the decree and took possession of the house. Subsequently the decree was reversed in appeal on the preliminary ground that the plaintiff had not given to the defendants notice to quit. The plaintiff thereupon having given the requisite notice, brought the present suit in the year 1897 for a declaration of her title to [505] the house and for an injunction restraining the defendants from taking possession from her.

The defendants answered (*inter alia*) that the plaintiff was not the owner of the house and that the suit was time-barred.

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* Second Appeal No. 697 of 1899.

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The Subordinate Judge found that the defendants entered on the premises as tenants of plaintiff's mother under the rent-note dated the 25th June, 1877; that though the rent-note contained a period of one year only, still as the defendants originally came in as tenants they were estopped from denying the title of the plaintiff who represented her mother, and that the suit was not time-barred though it was not brought within twelve years after the expiration of the tenancy. He, therefore, allowed the claim.

On appeal by defendant No. 1 the Judge reversed the decree and rejected the claim, holding that the defendants were, after the expiration of the term mentioned in the rent-note, tenants by sufferance, and that as there was no reliable evidence in the case to show that a fresh relation of landlord and tenant was created between the parties at any time since the year 1878, the defendants' possession was adverse and, therefore, the suit was time-barred.

The plaintiff preferred a second appeal.

Daji A. Khare, for the appellant (plaintiff).—We are already in possession, and in the present suit we merely seek a declaration and an injunction; consequently, the suit cannot be time-barred.

[JENKINS, C. J.—But you obtained possession in execution of a decree which was subsequently found to be wrong in law and reversed. Therefore the relief which you now claim is tantamount to possession.]

The Judge has, in support of his decision, relied on *Kantheppa* v. *Sheshappa* (1). But the remarks made therein are merely *obiter dicta*. The present case is governed by *Krishnaji* v. *Antaji* (2). Although the tenancy created under the lease came to an end when the stipulated period of one year expired, still the tenancy was not determined. Article 139, sch. II of the Limitation **[506]** Act applies to a tenancy which is determined. The defendants continued to be our tenants by sufferance and they ought to have shown that they held adversely for more than twelve years. The burden of proof lay on them—*Adimulam* v. *Pir Ravuthan* (3). Unless a tenant clearly shows when his holding became adverse, his mere holding over after the expiration of the stipulated term cannot make his possession adverse to his landlord.

[CANDY, J.—If the tenant holds over for one hundred years, can the landlord recover the property?]

We submit that art. 144, sch. II of the Limitation Act applies to such a case, and the tenant ought to show that his possession was adverse. After the expiration of the fixed period, a new relationship comes into existence.

[JENKINS, C. J.—But art. 144 applies when no other article applies.]

According to our contention art. 139 is not applicable because it relates to a tenancy which is determined by act of parties. It would apply when the tenant holds over and does something which determines the tenancy, as by attornment to a third person, or when the landlord determines it by giving a notice to quit.

G. K. Dandekar, for the respondent (defendant No. 1):—The ruling in *Kantheppa* v. *Sheshappa* (1) fully applies. See also *Shivabasaya* v. *Totad Swami* (4).

[JENKINS, C. J.—Is there any other authority besides *Kantheppa* v. *Sheshappa* (1) to show that a tenant by sufferance becomes full owner after twelve years from the time the term fixed in the lease expires?]

(1) 22 B. 893. (2) 18 B. 256. (3) 8 M. 424. (4) P.J. (1898), pp. 357 (365).

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If, as contended, art. 139 applies only when the tenancy is determined by act of parties, we submit that the present case falls under that article, because the time by the efflux of which the tenancy determines under s. 111 of the Transfer of Property Act is fixed by the parties. At the commencement of the tenancy the parties by fixing the time do an act by which the tenancy gets determined.

JUDGMENT.

[507] JENKINS, C. J.—The only point for our determination in this appeal is, whether the plea of limitation ought to prevail. On the 25th of June, 1877, the defendant No. 1 and his father passed a rent-note in favour of the plaintiff's mother and predecessor in title for one year.

At the end of the year the premises were not given up; nor has any rent since been paid. Under these circumstances the defendant contends that the plaintiff's claim to recover possession (for that is how this suit should be regarded) is barred. This view the plaintiff combats.

The lower appellate Court held the plea established and dismissed the suit; from this decision this appeal has been preferred. The decision of the lower Court proceeded on the case of *Kantheppa* v. *Sheshappa* (1) and the opinion there expressed by Sir Charles Farran and Mr. Justice Candy. Before us, however, it has been contended that this opinion is no more than a *dictum*, and that the case is covered by the earlier authority of *Krishnaji* v. *Antaji* (2). In his opening Mr. Khare argued the case on the footing of its being governed by art. 139 of the Limitation Act: his argument was that, though the original tenancy had determined more than twelve years before the commencement of the suit, there had been no such determination of the tenancy that came into existence on the holding over, so that the suit was really brought within twelve years of the termination of the tenancy. In this line of argument, however, the case in the 18th Bombay does not support him; for it is there distinctly said "in this case there is no tenancy." But can it be said there is a tenancy when a tenant holds over without paying rent or the landlord's otherwise assenting to his continuing in possession? According to the finding of the lower appellate Court in this case (by which of course we are bound) on the determination of the letting of 1877 the tenants became tenants at sufferance, and the question arises, whether between tenants at sufferance and the owners of the land there is such a relationship as is contemplated by art. 139. Now it is to my mind clear, that the article deals with those cases where there has been the relationship of landlord and **[508]** tenant. But in the case of a tenancy at sufferance there is no such relationship. Thus a release to a tenant at sufferance is void, because he hath a possession without privity. (Co. Lit. 270*b*.) A tenant by sufferance is only in by the laches of the owner, so that there is no privity between them.

It follows, therefore, that if art. 139 governs the case, time must be counted from 1878, and not from the termination of the estate at sufferance. To meet this difficulty, Mr. Khare has argued that when an estate by sufferance arises, the governing article is not 139 but art. 144. This is opposed to the Madras decisions, but it is claimed that it is supported by the decision in *Krishnaji* v. *Antaji* (2). It is difficult to say what article was considered applicable in that case,

(1) 22 B. 393. (2) 18 B. 256.

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as none was mentioned in the judgment, but from what is said by Mr. Justice Fulton, (who was a party to the decision) in the later case of *Shivabasaya* v. *Totad Swami* (1), I infer the case was treated as falling under art. 139, and that the decision turned on the particular facts of the case. Certainly art. 139 is the only one mentioned in the report of the argument, and no reference is made to any other article in the judgment. Apart, then, from this case, can it be successfully argued that art. 139 does not apply? The only other article that could apply is art. 144, but that article "is not applicable where the suit is otherwise specially provided for"—*Runchordas* v. *Parvatibai* (2). But how can it be said that this suit is not specially provided for by art. 139? The description of the suit to which that article applies is one by a landlord to recover possession from a tenant: that cannot mean a suit in which the relationship of landlord is one that still subsists; for the time from which the period for limitation begins to run is when the tenancy is determined; and this necessarily implies that the suit must be brought after the relationship of landlord and tenant has ceased. Therefore, it seems to me that this suit falls precisely within the description given in the first column of art. 139. For these reasons, I would affirm the decree of the lower Court and dismiss this appeal with costs.

[509] CANDY, J.—I concur. The decision in *Kantheppa* v. *Sheshappa*(3) was given after much consideration. As the late Chief Justice said, the question is one of difficulty, having regard to the state of the authorities. But we felt unable to agree with the ruling of the Madras High Court that in the case of a lessee holding over after the expiration of his lease, and thus becoming "a tenant on sufferance," it lies upon the person resisting the landlord's claim for possession, on the ground of limitation, to show that the tenancy on sufferance is determined. Their Lordships said: "All that is shown in this case is that the tenancy for the term has determined; for aught that appears, the tenancy by sufferance subsisted up to the date of the suit:" in other words, that the tenancy is determined by the suit, and thus in the absence of any circumstances showing that the tenancy by sufferance was determined prior to the suit, there never could be any bar of limitation. But this assumes that in the case of what is called "tenancy by sufferance," there is the legal relationship of landlord and tenant, to which art. 139 of the Limitation Act of 1877 would be applicable. But that is not so. The possession of such a person holding over is wrongful. Therefore, if art. 139 is applicable (as was admitted in the Madras case), and there is no evidence from which a fresh tenancy can be inferred in the strict sense of that term, time begins to run against the landlord when the period of the fixed lease expires.

I still think that that is the correct view; and I am unable to see what other article of the Limitation Act could be applicable. Thus in the present case the Landlord's right to the property having been extinguished in 1890, and no objection having been taken to the form of the decree given by the lower appellate Court (that the plaintiff do restore possession of the property), I would confirm the decree with costs.

Decree confirmed.

(1) P.J. (1898), p. 357 (365). (2) 23 B. 725 = 26 I.A. 71. (3) 22 B. 893.

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[510] ORIGINAL CIVIL.

Before Sir L.H. Jenkins, Kt., Chief Justice, and Mr. Justice Russell.

HAJI MAHOMED HAJI JIVA (*Original Defendant*), *Appellant v.* E. SPINNER AND OTHERS (*Original Plaintiffs*), *Respondents.**

[13th and 20th July, 1900.]

Contract—Offer—Acceptance in different terms—Contract Act (IX of 1872), *ss.* 7 *and* 207—*Evidence Act (I of* 1872), *s.* 92, *proviso* 5—*Evidence of previous dealings between parties when admissible—Interest on price and charges not legally demandable in absence of special contract.*

The defendant made an offer in writing to the plaintiffs for the purchase of 200 bales of pepperill drill at 9s. 2*d*. A few days later, the plaintiffs' salesman tendered for signature to the defendant an indent containing certain terms not contained in the original offer, and in particular containing the words "Free Bombay Harbour and interest." This the defendant refused to sign. The plaintiffs, however, sent the offer by cable to their home firm, and on receipt of a favourable reply communicated this acceptance to the defendant. This acceptance the defendant said he had returned. The plaintiffs denied that he had done so.

Held per SIR L. JENKINS, C.J.—"The law on this point is thus formulated in the most authoritative mode by the Contract Act (IX of 1872), s. 7: "In order to convert a proposal into a promise the acceptance must be absolute and unqualified.' That is to say, until there is such an acceptance the stage of negotiations has not been passed, and no legal obligation is imposed. Similarly, any departure from the terms of the offer or any qualification vitiates the acceptance it accompanies unless it is agreed to by the person from whom the offer comes. In other words, an acceptance with a variation is no acceptance; it is simply a counter-proposal, which must be accepted by the original promisor before a contract is made."

Held, further, that because the acceptance was not shown to have been returned, no inference could be drawn that the defendant must have assented to the terms in which it failed to correspond to his offer. It is clear that a person making a proposal cannot impose on the party to whom it is addressed the obligation to refuse it under the penalty of imputed assent, or attach to his silence the legal result that he must be deemed to have accepted it.

Held, further, that evidence of previous dealings is admissible only for the purpose of explaining the terms used in a contract and not to impose on a party an obligation as to which the contract is silent, or to read into it a liability which would otherwise not exist. It was impossible to find, in dealings carried out on the basis of signed indents, any clue to the intention of the parties when not only was no indent signed, but the defendant refused to sign one.

[511] *Held*, further, that in the absence of any contract to that effect, interest could not be legally demanded on the contract price, and still less could it be demanded on the incidental charges on the invoice.

[R., 92 P.R. 1913; 2 S.L.R. 7 (9).]

THIS was an appeal from the decision of Mr. Justice Crowe.

On the 18th of October, 1897, the defendant Haji Mahomed made an offer to the plaintiffs (Spinner & Co.) to purchase 200 bales of pepperill drill, containing about 3,000 pieces at 9 shillings and 2 pence per piece, on the terms set out in Ex. A, which will be found in the judgment of the Chief Justice at p. 519. On the 19th or 20th October the plaintiffs' salesman tendered for signature to the defendant an indent, which is referred to as Ex. 13 in the judgments. This indent contained certain terms not contained in the defendant's offer of the 18th October, and in particular contained the words "Free Bombay

* Suit No. 549 of 1899; Appeal No. 1079.

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Harbour and interest." This indent the defendant refused to sign. The plaintiffs, however, ordered out the goods, and on their arrival tendered them to the defendant, demanding at the same time such sums for charges, expenses and interest as would have been due under a contract entered into on the terms "Free Bombay Harbour and interest." These the defendant refused to pay. The plaintiffs' thereupon sold the said 200 bales by public auction and filed this suit against the defendant claiming the deficiency together with the above sums for interest and charges. Before the filing by the plaintiffs of this suit, the defendant had filed a suit against the plaintiffs, being Suit No. 118 of 1899, claiming an account against the plaintiffs and payment of the balance, if any, due to him by them. This suit was pending. The plaintiffs' suit, however, came on first for hearing. In his written statement in this suit the defendant stated as follows:—

"6. The said suit No. 118 of 1899 is still pending, and it will be some time before it can be disposed of. Pending this suit the plaintiffs have sold and disposed of by public auction certain other goods ordered out by the defendant through them and mentioned in the plaint in this suit, and have filed this suit to recover the alleged deficiency on such sale. This defendant says that there have been several disputes between the plaintiffs and the defendant in respect of the said goods, *viz.*, as to the prices thereof and the interest and other charges unjustly claimed by the plaintiffs [512] from this defendant. This defendant says that this suit is utterly unnecessary and improper, as all the matters in issue in this suit are also directly and substantially in issue in the said suit No. 118 of 1899, which was instituted previously to this suit."

The remaining facts sufficiently appear from the judgments.

Mr. Justice Crowe for the reasons given in the following judgment decided the suit in favour of the plaintiffs.

CROWE, J.—The plaintiffs claim in this suit Rs. 4,630-0-2 together with interest thereon from 12th August, 1899, at nine per cent. per annum, being the amount of damages sustained by plaintiffs on account of the failure of the defendant to take delivery of certain goods contracted to be purchased by him on the 18th October, 1897, and for costs. In his written statement defendant replied that he had ordered the goods through plaintiffs from Europe for the last eight or nine years; that there had been only one genereal account between them which was last adjusted about April, 1896; that he had pressed the plaintiffs for a further adjustment; and, if the accounts were adjusted up to date, it would be found that plaintiffs had been overpaid by defendant; that while these disputes were pending, plaintiffs, with a view to force defendant to accede to their terms, sold by auction certain goods indented for by defendant through them and at the same time retained in their hands certain other goods indented for by defendant through them, and eventually filed a suit in the Small Cause Court. He thereupon filed a suit praying that an account might be taken of all dealings and transactions between him and plaintiffs since the date of the last adjustment, and then plaintiffs should be ordered to pay what might be found due to him by them on taking such account. This suit is still pending and plaintiffs have sold and disposed of by public auction certain other goods ordered over by defendant through them and mentioned in the plaint in this suit, and have filed this suit to recover the alleged deficiency on such sale. The defendant further alleged that plaintiffs were not justified in selling the goods mentioned in the plaint; that the sale was illegal, irregular and improper; and if necessary

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defendant would seek to counter-claim against [513] plaintiffs in respect of the loss sustained by him in consequence of plaintiffs failing to give delivery of the said goods to him.

The first issue raised was whether plaintiffs were entitled to maintain this suit, having regard to the provisions of s. 12, Civil Procedure Code (Act XIV of 1882), and whether the Court had jurisdiction.

I find that plaintiffs can maintain this suit. The matter in issue in the present suit is not the same as that in suit No. 118 of 1899 filed by defendant, and s. 12, Civil Procedure Code, does not apply. The question of fact to be tried here is whether there has been a breach of contract by the defendant. The question raised in defendant's suit relates to the nature of the dealings between the parties, and whether all dealings were included in one general account, and it can in no circumstances be held to be for the same relief.

The next issue is whether there was a general account between plaintiffs and defendant as alleged in the third paragraph of the written statement. I find in the negative. There is no satisfactory evidence to contradict the statement of Mr. Kreis, the manager of the plaintiffs, and Dinanath Bahunath, the salesman of plaintiffs, supported as it is by their accounts. They state that the various departments of the firm are entirely separate—consisting of the miscellaneous, Manchester 'khaki' and export departments; that separate sets of books are kept, and each is managed distinct from the others. The defendant in his examination stated that he had a general account with plaintiffs in *his* books and that the accounts were settled in 1896. He also produces a summary of the accounts of himself and plaintiffs (Ex. No. 29) for the purpose of showing that so far from any sum being due by him to plaintiffs on the whole transactions, the balance really was on the other side. The manner in which the defendant has kept his books is immaterial to the question. The plaintiffs emphatically deny that the different transactions were merged in one general account, and this is supported, in a great measure, by the defendant's own explanation, by the manner in which he took the delivery of goods indented for, and paid for [514] them. He states that he is not in the habit of taking delivery of all the goods included in an invoice at the same time, that he took delivery as he wanted the goods, and paid for them accordingly, and sometimes several months would elapse before he took delivery of the whole of the goods included in an invoice, and that he had to pay warehouse rent for the balance. Exhibits A 11, A 12, A 13, A 14—the vouchers of plaintiffs' delivery book—show clearly that this was the case, and that so far from there being any general account, the amount of each invoice was settled separately and independently, though it might be by several distinct payments. It is, therefore, extremely improbable, on the face of it, that there would be any overpayments on defendant's side. With regard to the allegation of the defendant that the accounts were settled in 1896, there is no reliable evidence to support it, and it depends entirely on defendant's uncorroborated statement. If such had been the case, the account books would have shown it. Defendant produces a summary of accounts (Ex. 29) but how it has been compiled is not clear. It apparently starts on the assumption that the accounts were adjusted about April, 1896. The plaintiffs appear to have made every effort to obtain inspection of defendant's entire books of accounts to ascertain how Ex. 29 was compiled, and I am satisfied from the evidence of Mr. Payne, who was examined for the plaintiffs, and Muncherji, the

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plaintiffs' accountant, that the defendant's books were kept back and opportunity was not afforded to plaintiffs of checking the accuracy of the summary. The correspondence between the solicitors supports this conclusion. It is quite clear that Ex. 29 was tampered with since a copy of it was taken by plaintiffs (Ex. 40), as a comparison of the two will show. I find that the allegation of the defendant that plaintiffs have been overpaid is not supported by the evidence.

The next issue is whether plaintiffs have not made demands for interest and other charges to which they were not entitled. In order to arrive at a determination of this question it is necessary to see what the actual contract was between the parties. And I may remark at this stage that the learned counsel for the defendant in the course of his argument set up a defence altogether inconsistent with defendant's written statement, and not arising **[515]** out of the proceedings. He contended that there had been no contract at all; and he bases this allegation on the assumption that the parties were never *ad idem*, and that if a man is to be bound by a contract, it must be by the exact terms of the contract and no others. Now it is idle to contend, in the face of the defendant's written statement, that there was no contract. He speaks of the goods mentioned in the plaint in this suit, which were sold by auction by plaintiffs, as having been ordered out by him through them. He threatens a counter-claim in consequence of plaintiffs' having failed to give delivery *of the said goods* to him; and asserts that the sale of these goods by plaintiffs was illegal. Looking at these admissions, there can be no doubt whatever that there was a contract between the parties, and what we have to see is what are the actual terms of the contract, whether there has been a breach of it by defendant and whether plaintiffs were justified in selling the goods. Dinanath Bahunath—the plaintiffs' salesman—states that on the 18th October, 1897, an offer was made by defendant regarding certain goods, and that offer is embodied in Ex. A. He says the offer was telegraphed to Manchester and accepted, and that the fact of acceptance was duly communicated to defendant (Exs. C and D). He says they have regular forms of indent, and the custom is for the indent to be sent to the indentor for signature after it is accepted; and he admits that the defendant refused to sign the indent. It was contended for defendant that the ground of his refusal to sign the indent was that the terms set out in the indent form (Ex. 13) were at variance with those in Ex. A. Exhibit A is admitted by defendant to be in his handwriting—it is a rough memorandum, and read by itself is incomplete and unintelligible. Evidence was cited by plaintiffs' counsel to explain the document on the ground that it was not complete in itself, that it was a document in use in the commercial world, and that evidence could be admitted to show what the usual incidents of contracts of this kind were. The Court held that plaintiffs were at liberty to put in evidence to show the terms in which the parties must be presumed to have contracted, as to which the document itself is silent, according to the provisions of proviso 5 of s. 92 of the Evidence Act (I of 1872).

[516] The memorandum is silent as to charges and interest. Dinanath says that the contract was made with him in the bazar, and though he takes the indent form with him to the market, he is in the habit of taking an offer on a piece of blank paper when he has no indent form with him. He produces several memoranda of contracts, all more or less informal, though none of them correspond exactly with Ex. A.

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Unless specially agreed upon, interest is always charged on goods held over, and the defendant had always been charged interest. The contract was entered into on the terms "Free Bombay Harbour and interest," which terms are entered in the indent (Ex. 13) which defendant refused to sign, and in the memorandum of acceptance (Ex. D). In addition to the words which actually relate to the contract in dispute, there are two endorsements on Ex. A which refer to a former order given by defendant on 30th January, 1896, for 100 bales of pepperill drill. He says defendant had taken delivery of 70 bales only and 30 were undelivered, and defendant wanted the interest on these 30 bales to be remitted. Plaintiffs agreed that on his giving a large order they might make the concession asked for, and the defendant consequently gave the order for the present 200 bales. This explanation accounts for the endorsements on Ex. A, and those endorsements further show that the basis of the dealings between the parties had been that defendant should pay interest. Evidence is brought to show that in all contracts of this kind the usual terms of business were that charges and interest had to be paid by the dealer. According to Mr. Kreis, the manager of plaintiffs' firm, there are three ways in which payments in sterling are made for goods supplied. These are expressed by the terms "Free on board," "Free Bombay Harbour" and "Free Bombay Harbour and interest." Of these the last mentioned is the most favourable for the dealer and implies that no interest will be charged until eight days after the arrival of the steamer in Bombay. Several cloth merchants have been examined, and describe the terms in which they have done business with plaintiffs' firm for years past, and they say that it is the custom, in the first instance, for offers to be made by word of mouth, the terms of the offer are then put in writing and signed **[517]** by the dealer, and if the offer is accepted, an indent is prepared. In every case the purchaser has to pay the charges, and if delay in taking delivery exceeds eight days, the purchaser pays interest. The contract is completed when the offer is accepted and the goods are ordered at once, a delay of 4—10 days often occurring before the indent is prepared. There can be no doubt that the ordinary terms of plaintiffs' contracts were well known to defendant. It is not contended that any special conditions were attached or asked for at the time. The defendant himself has not dared to make any such allegation. He was cross-examined at great length as to the usual terms of his contracts with plaintiffs, but he equivocated, evaded the questions, and showed himself an extremely unreliable and unsatisfactory witness. Now there is no doubt the goods were sent out. Defendant himself states that he did buy the 200 bales, that the goods came out afterwards, and if he had taken delivery at once no interest would have been claimed. He says he asked for delivery according to the terms of his memorandum, on the basis of no interest, no duty and no charges. He offered to take delivery 8—15 days after their arrival. Now it is a significant circumstance that although the indent was sent for signature to defendant, he never wrote to plaintiffs complaining of the terms of the indent with respect to the condition regarding interest, &c., comprised in the expression "F. B. H and interest." While in the witness box he pretended that he did not know what these terms implied, though he has been carrying on the business of a cloth merchant, and indenting for goods from Europe for many years. It is unlikely the plaintiffs would have prepared the indent (Ex. 13), in the manner in which it has been prepared, if any special agreement had been arrived at regarding non-payment of interest. The

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salesman of the plaintiffs has deposed that there was a fall in the market immediately after the contract was entered into, which would probably account for the desire of the defendant to repudiate it. Evidence has been put in (Exs. J, K, L) showing that due intimation was given to defendant of the arrival of the goods and calling on him to take delivery, and letters were sent giving notice that on his failure to take delivery the goods would be sold. In some cases the letters were refused and returned to [518] post office. Letters were also addressed to the attorneys (Exs. M, N, O, P). A statement of accounts was also sent to defendant on 25th July, 1899 (Ex. Q), and a further one on 9th August (Ex. R), and no payment has been made by defendant. I find that plaintiffs have not made demands for interest and other charges to which they were not entitled, and that they were justified in selling the goods.

I find for plaintiffs and decree for the amount claimed in the prayer of the plaint with costs, with interest at 6 per cent. from 12th August, 1899, to this date. Interest on judgment at 6 per cent.

The ledger and stock book of plaintiffs to be returned on their undertaking to produce them when required.

The defendant appealed.

Robertson (*Raikes* with him), for the appellant.

Lang and *Starling*, for the respondents.

The following authorities were cited :—Chitty on Contract, Chap. III s. 1, p. 55 ; Chap. V, s. 1, p. 127 ; *Grenon* v. *Lachmi Narain* (1) ; *Bourne* v. *Gatliff* (2) ; *Greaves* v. *Ashlin* (3); *Ford* v. *Yates* (4); *Jeffery* v. *Walton* (5).

JUDGMENT.

JENKINS, C. J.—The plaintiffs carry on business in Bombay, and for some years past the defendant, a Bombay merchant, has been in the habit of ordering goods from Europe through them. The usual and (so far as the evidence discloses) with one exception the invariable practice has been for the defendant to sign a formal document, called an indent, printed forms of which are kept by the plaintiffs, and the indent, when duly filled in in accordance with the requirements of the particular case, and signed, defines in detail the rights and obligations of the parties ; and in particular determines the payments (if any) over and above the contract price, to be made by the defendant. It will help to a clearer perception of the contentions, with which I will later deal, if I [519] here refer to that part of Mr. Kreis's evidence which explains the character of these payments : it is as follows :—

" There are three ways in which payment in sterling is made for goods supplied. The first is F. O. B., in which no liability is incurred till the goods are on board. The purchaser then pays all charges, including interest until he takes delivery. The second is ' Free Bombay Harbour,' which means that the goods are delivered free of all charges, including freight and insurance, up to arrival in Bombay Harbour. Interest is recovered from the purchaser from the date of the invoice at home up to the date when he ought to take delivery ; interest is charged afterwards at 9 per cent. This is charged in all cases after due date.

" The third mode is ' Free Bombay Harbour and interest,' which means that interest is only paid by the purchaser after their arrival in Bombay. In the second case interest is charged up to the date of the receipt of the remittance at home. The third method is the most favourable

(1) 24 C. 8. (2) (1844) 11 C. & F. 45 (58, 62). (3) (1813) 3 Camp. 426.
(4) (1841) 2 M. & G. 549. (5) (1816) 1 Starkie 267.

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for the dealer. It is very seldom there is a sale 'ex-godown' on sterling terms. It never happened to me. It implies the payment of import duty and landing charges which have to be paid in rupees. When we sell ex-godown it is invariably stated in the indent."

Now I come to the transaction in suit. On the 18th October, 1897, the defendant wrote out and handed to Dinanath Bahunath, the plaintiff's salesman, Ex. A, which contains the terms of the offer alleged in para. 1 of the plaint. It is in these terms :—

"*Bombay*, 18*th October*, 1897.

"No. 542.

"To

MESSRS. E. SPINNER & Co.,
31, Esplanade Road, Bombay.

"200 bales (of pepperill) 'Jean' bearing Swan (mark) ; 3,000 pieces ; 29 inches × 40 yards ; lb. 14/14½ ; shillings 9-2 (namely) nine shillings and two pence.

"Shipment of December-January.

"On (the order in respect of.....) these goods being accepted as to whatever interest there is the same is to be given up.

"£225 are to be received (by you) for which for (the equivalent of)

£112-10 ..... Rs. .....
For £112-10 ..... ,, ...

"This principal (sum I) am to pay.

"(Sd.) HAJI JIVA NUR MAHOMED.

"The 18th day of October, 1897,

"Reply to be given on the 21st."

"*On receipt of reply in respect of these (goods) £225 are to be received (by you) and (the account is) to be settled. (I) am not to pay any interest whatever.*

[520] The offer was sent by cable to the plaintiffs' home firm at Manchester, by whom it was accepted ; and on the 21st October this acceptance was communicated to the defendant by the following letter :—

"*Bombay* 21*st October*, 1897.

"E. SPINNER & Co.

"To

MR. HAJI JIVA NUR MAHOMED,
Bombay.

"Dear Sir,—We have just received a telegram from our home friends advising acceptance of your indent No. 542/922, 200 bales American grey pepperills, at 9/2, F. B. H. and interest.

"Shipment ½ December,
,, ½ January,

which please note subject to confirmation on receipt of mail advices ; objections to above particulars must be raised within two clear days from date, otherwise they could not be considered.

"Yours faithfully,
"(Sd.) E. SPINNER & Co."

In the meantime, however, the defendant had refused to sign the usual indent, so in sending the offer home the plaintiffs departed from their usual practice ; for in reference to this point Dinanath Bahunath has stated : "Generally the indent form is filled up first and signed before the home firm are communicated with, and that is considered the offer." Why

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they departed in this instance from their general practice we are not told, nor does the evidence show, whether the communication with the home firm was before or after the defendant's refusal to sign the indent.

Subsequently the plaintiffs received from the Manchester firm a letter confirming their telegram, and they thereupon sent to the defendant a confirmatory letter of acceptance. It was in these terms:—

[521] "*Bombay*, 29*th November*, 1897.

" E. SPINNER & Co.,

"To

MR. HAJI JIVA NUR MAHOMED,
Bombay.

"Dear Sir,—Referring to our preliminary advice of 21st October, 1897, we now beg to confirm that your indent No. 542/922 for 200 bales Grey American pepperill drills at 9½ p. p. F. B. H. and interest.

" Shipments in two lots—
First in December, 1897,
Second in January, 1898,

will be executed by our home friends as per above particulars, objections to which (if any) must be raised within two days from date, otherwise they could not be considered.

"Yours faithfully,
"(Sd.) E. SPINNER & Co."

This letter the defendant returned, and thereupon the plaintiffs wrote to him as follows:—

" *Bombay*, 7*th December*, 1897.

" HAJI JIVA NUR MAHOMED, ESQ,
Bombay.

" Dear Sir,—We are extremely surprised to receive back our acceptance note of your indent No. 542/922 for 200 bales Amrican Pepperill drills, at 9*s*. 2*d*., which we bought by your order dated 18th October, 1897, duly signed by you. We return this acceptance note herewith and hereby give you notice that if you fail to take up the goods on arrival, we shall at once sell them for your account and risk by public auction or otherwise, and sue you for the difference, if any.

" As regards the 30 bales undelivered against invoice No. 74, we hereby give you final notice that if these 30 bales are not taken up by you next Tuesday, the 15th instant, we shall sell them by public auction on your account and risk, and hold you responsible for any loss we might sustain thereby.

" Yours truly,
" (Sd.) E. SPINNER & Co."

The goods arrived in due course, and thereupon the plaintiffs maintained that the defendant was bound to take the goods on " Free Bombay Harbour and interest " terms, while the defendant's position (Ex. N) was, and throughout has been, that he was ready and willing to take up the goods at 9*s*. 2*d*. without having to pay or bear any charges or interest at all; and that the 9*s*. 2*d*. was an excess price (the goods having been invoiced at 8*s*. 11*d*.) which he was willing to offer on the understanding [522] that it was to cover all his liabilities. The plaintiffs declining to deliver on the defendant's terms, they in the end sold the goods, and

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in this suit they seek to recover the deficiency on the sale together with interest and charges, amounting in all to Rs. 4,630-0-2.

The case was heard by Mr. Justice Crowe, who passed a decree in the plaintiff's favour for Rs. 4,726-0-6 and the costs of the suit, and from this decree the present appeal is preferred.

The contract on which the plaintiffs rely is thus formulated in the plaint :—

"On the 18th day of October, 1897, the defendant abovenamed offered in writing to purchase from the plaintiffs abovenamed 200 bales pepperill drill containing 3,000 pieces, at the price of nine shillings and two pence per piece, for shipment from Europe in December and January then next on the terms and conditions mentioned in a memorandum of such offer of that date signed by the defendant.

"2. On the 21st October, 1897, the plaintiffs abovenamed in writing accepted the defendant's said offer on the said terms and conditions at the price mentioned in the said memorandum or writing dated the 18th day of October, 1897."

The defendant does not deny the contract so alleged, but claims that under it he was entitled to delivery of the goods on the terms I have already stated. The plaintiffs on the other hand maintain that the meaning placed on the contract by the defendant is wrong ; for that it imposed on him the further obligation of interest and charges, and the breach, which they allege, and on which they base the suit, is his failure to take delivery on these more onerous terms.

In support of their case the plaintiffs have before us presented a triple argument. First they maintain that by Ex. A the terms of the indent were incorporated into the contract. Secondly, that the terms "Free Bombay Harbour and interest" must be read into the contract in the light of the previous dealings between the parties. And lastly, that the burden of interest and charges would be thrown on the defendant even under a contract in the terms of the offer contained in Ex. A.

[523] Now as to the incorporation of the terms of the indent, at any rate in so far as it provides for the terms "Free Bombay Harbour and interest," it will be convenient to start by seeing precisely what the law is in the case of an offer followed by an acceptance, and to ascertain what the conditions are on which alone contractual obligations can arise: for a certain amount of confusion has been introduced into the case by the blurring of these considerations.

The law on this point is thus formulated in the most authoritative mode by the Contract Act (IX of 1872), s. 7: "In order to convert a proposal into a promise the acceptance must be absolute and unqualified." That is to say, until there is such an acceptance the stage of negotiation has not been passed and no legal obligation is imposed. Similarly, any departure from the terms of the offer or any qualification vitiates the acceptance it accompanies unless it is agreed to by the person from whom the offer comes. In other words, an acceptance with a variation is no acceptance: it is simply a counter-proposal, which must be accepted by the original promisor before a contract is made. Apart, then, from the condition as to continuation contained in Ex. D, it follows that the argument, which seeks to incorporate the terms of the indent by the acceptance in Ex. D, necessarily involves the conclusion that this so-called acceptance was itself a counter-proposal or a new offer proceeding from the plaintiffs. Was, then, this counter-proposal ever accepted by the defendant? for,

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that, as it seems to me, is the way in which the question before us has to be approached. The plaintiffs have in the course of the argument laid great stress on the defendant's admission that there is a contract, but in connection with the argument now under consideration it carries the case no further, for, as I have already shown, the contract the defendant asserts is one which has no reference to the indent.

The value of the contention that the indent has been incorporated must be estimated by the evidence in the case. But looking there we find that only a few days before the plaintiff's counter-proposal (for so I treat it) the defendant had absolutely declined to sign the indent, and there is no evidence which [524] suggests that the defendant receded from this determination or was even approached on the subject. It is, therefore, not too much to say that there is no antecedent probability in favour of the defendant's acceptance of an offer based on, and incorporating, the indent. What the fate was of the document containing the counter-proposal is a matter of controversy, but the defendant has not made out to my satisfaction that it was returned.

Still I am unable to draw the inference that, because it is not shown to have been returned, the defendant must be taken to have assented to the terms in which it failed to correspond to his offer, or that he assented to the imposition of the terms of the indent, though he had immediately before declined to sign it. Some stress was laid by counsel for the plaintiffs on the concluding paragraph in the letter of the 21st October, 1897, but it appears to me that the argument is not sound; for, I take it to be clear that a person making a proposal cannot impose on the party to whom it is addressed, the obligation to refuse it under the penalty of imputed assent, or attach to his silence the legal result that he must be deemed to have accepted it—*Felthouse* v. *Bindley*(1). Nor can I find in the defendant's subsequent conduct any acceptance of the obligations of the indent. On the contrary, his behaviour points the other way; for when the confirmatory acceptance of the 29th November, 1897, (which also attempts to incorporate the Indent No. 542/922) was sent to him he immediately returned it. It is said that this had no value, inasmuch as it was not accompanied by a letter of repudiation. In this I do not agree; for to a person in the defendant's position what he did would have appeared the most emphatic disclaimer and refusal to be bound by the terms of the document he thus returned.

The conclusion to which I come is, that there was no acceptance by the defendant of the counter-proposal, and that the terms "Free Bombay Harbour and interest" were not incorporated by Ex. D into any contract between the parties.

And this brings me to the argument that even if the terms of the indent were not incorporated into the contract by Ex. D, still an identical obligation is imposed, (at any rate so far as the terms "Free Bombay Harbour and interest" go,) by [525] the evidence which has been furnished as to the previous dealings of the parties.

Now it must be observed, that what the plaintiffs seek to make use of is, not any custom of the port or usage of trade, but the terms on which the plaintiffs and defendant have dealt with each other on prior occasions. But evidence of previous dealings is admissible only for the purpose of explaining the terms used in a contract; and not to impose on a party an

(1) (1862) 6 Law T. 157 = 10 W.R. 423.

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obligation as to which the contract is silent—*Bourne* v. *Gatliff* (1); *Ford* v. *Yates* (2). The argument, however, with which I am now dealing obviously seeks to read into the contract a liability that otherwise would not exist; for if it did exist, the evidence would not be required. But beyond this it appears to me it would clearly be wrong, on the facts of this case, to act on this evidence. The prior dealings (with one exception to which I will later refer) were all carried through on the basis of signed indents, so that it appears to be impossible to find any clue in those dealings to the intention of the parties on this occasion, when no indent was signed, and when the defendant, before there was even the suggestion of an acceptance, had declined to sign an indent. The exception to which I refer was an earlier dealing, in which it was said that though no indent was signed, and only an offer similar to A was made, the transaction was carried out on the terms "Free Bombay Harbour and interest."

But any value this isolated transaction might otherwise have possessed is discounted by the fact that the plaintiffs' own witness, Dadabhoy Patell, admits he had a conversation with the defendant and agreed on the terms contained in the indent; and there was not, as in the transaction in suit, any refusal to sign. I have not thought it necessary or profitable to investigate in this connection the rival reasons set forth as the explanation of the defendant's refusal. Whether it was due to a drop of prices as the plaintiffs would have it, regardless of the fact that this theory is almost destructive of the suggestion that there was an acceptance of the counter-proposal, or, as the defendant suggested, to an awakened conscience which recognised at this eleventh **[526]** hour the sinfulness of interest, we have the fact, and that is sufficient, that the defendant unquestionably refused to sign. In my opinion, therefore, the plaintiffs gain no advantage from the previous dealings, on which so much reliance has been placed.

This brings me to the last of the arguments which would spell out of the terms in Ex. A, without any extraneous aid, an obligation saddling the defendant with the interest and charges that have been demanded. I pass by the difficulty as to whether there was any such acceptance of the original offer as the law requires. I will assume this in the plaintiffs' favour. But even then I think they cannot succeed. As I have already said, the plaintiffs were only willing to deliver on the terms "Free Bombay Harbour and interest;" that is to say, they claimed to charge, in addition to the contract price of 9/2 per piece, (*a*) interest on that price as 5 per cent., (*b*) charges on the invoice, and (*c*) interest on these charges. But how, in the absence of any contract to that effect, could these liabilities arise? Even if they were entitled to recover the amount of the charges, as a necessary expense incumbent on the purchaser, I fail to see how interest on the contract price and still less on the amount of those charges, could be legally demanded in the absence of a provision in the contract to that effect; for it has not been suggested before us that any of those conditions occurred, which would give rise to a statutory liability to pay interest.

The conclusion, therefore, to which I come is that the plaintiffs have failed to show that they were ready and willing to deliver according to a contract subsisting between them and the defendant, and that their suit cannot be sustained. In this view of the case it becomes unnecessary to consider the defendant's plea of a general account.

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(1) (1844) 11 C. & F. 45.

(2) (1841) 2 M. & G. 549.

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The result is that, in my opinion, the appeal must be allowed, and the suit dismissed with costs throughout.

RUSSEL, J., concurred.

Appeal allowed and suit dismissed.

Attorneys for plaintiffs :—Messrs. *Payne, Gilbert and Sayani.*

Attorneys for defendant :—Messrs. *Ardesir, Hormusji, Dinshaw and Co.*

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24 B. 527 = 2 Bom. L.R. 84.

[527] CRIMINAL REVISION.

Before Mr. Justice Ranade and Mr. Justice Crowe.

IN RE PANDURANG GOVIND AND OTHERS.* [22nd January, 1900.]

Criminal Procedure Code (Act V of 1898), ss. 144, 145, 435 and 439—Dispute about right to perform service in a public temple—Notice—High Court—High Court's criminal revisional jurisdiction.

A Magistrate professing to act under s. 145 of the Criminal Procedure Code (Act V of 1898) is bound to follow the proper procedure. He must set forth the grounds on which he is satisfied that there is a dispute likely to cause a breach of the peace. He is bound to issue notices to all parties concerned so as to give them an opportunity to put in their respective claims. And his order should not interfere with the rights of the parties as determined by previous decisions of the Civil Court.

A dispute relating to the right of performing religious service in a public temple when it is likely to cause a breach of the public peace, falls under s. 145 of the Criminal Procedure Code (Act V of 1898).

The High Court ordinarily has no jurisdiction to interfere with an order under chap. XII of the Criminal Procedure Code (Act V of 1898), which is not a proceeding within the meaning of s. 435 of the Code ; but when the Magistrate exceeds his jurisdiction under s. 144 or 145, the High Court has power to interfere under its revisional jurisdiction (s. 439).

A dispute arose between certain classes of priests attached to a Hindu temple, about the right of performing a certain religious service. On the complaint of one of the parties, the Magistrate of the district, purporting to act under s. 145 of the Code of Criminal Procedure (Act V of 1898), passed an *ex parte* order prohibiting the other party from taking any part in the said service, although both parties had been previously declared by the Civil Court to be entitled to officiate at the service.

Held, that the order was illegal, and opposed to the provisions of s. 145 of the Code.

[F., 8 S.L.R. 215 ; R., 25 A. 537 (540) = 23 A.W.N. 102 ; 31 A. 148 = 6 A.L.J. 113 ; 25 B. 179 (181) ; 33 C. 68 (82) = 2 C.L.J. 241 = 9 C.W.N. 1046 ; 3 Bom. L.R. 416 (418) ; 4 Bom. L.R. 582 (583) ; 6 Bom. L.R. 246 (247) ; 8 Cr. L.J. 170 = 1 S.L.R. 50 (58) ; 17 C.P.L.R. 133 (138) ; 14 C.W.N. 611 ; 17 Ind. Cas. 65 = 23 M.L.J. 499 = 12 M.L.T. 439 = (1912) M.W.N. 1154 ; 2 L.B.R. 239 (240) ; 5 O. C. 1 (3) ; 8 S.L.R. 207.]

APPLICATION for revision under s. 435 of the Criminal Procedure Code (Act V of 1898).

The applicants were the *Shevadharis* or hereditary priests attached to the temple of Shri Pandurang at Pandharpur.

There were seven classes of *Shevadharis, viz.*: (1) the *Pujaris*, (2) the *Haradas*, (3) the *Benaris*, (4) the *Dingres*, (5) the *Divates*, (6) the *Danges* and (7) the *Paricharacks*.

[528] The *Badves* were the chief priests, managers and overseers of the temple.

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* Criminal Revision No. 247 of 1899.

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24 B. 527 = 2 Bom. L.R. 84.

On the 6th September, 1899, one Dnyaneshver Dadaji Badve made a complaint to the District Magistrate of Sholapur to the following effect :—

"While performing on behalf of our *yajmans* the *Alankar puja* of the deity Shri Pandurang in accordance with the decisions of the High Court, the *Benaris* who have no right to attend that *puja*, in spite of the Magistrate's orders to that effect passed from time to time, assemble there without any cause and offer resistance to us. I, therefore, pray that you will be good enough to order the *faujdar* to take steps preventing the *Benaris* from offering resistance."

The District Magistrate forwarded the application to the First Class Magistrate for report.

Thereupon the First Class Magistrate made a report to the following effect :—

"In a case between the *Badves* and the *Shevadharis*, with regard to the *Alankar puja* which was recently tried by me, I, on a consideration of the evidence in that case, expressed my opinion to the effect that the *Benaris* have no right whatsoever to attend while the *Alankar puja* is being performed."

On receipt of this report the District Magistrate without issuing any notice to the *Benaris* or the other *Shevadharis* passed an *ex parte* order as follows :—

"There appears to be a dispute with regard to the *Alankar puja*. But looking to the practice continued from former times, it seems that the *Badves* only have the right to perform this *puja*. Moreover, in the orders passed by the High Court it has been decided that only the *Badves* should perform this *puja*. The *Benaris* and other *Shevadharis* have no right at all to perform this *puja*. Therefore, should the *Shevadharis* or any other persons cause obstruction to the *Badves* during the performance of this *puja*, the police should remove the said obstruction of theirs and if necessary the persons causing obstruction should be sent out of the temple. The *Badves*, whenever they may have **[529]** an occasion to perform such *puja*, should give intimation thereof to the police."

In accordance with this order the chief constable of Pandharpur went to the temple on the 18th of October, 1899, and prevented all the *Shevadharis* from performing their respective duties at the time of the *Alankar puja*.

Thereupon the *Shevadharis* applied to the High Court for a reversal of the District Magistrate's order, as being illegal and *ultra vires*.

The High Court called for the record of the case.

G. S. Rao, for applicants.

Rao Bahadur *Vasudev Jaganath Kirtikar*, Government Pleader, for the Crown.

Inverarity (with *N. G. Chandavarkar*), for opponents.

JUDGMENT.

RANADE, J.—This is an application for the revision of an order passed by the District Magistrate of Sholapur. The order was to the following effect :—

"There appears to be a dispute about the *Alankar puja* (service). But looking to the past practice, the *Badves* alone have the right to perform this service. And the High Court of Bombay has also decided that the *Badves* alone should perform this *puja*. The *Benaris* and other *Shevadharis* (temple-servants) have no right at all to perform this service. For this reason, if the *Shevadharis* or other persons obstruct the *Badves* at the

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time of this service, the police should remove the obstruction. And if necessary those who cause the obstruction should be expelled from the temple during this service. The *Badves* should give information to the police when the service is to be performed.

"A copy of this order should be sent to the chief constable at Pandharpur, and the applicant be informed in writing, and this proceeding should be returned. Dated 10th October, 1899."

The applicants seek revision on the following grounds, namely, (1) that the District Magistrate passed the order *ex parte*; (2) that the District Magistrate had no jurisdiction to interfere with the rights of the applicants; (3) that the District Magistrate misconstrued the decisions and decrees of the Civil Courts; **[530]** (4) that the District Magistrate assumed to himself the powers of a Civil Court; (5) that the District Magistrate should have referred the complainant to a Civil Court.

The facts of the case as disclosed by the record appear to be that one Dnyandev Badve applied to the District Magistrate on 6th September, 1899, that while performing *Alankar puja* for one of his *yajmans*, the *Benaris* (a class of temple-servants or *Shevadharis* whose names are not specified in the petition) obstructed him without right and offered resistance, and the complainant asked that orders may be issued to remove the obstruction. The petition was forwarded by the District Magistrate to the First Class Magistrate, who reported that in another case tried by him between *Badves* and *Shevadharis*, when the dispute was about *Alankar puja*, he had come to the conclusion that the *Benaris* had no right to perform the *Alankar puja*. The inquiry to which the First Class Magistrate referred was held on the complaint of one Sadashiva Badve brought against certain *Shevadharis*, twenty-one in number. Three of the present applicants were parties to this proceeding, and they represented three classes of *Shevadharis*, namely, *Pujaris*, *Benaris*, and *Dingres*. The first Class Magistrate on Sadashiv's application issued notices to thirteen of the opponents to show cause why they should not pass security-bonds for Rs. 500 each. The First Class Magistrate held an inquiry and came to the conclusion that under the High Court decisions, the *Pujaris* had the right to render certain services at the time of the *Alankar puja*, but the *Benaris* and *Dingres* had no particular function at the *puja* and that the *Badves* had the chief right of management. The Magistrate, however, found that as a matter of fact no obstruction had been caused by the opponents, who were thereupon discharged on 2nd August, 1899. About the same time a proceeding had been instituted on the initiation of the chief constable on the 5th July, 1899, requiring both *Badves* and *Shevadharis* of all classes to pass security-bonds. This proceeding was also dropped by the order of the same First Class Magistrate on 2nd August, 1899. These proceedings appear to have been referred to in the First Class Magistrate's report submitted by him to the District Magistrate on the petition of Dnyandev Badve dated 6th September **[531]** 1899. The District Magistrate appears to have been satisfied that there was a dispute, and passed his order on 10th October, 1899, which was very general in its terms and applied to all *Shevadharis*, of whom there are seven classes. The Chief Constable took action on the order of the District Magistrate, and prevented one of the *Shevadharis* from taking any part in the *Alankar puja*, and thereupon one representative of each of the *Shevadharis*, seven in number, have presented this revision application.

The first point for consideration in this case is whether this Court has, in the exercise of its revisionary powers, jurisdiction to interfere with the

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District Magistrate's order. The decision of this question depends upon the inquiry under what section the District Magistrate passed his order. The order makes mention of no particular section. The Government Pleader suggested only two sections under which the order could have been passed—s. 144 and s. 145 of the Criminal Procedure Code. It is evident, from the mention of the existence of the fact of a dispute in the District Magistrate's order, that he had in view ss. 145, 146, 147, and not s. 144. This latter section has reference to temporary orders in urgent cases of nuisance. The section gives jurisdiction where urgency exists independently of dispute. The order under s. 144 has to be directed to particular individuals or to the public generally enjoining particular acts or abstentions, and it is in its very nature a temporary order. The present order fulfils none of these conditions. An order under s. 145, on the other hand, presupposes a dispute likely to cause a breach of the peace, and in making it, a Magistrate may take action on the report of the police or on other information. The dispute in this case does not relate to the possession of any land, &c.; but it has been held in *Muhammad Musliar* v. *Kunji Chek Musliar*(1) that the claim to perform a religious ceremony in a mosque, where it is the subject of an apprehended dispute, falls under s. 145. The present case thus comes under Chap. XII of Criminal Procedure Code. The High Court has ordinarily no jurisdiction to interfere with the order under chap. XII which **[532]** is not a proceeding, but when the Magistrate exceeds his jurisdiction under ss. 144, 145, the High Court has power to interfere in its extraordinary jurisdiction to set the order aright—*Reid* v. *Richardson* (2); *Ananda Chandra* v. *Carr Stephen* (3); *Agra Bank* v. *Leishman* (4); *Queen-Empress* v. *Lakhmidas* (5). As there was evidence on which the District Magistrate could act, namely, the Police and Magistrate's inquiries and reports, and the District Magistrate was satisfied that there was dispute, there is no doubt that the Magistrate had jurisdiction; but he was bound to follow the proper procedure. It does not appear that the District Magistrate in this case followed the procedure laid down. Several defects in the procedure may be noticed in this place. (1) In the first instance, the District Magistrate's order does not set forth, as the law requires, the grounds on which he was satisfied that there was a dispute likely to cause a breach of the peace. The only two proceedings to which his attention was drawn resulted in an acquittal of the persons charged. The other proceeding took place several years before, and was not sufficient to give jurisdiction. (2) The complaint did not specify the persons against whom the protection of the District Magistrate was asked. The original complaint was against *Benaris* generally without any particulars being specified. In the two complaints brought to his notice, certain persons were named, but they did not include all the *Shevadharis* to whom his order has been made to apply. The section requires that the parties concerned should be named specifically, for they are to be served with notices to attend the Court and state their case to the District Magistrate. (3) No such notice was issued in this case and the parties concerned had thus no opportunity to put in their respective claims. The Government Pleader admitted that, in so far as Dnyandev Badve's complaint is concerned, the order was an *ex-parte* order and not passed on any inquiry such as is contemplated by the sections. (4) The case is not covered by proviso to clause (iv), for that proviso relates to

(1) 11 M. 323. (2) 14 C. 361. (3) 19 C. 127.
(4) 18 M. 41. (5) 14 B. 165.

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the attachment of the property. There was no such attachment, but a definite order in favour of *Badvés* as a class and to the prejudice of the [533] *Shevadharis* generally. (5) The order interferes with the decree passed by the High Court. One of these decrees recognised the rights of the *Pujaris* to take part in the *Alankar puja* as held by the First Class Magistrate. This remark applies to the other *Shevadharis* also to a less extent.

In these several respects, the procedure followed by the District Magistrate appears to be defective. It was held in *Queen Empress* v. *Gobind Chandra Das* (1) that it is obligatory on the Magistrate to inform the parties concerned of the grounds of the report or complaint before he makes an order under s. 145. It is also the duty of the Magistrate to ascertain who are the parties concerned, and give them notice before he makes his final order—*Ram Chandra Das* v. *Moncher Roy* (2); *Protap Narain Singh* v. *Rajendra Narain Singh* (3). An order is bad if all the parties interested are not made parties—*Behary Lall* v. *Darby* (4). Following the authorities quoted above, we must hold that the procedure followed by the District Magistrate was defective, and that his order must be set aside. The District Magistrate should re-hear the case after making all the persons interested parties, and receiving the evidence they may produce before him, and pass a fresh order.

Order set aside and case remanded for further hearing.

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APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

DATTATRAYA GOPAL AND ANOTHER (*Original Plaintiffs*), *Appellants* *v.* RAMCHANDRA VISHNU AND OTHERS (*Original Defendants*), *Respondents.** [5th February, 1900.]

Khot—Mortgagee of a co-sharer in the khotki—Khoti Act (Bom. Act I of 1880), s. 16—Settlement register—Entry in the register—Survey Officer's authority to determine the title of persons claiming as mortgagees only from a co-sharer—Declaratory suit—Limitation.

The word "khot" as used in the Bombay Khoti Act (Bom. Act I of 1880) does not include a mortgagee of a co-sharer in the khotki.

[534] The Khoti Act does not give the Survey Officer, when preparing the settlement register, any authority to investigate and determine the title of persons who claim as mortgagees only of a share in the khotki, still less to determine whether an alleged mortgage of a share has been redeemed or is still subsisting.

On 28th April, 1888, the Survey Officer after determining the co-sharers in a khoti village prepared the settlement register under s.16 of Bombay Act I of 1880, in which he entered the names of defendants as mortgagees of a certain share in the khotki. In 1891 plaintiffs, who claimed to be entitled to the said share, on becoming aware of the entry, petitioned the Collector for a removal of the names of the defendants from the register on the ground that their mortgage had been redeemed. This petition was opposed on 15th October, 1892, by defendants, who denied plaintiff's title, and was finally rejected by the Collector on 25th November, 1892. In 1896 plaintiffs filed the present suit to cancel the entry in the register and for a declaration of their own title.

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* Second Appeal No. 585 of 1899.

(1) 20 C. 520. (2) 21 C. 29. (3) 24 C. 55. (4) 21 C. 915.

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Held, that the suit was not time-barred. The cause of action accrued on 15th October, 1892, when defendants denied plaintiffs' title, and not on 29th April, 1888, when defendants' names were entered in the register as mortgagees.

[R., 3 Bom. L.R. 181 (182) ; 6 S.L.R. 210.]

SECOND appeal from the decision of Rao Bahadur M R. Nadkarni, Additional First Class Subordinate Judge A. P. at Ratnagiri.

Plaintiffs sued for a modification of an entry in the Settlement Register prepared on 29th April, 1888, under s. 16 of the Khoti Act (Bom. Act I of 1880).

The entry related to the share of one Ganesh Govind Thakur (defendant No. 4) in the khotki of the village of Goval in the Ratnagiri District.

The entry was as follows :—

1 4 0 Ganesh Govind Thakur Desai.
0 6 8 Out of self-mortgagees as below mentioned.
0 3 4 Bhau Manik Thakur Desai. In this there are mortgagees by right of inheritance and heirship as detailed below :—
8 0 0 Ramchandra Bapuji (5-4-0).
Vaman Vishnu Gokhale (2-8-0).
8 0 0 Vasudev Dhondshet Nakar (2-8-0)
Nama bin Babu Joshi (2-8-0).
Babu bin Devji Mandavkar (2-8-0;.

0 3 4 Chintaman Manik (out of) mortgagees by heirship as above.
0 3 4 Out of Krishnaji Manik mortgagees by heirship as above.

[535] The plaintiffs alleged that the Survey Officer had wrongly entered the names of the defendants Nos. 1 to 3 as mortgagees of 1 anna 16 visvas share out of the 1 anna 4 pies share standing in the name of Ganesh Govind Thakur (defendant No. 4) ; that the mortgage to defendants Nos. 1 to 3 had been redeemed ; and that they, the plaintiffs, were now entitled to the said 1 anna 16 visvas share (*viz.* 3 pies 4 visvas as owners and 9 pies 12 visvas as mortgagees of defendant No. 4).

Plaintiffs further alleged that they were not aware of the proceedings before the Settlement Officer or of his decision till 27th May, 1890 ; that when they came to know of the entry in the Survey Register, they petitioned the Collector on 11th September, 1891, praying for a removal of the names of defendants Nos. 1 to 3 as mortgagees from the settlement register ; that their petition was opposed by defendant No. 1 on 15th October. 1892, when he denied the plaintiffs' title ; and that the petition was finally rejected on 25th November, 1892.

Hence the present suit which was filed in 1896.

Plaintiffs sought for a cancellation of the above entry and for a declaration of their title to the 1 anna 16 visvas share out of the 1 anna 4 pies share of defendant No. 4 in the khotki.

Defendants Nos. 1 to 3 alleged that their mortgage had not been redeemed, and that the claim was time-barred.

The Court of first instance held that the suit was not barred by limitation, as the cause of action did not accrue until the 15th of October, 1892, at the earliest, when the defendant No. 1 denied plaintiffs' title.

The Court, therefore, granted the declaration sought.

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On appeal the First Class Subordinate Judge, A. P., reversed this decree and held that the suit was barred by limitation.

His reasons were as follows :—

"The plaintiffs' cause of action arose on 29th April, 1888, when the settlement officer made his decision as to the interests of several co-sharers in the khotki under s. 20 of the Act, and this suit, not having been brought within six years from the [536] date of that decision, is under art. 120, sch. II of Act XV of 1877, barred by limitation."

Against this decision plaintiffs appealed to the High Court.

N. G. Chandavarkar, for appellants.

M. B. Chaubal, for respondents Nos. 1 and 2.

JUDGMENT.

PARSONS, J. —The First Class Subordinate Judge, A. P., has held that "the plaintiffs' cause of action arose on 29th April, 1888, when the Settlement Officer made his decision as to the interests of the several co-sharers in the khotki under s. 20 of the Act, and this suit, not having been brought within six years from the date of that decision, is, under art. 120, sch. II of Act XV of 1877, barred by limitation." The suit was instituted by the plaintiffs to cancel the entry of the names of the defendants Nos. 1 to 3 as mortgagees of the 1 anna 16 visvas share out of the 1 anna 4 pies share of the khotki of the village of Goval standing in the name of the defendant No. 4, on the ground that the mortgage had been redeemed by them to that extent, and for a declaration of their own title to the said 1 anna 16 visvas share, namely, to 3 pies 4 visvas of it as owners and to 9 pies 12 visvas of it as mortgagees of the defendant No. 4, and for an order that the same be entered in their names. The defendant No. 4 admitted the title of the plaintiffs to the share claimed by them. The defendants Nos. 1—3 pleaded that their mortgage had not been redeemed, and that they had still the right to hold possession of the whole share of 1 anna 4 pies. The Court of first instance held that the mortgage of the defendants Nos. 1 to 3 had been redeemed by the plaintiffs under the decrees in the suits of 1871 and 1874, and that the plaintiffs had proved their right to the share claimed. The appellate Court without going into the merits dismissed the suit as barred by limitation as above stated.

It is not disputed in the case that the survey officer prepared the register after determining the co-sharers in this khotki on the 29th April, 1888. He made the following entry as to this 1 anna 4 pies share :—

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1	4	0	Ganesh Govind Thakur Desai—
0	6	8	Out of self-mortgagees as below mentioned.
0	3	4	Bhau Manik Thakur Desai. In this there are mortgagees by right of inheritance and heirship as detailed below :—
8	0	0	Ramchandra Bapuji (5-4-0) Vaman Vishnu Gokhale (2-8-0).
8	0	0	Vasudev Dhondshet Narkar (2-8-0). Nama bin Babu Joshi (2-8-0). Babu bin Devji Mandavkar (2-8-0).
0	3	4	Chintaman Manik (out of) mortgagees by heirship as above.
0	3	4	Out of Krishnaji Manik mortgagees by heirship as above.

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In his decision he mentions the contentions of the khots that the share had been redeemed and of the mortgagees that it had not been, and he decided in favour of the latter and entered the names of the defendants accordingly. The Judge of the appellate Court admits that the plaintiffs were no parties to the proceedings before the survey officer, and apparently is also of opinion that this suit filed in 1896 would be in time if time was counted from the date the plaintiffs had notice of the entry in the register, but he thinks that under the Khoti Act the date of the decision must be taken as the date from which limitation began to run. It is not necessary to discuss the correctness of this opinion founded on the Khoti Act, because we must hold that the general law applies, and that under it, the plaintiffs' suit, in so far as it seeks a declaration of their title against the title set up by the defendants Nos. 1 to 3 and a consequent reversal of the decision of the survey officer, is within time.

The Khoti Act could only govern this case if the decision of the survey officer was passed under its provisions. Section 16 of that Act says "that the said register shall also contain a list of all the co-sharers of the khotki, if the village be not held by one khot in his own sole right, and shall specify the extent of each such co-sharer's interest in the khotki." All, therefore, that the survey officer is bound to record is the co-sharers of the khotki and the extent of the interest of each, and he is authorised [538] to investigate and determine a dispute as to this matter only. The word "khot" as used in the Act is defined to include a mortgagee lawfully in possession of a khotki, and "khotki" means the aggregate of the rights and interests vested in a khot as such. Thus the only mortgagee recognised by the Act is one who is in possession of the khotki; the term co-sharers of the khotki is not defined, and in the absence of definition it cannot, we think, be held to include mortgagees of co-sharers. This being so, the law nowhere gives the survey officer authority to investigate and determine the title of persons to whom no share of the khotki has been transferred either absolutely or conditionally, but who claim as mortgagees only of a share of the khotki, still less can he decide whether any of those alleged mortgages have been redeemed or are still subsisting. The defendant No. 5 and the defendants Nos. 1—3 might have a dispute upon that latter point and might go before the survey officer to have the dispute settled, but their conduct cannot affect the plaintiffs, and the decision of the survey officer is in excess of his powers, and must be treated as a nullity, and not as a decision under the Khoti Act binding on them. Under the general law applicable to declaratory suits, time will not run until the right to sue accrues. As shown by the Judge of the first Court, this was not until the 15th October, 1892, when the defendants denied the plaintiffs' title.

There is a further point which apparently has been overlooked by the appellate Judge. The shares of the khotki stand entered in the botkhat in the names of persons who are dead. Cause of action would not accrue to their successors-in-title to have their names entered until the death of those sharers, and, similarly, until a title had been acquired, no cause of action would exist in the acquirer. We only mention this, as there is nothing on the record to show when the plaintiffs acquired the title to the share on which they have founded their present claim.

We must, therefore, reverse the decree of the lower appellate Court, which was founded on a wrong determination of the question of limitation, and remand the appeal for a hearing on the merits; and in reference to

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the last argument, that the plaintiff cannot claim a transfer of names in the register or to have their names entered as mortgagees in place of the defendants Nos. 1—3, **[539]** we would only observe that the suit ought now to be treated not as merely one for that purpose, but as one asking also for a declaration of their title as against the title set up by the defendants Nos. 1 to 3, and the appellate Court ought to see whether the decree of the lower Court, which has included both within its scope, is right or not as to either.

We reverse the decree and remand the appeal for trial on the merits with reference to the above remarks. Costs to be costs in the cause.

Decree reversed and case remanded.

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24 B. 539=2 Bom. L.R. 235.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

GOPIKABAI (*Original Defendant*), *Appellant v.* LAKSHMAN (*Original Plaintiff*), *Respondent.** [12th February, 1900.]

Land Revenue Code (Bombay Act V of 1879), s. 216—Holder of an alienated village—Application for introduction of survey by a co-sharer of an inam village.

Under s. 216 of the Land Revenue Code (Bombay Act V of 1879) it is competent to one out of several co-sharers of an alienated village to apply on behalf of and with the consent of all the other co-sharers for the introduction of a survey into the village; and it is not open to the cultivators of lands in the village to question the action of Government in introducing the survey on such application.

The section does not require that the application should be made or signed by all the sharers.

APPEAL from a remand order passed by M. B. Tyabji, District Judge of Thana.

Bapuji Sakharam was the principal sharer in the inam villages of Taran Khop and Ramraj in the Thana District.

The villages were entered in Bapuji's name in the Government records and were entrusted to his management by all the co-sharers.

On the 2nd June, 1885, Bapuji applied to Government, under s. 216 of the Land Revenue Code (Bombay Act V of 1879), for the introduction of survey into the village.

[540] At the date of this application Bapuji was owner of 37 out of 40 shares in the villages and was also a mortgagee in possession of the remaining three shares.

In July or August, 1885, Bapuji purchased the remaining three shares in the villages.

Government sanctioned the introduction of survey into the villages, and the new rates of assessment were fixed by a Government proclamation from 28th June, 1894.

In 1891 Bapuji assigned the whole of his interest in the villages to Lakshman (the plaintiff).

In 1897 plaintiff sued the defendants, who cultivated lands in the villages, to recover the amount of assessment and local cess fixed at the survey settlement.

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* Appeal No. 43 of 1899, from order.

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Defendants contended that the introduction of the survey was illegal, as it was made on the application of Bapuji, who was then not a full owner of the villages in dispute.

The Court of first instance held that Bapuji was not competent to make the application under s. 216 of the Land Revenue Code as he was not a "holder" of the villages within the meaning of the Code; that the extension of the survey was, therefore, illegal; and that the defendants were not liable to pay the survey rates.

The suit was, therefore, dismissed.

On appeal the District Judge held that the survey was properly introduced into the villages and that defendants were liable to pay the new rates of assessment.

He, therefore, reversed the decision of the first Court and remanded the case for a decision on merits.

Against this order of remand, defendants appealed to the High Court.

Robertson (with *D. A. Khare* and *G. S. Rao*), for appellants.

Inverarity (with *M. B. Chaubal*). for respondent.

JUDGMENT.

PARSONS, J.—The respondent, who is found by the Judge of the lower appellate Court to be the holder either as owner or as mortgagee of the whole of the villages of Taran Khop and [541] Ramraj, sued the appellant, who cultivates lands in his villages, for the amount of assessment fixed on them at the survey settlement, which was applied to the villages under s. 216 of the Bombay Land Revenue Code by the Governor in Council under Resolution dated 1st July, 1885, the new rates of assessment having been introduced by proclamation from the 28th June, 1894. The defence raised in the suit was that the extension of the survey was illegal, since it was made on the application not of the holder of the villages but of Bapuji Sakharam, who owned a share of the villages only.

The following facts are proved:—(1) Bapuji alone made the application on the 2nd June, 1885; (2) at the time he owned 37/40 only of the villages, but he was the person who passed the kabulayat for and managed the whole villages, and the sanad for them stood in his name; (3) in July, or August, 1885, Bapuji bought the remaining 3/40 share of the villages; and (4) in 1891 he assigned the whole to the respondent. It is on these facts that we have to determine the point whether the introduction of the survey was legal.

Section 216 of the Bombay Land Revenue Code, 1879, declares that "It shall be lawful for the Governor in Council, on an application in writing being made by the holder of any such village to that effect, to authorise the extension of all or any of the provisions of the said chapters to any such village." The word "holder" is defined as "the person in whom a right to hold land is vested, whether solely on his own account, or wholly or partly in trust for another person, or for a class of persons or for the public. It includes a mortgagee vested with a right to possession." "To hold land" is defined to mean "to be legally invested with a right to the possession and enjoyment or disposal of such land, either immediate or at the termination of tenancies legally subsisting;" and the word "village" includes all lands belonging to any village (see s. 3 (10), (11) and (20) of the Act).

It was argued that Bapuji Sakharam was not the holder of the villages under these definitions and, therefore, that the application made

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by him for the extension of the survey settlement was *ultra vires* and the extension illegal. It may be at [542] once conceded that, if these definitions are to be followed strictly, Bapuji Sakharam was not the holder of the villages,—that is to say, he did not hold the whole of the lands belonging to the villages, but it does not follow that he was not competent to make an application under s. 216. That section does not say that the writing shall be that of all the owners of the village or that they shall all sign the application, but merely that an application in writing shall be made by them. This would cover the case of an application made by one owner on behalf of or with the consent of the other owners. The fact that the villages stood in the name of Bapuji Sakharam, and that he was allowed to pass the kabulayat for them, is enough in itself to show that he was entrusted with the full powers of management of the same, and I consider that the making of an application under s. 216 would fall well within the powers of management conferred on him, so that in making it he ought to be considered to be making it on behalf of all. There is nothing to show that the owner of the small share of 3/40 of the villages did not consent to the application; on the contrary, the fact that he never objected, and has not now come forward to say that he did not consent, is entitled, I think, to be treated as *prima facie* evidence to show that he did consent.

Another argument was adduced in support of the validity of the action of Government in introducing the survey, and that was that even supposing there was a deficiency in the original application, it was cured when Bapuji Sakharam became the holder of the villages, which was in July, 1885, and that after that time the action of Government was perfectly legal, and the new survey rates introduced on and from the 28th June, 1894, can now be recovered by the respondent. There appears to be some force in the argument, but I need not consider it, as I am of opinion that the original application having been made by one owner of land in the villages on behalf of and with the consent of all the other owners, is a valid application under the section in question, and that the cultivators of lands in the villages cannot question the action of Government in introducing the survey on that application.

[543] My learned colleague agrees, and we, therefore, confirm the order, and dismiss this appeal with costs on the appellant.

RANADE, J.—The respondent-plaintiff in the original suit, as also in twenty other suits tried with it, claimed to be owner of 14 annas 6 pies share by right of purchase, and 1 anna 6 pies share as mortgagee with possession, in two inam villages, and he sought to recover the survey assessment with local cess from the different tenants of the lands who were made defendants in these suits. The plaintiff's case was that his predecessor-in-title, Bapuji, had, as purchaser and mortgagee of the two villages, applied in 1885 under the proviso to s. 216 of the Land Revenue Code, and on such application Government had authorised the extension of Chaps. VIII to X to the said two villages, and the assessments claimed were, therefore, properly demandable from the tenant-defendants. These defendants raised a preliminary contention that the respondent-plaintiff's predecessor-in-title, Bapuji, was not the holder of the two villages, who could validly apply to the Government under the proviso to s. 216, and, therefore, the Government order authorising the introduction of the survey was not proper, and the suits for the enhanced survey assessment were not maintainable. The Court of first instance held that Bapuji

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was not competent to make the application, as he was not the holder of the two villages, being only part-owner of the same and a mortgagee of the rest. It, therefore, rejected the claim in all these suits. In appeal the District Judge held that Bapuji was entitled to apply under the proviso to s. 216, and he accordingly reversed the finding and remanded all these cases for further inquiry. The defendant-appellants before us in all these cases contend that the lower Court was in error in holding that one of the co-sharers of an alienated village could apply under s. 216 without the consent of the other co-sharers, and, further, that the Government was competent, on such application, to extend the provisions of Chaps. VIII to X to these villages. It was contended that Bapuji's co-sharers were not shown to have assented or acquiesced in Bapuji's act, and that the suits were defective for want of parties. The s. 216, on which the whole dispute turns, is in these words: 'The provisions of Chaps. VIII to X shall not apply to alienated **[544]** villages, except as is provided for in s. 111 and as in this section; but it shall be lawful for the Governor in Council, on an application in writing by the holder of any such village, to authorise the extension of these chapters.' Chapter VIII refers to survey settlements. This chapter does not apply to alienated villages, unless, on the application of the holder thereof, Government authorises the extension of the chapter. The appellant's contention is that plaintiff's predecessor Bapuji was not the holder in entirety of these two villages. He was purchaser of a part and mortgagee of the rest, and on his application it was not lawful for Government to authorise the extension. The whole question, therefore, is whether Bapuji, when he made the application on 2nd June, 1885, to Government, was the holder of the villages in dispute, who was competent to apply to Government. It is admitted that the sanads of the two villages are in Bapuji's name. It is also admitted that he has been managing vahivatdar of both the villages. It is also proved that at the time of the application he was owner of the rights of all the sharers excepting the owners of 3/40th share of whose rights he was a mortgagee; and of these 3/40th, he bought 2/40th share on 15th July, 1885, and the present respondent-plaintiff has succeeded to all Bapuji's rights of ownership, mortgage and management. The Court of first instance thought that these circumstances did not make Bapuji's predecessor the holder of these two villages under s. 216. It was of opinion that the villages were held by more than one holder, *viz.*, Bapuji, and the mortgagor of 3/40th share, and as such Bapuji alone could not make a valid application.

It seems to me that this was a too narrow construction of the words "holder of the villages" used in s. 216. A "holder" has been defined as being one in whom a right to hold land solely on his own account, or wholly or partly in trust for other persons or a class of persons, is vested. The inclusion of a mortgagee with a right to possession in the word 'holder' makes it clear that Bapuji was a holder of these villages in the strictest sense of the word. As against the tenants, Bapuji was a superior holder with rights against his inferior holders, the tenant-defendants. The subject of Bapuji's application was an alienated village, and it will be seen that wherever the Code speaks of alienated **[545]** villages, or of shares in such villages, it uses the word 'superior holder' throughout—(sections 58, 85, 88—93, 111, 136, 159, 160—163.)

The holder of these villages, therefore, is a superior holder as defined in s. 3, cl. (13). It is not every holder as defined in s. 3, cl. (11), but the holder who is defined as superior holder, and entitled to receive from other holders rent or revenue of an alienated village who is competent to apply,

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and in this view Bapuji was a competent person to apply. Of course every superior holder is necessarily a holder, but under s. 216 he must be not merely a holder, but a superior holder of an alienated village. A superior holder of an alienated village, or a sharer in such a village, has certain responsibilities attached to him. He has to give receipts (s. 58). He has to employ the agency of the village patel to make collections and may not do so himself, and the patel has to account to him for the receipts. He has a right under s. 86 for assistance. He may receive a commission under s. 88, and exercise the powers so conferred under that and the succeeding sections. He is responsible for the revenue due to Government (s. 136). In all these respects, Bapuji and, after him, the respondent-plaintiff was the holder of these villages. The mortgagor of 1/40th share, not having all these powers and responsibilities, was not the holder of these villages, and it was lawful for Government, on the application of such a holder as Bapuji was, to authorise the extension of the survey.

The analogies of the general law, on which the Court of first instance appears to have relied, are not of much value, though it may be noted that the cases relied upon by it, and referred to by the appellant's pleader here, are not very appropriate. In the case of *Balaji* v. *Gopal* (1), the claim was disallowed, because the other sharer had not concurred in bringing the suit. A single co-sharer cannot sue for the rent unless he was acting by consent of the other co-sharers as the manager of them all—*Balkrishna* v. *Moro* (2). In this case, Bapuji was admitted by both sides to be the sole manager of the villages. The cases of **[546]** *Guni Mahomed* v. *Moran* (3) and *Jogendro Chunder* v. *Nobin Chunder* (4) had each its own particular circumstances which do not exist in the present case. *Balkrishna* v. *Moro* (2) is similarly distinguishable, for in the present case there is really no co sharer in the sense of being a holder of an alienated village, with rights independent of those of Bapuji, in his double character of mortgagee and purchaser. There can be no doubt that the words 'the holder of any such village' used in s. 216 are obviously meant to exclude mere holders of shares whose right of possession or management of the villages is recognised by Government. Bapuji alone had these rights, and they have come to the plaintiff-respondent, who was, therefore, properly held by the lower Court of appeal to have been competent to apply to Government, and the action taken by Government on his application was strictly legal, and the suits brought by the respondent-plaintiff were accordingly maintainable.

It appears from the record that the whole of this contention was, to some extent, superfluous, for the tenant-defendants claimed rights under kowls, the legality of which is not admitted by the plaintiff. This is the real point on which the parties seem to be at issue. The preliminary objection had not much bearing on the real contention of the parties. The lower appellate Court has correctly disposed of the question raised, and the remand order was a proper order under the circumstances, and I would, therefore, confirm it and dismiss the appeal with costs.

Appeal dismissed.

(1) 3 B. 23. (2) 21 B. 154. (3) 4 C. 96. (4) 8 C. 353.

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[547] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

HANMANTAPA, A MINOR (*Original Plaintiff*), *Appellant v.* JIVUBAI AND OTHERS (*Original Defendants*), *Respondents.**

[21st March, 1900.]

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Minor—Guardian—Ex-parte *decree against minor—Minor's right to sue to set aside* ex-parte *decree—Proof of negligence or fraud on the part of the guardian—Practice—Genuine gift by father-in-law to his widowed daughter-in-law—Gift by way of affection of a small share of moveable property acquired by the donor while living in union with his sons and grandson—Gift valid—Hindu law.*

It is only where fraud or negligence is proved on the part of the guardian of a minor that the right to bring a suit to set aside the previous decision can be claimed by a minor or his administrator.

The plaintiff, a minor represented by an administrator, sued to recover possession of two houses. With respect to one of the houses there had been previous litigation. The plaintiff was the defendant, a minor represented by his guardian, and one of the present defendants was the plaintiff in that litigation, and an *ex-parte* decree was passed against the plaintiff.

Held, that the decision in the previous litigation barred the present claim with respect to the house which was the subject of that litigation, no negligence being proved on the part of the plaintiff's guardian therein.

Where there is a genuine gift by a father-in-law to his widowed daughter in-law by way of affection, out of a small share of moveable property most of which was acquired by the donor while living in union with his sons and grandson, the gift cannot be impeached as being opposed to the principles of Hindu law.

[**R.**, 29 B. 51 (62)=6 Bom. L.R. 268; 13 Ind. Cas. 475=22 M.L.J. 321=11 M.L.T. 103=(1912) M.W.N. 89; **D.**, 30 M. 452 (454)=17 M.L.J. 405=3 M.L.T. 23.]

SECOND appeal from the decision of T. Walker, District Judge of Dharwar, varying the decree of Rao Saheb Sheshgeri, R. K., Second Class Subordinate Judge of Hubli.

The plaintiff, a minor represented by his administrator, sued to recover possession of two houses and some gold ornaments, alleging that he was the undivided grandson and heir of his deceased grandfather, Yellappa, who died possessed of moveable and immoveable property; that the plaintiff's administrator was in possession of all the property left by Yellappa except the property in suit; that the defendants were in wrongful possession of the said property and refused to part with it on the strength [548] of a will alleged to have been executed by Yellappa in favour of defendants Nos. 1 and 2; that Yellappa had no authority to dispose of the property by will, as it was ancestral and undivided, and that he professed to dispose of the property under the will as his self-acquired property and granted it to the defendants as a gift *inter vivos* at the instigation of his widowed daughter-in-law (plaintiff's paternal aunt) Yamnava and her daughter defendant No. 1, with the intention of defrauding the plaintiff. Defendant No. 2 was the husband of defendant No. 1, and defendant No. 3 was joined because he was in actual possession.

Defendant No. 1 answered (*inter alia*) that Yellappa had no ancestral property; that one of the houses in suit was exclusively owned by him and he transferred it with possession to the defendant under a deed dated the 31st March, 1893; that the minor plaintiff having

* Second Appeal No. 537 of 1899.

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subsequently dispossessed the defendant, she filed a suit, No. 127 of 1894, against him represented by the Nazir of the Court as his next friend, and got an *ex-parte* decree in respect thereof; that an application, No. 25 of 1895, was made to set aside the *ex-parte* decree, but it proved unsuccessful, therefore the present suit was *res judicata*; that the ornaments and the other house in suit belonged to Yellappa, who granted them to defendant's mother Yamnava by a deed dated the 31st March, 1893, and that Yamnava subsequently transferred them to the defendant on the 13th September, 1893.

Defendants Nos. 2 and 3 supported some of the allegations of defendant No. 1, and added that they were sued needlessly.

The Subordinate Judge found that the suit as regards the house about which there was prior litigation was not *res judicata*; that the property in suit was the joint ancestral property as between the plaintiff and his grandfather Yellappa; and that the gift of the property by Yellappa to Yamnava and defendant No. 1 was not valid as against the plaintiff. He, therefore, allowed the claim.

On appeal by the defendants, the Judge held that the claim with respect to one of the houses was *res judicata* and that the houses were the ancestral property of Yellappa, but not the ornaments. He, therefore, varied the decree by allowing the plaintiff's [549] claim with respect only to one of the houses which was not the subject of the former litigation. The rest of the claim was dismissed.

The plaintiff preferred a second appeal.

Branson with *Narayan G. Chandavarkar*, for the appellant (plaintiff).—The Judge was wrong in holding that the *ex-parte* decree in the former suit operated as *res judicata*. That suit was not defended, and the Court had no opportunity to consider the question of title to the house comprised in that suit. The first Court found that the Nazir, who represented the minor plaintiff as his next friend in that suit, was guilty of negligence in not defending the suit, and, therefore, it held that the decision in that suit was not *res judicata*. The Judge in appeal found that negligence on the part of the Nazir was not proved. We contend that the very fact that the Nazir did not defend the suit, proves negligence on his part. Whether the Nazir was guilty of negligence or not, is, no doubt, a question of fact, but his conduct has prejudiced the minor plaintiff and, therefore, that decree must be set aside—*Lalla Sheo Churn* v. *Ramnandan* (1); *Cursandas* v. *Ladkavahu* (2). Further, when the present administrator made an application to set aside the *ex-parte* decree, he was ordered to file a fresh suit for that purpose. We, therefore, filed the present suit. Consequently the Judge ought to have very carefully considered whether the Nazir was negligent in the performance of his duty as the next friend of the minor plaintiff.

The next question relates to the burden of proof with respect to the nature of the property. The Judge finds that the houses were ancestral property in the hands of Yellappa, and, therefore, he had no right to dispose of them. He allowed our claim with respect to one of the houses, and the claim of the other house was rejected on the ground of *res judicata*. Notwithstanding that the Judge held that the houses were ancestral property, he placed the burden of proof with respect to the ornaments on us and disallowed our claim to them on the ground that we had not proved

(1) 22 C. 8.

(2) 19 B. 571.

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that they were ancestral property. The ornaments are worth a considerable sum, namely, Rs. 2,000. If the houses were ancestral property, [550] then the natural inference would be that the ornaments of such a considerable value are also ancestral property and the burden of proof would be on the plaintiff to show that they were Yellappa's self-acquisition. The view which the Judge has taken with respect to the ornaments is clearly wrong.

Bhandarkar (with *Shivram V. Bhandarkar*), for the respondents (defendants).—The Judge has found that negligence on the part of the Nazir was not proved. It was for the plaintiff to show that the Nazir was negligent in not defending the former suit. The burden of proof lay on him and he has failed to discharge it. It appears from Ex. 97, the *ex-parte* decree, that the Nazir had no instructions to defend that suit. This circumstance clearly shows that the Nazir's conduct cannot be impeached and the Judge has arrived at a correct finding which is a finding of fact. Even the cases relied on, show that an *ex-parte* decree passed against a minor cannot be impeached unless fraud or negligence is proved on the part of the next friend or administrator. We, therefore, submit that the former decree operates as a bar of *res judicata* to the present suit. It was argued that the present suit was filed for the purpose of setting aside the *ex-parte* decree. But in the present plaint nothing is said about the fraud or gross negligence of the Nazir. Unless there is a specific allegation of fraud or gross negligence, and unless that allegation is clearly proved, a previous decree cannot be set aside. See Hukum Chand on *Res Judicata*, p. 164.

The Judge has, no doubt, found that the houses were ancestral property, but that finding cannot lead irresistibly to the conclusion that the ornaments, which are moveables, were ancestral property. The Judge has given reasons for placing the burden of proof with respect to the ornaments on the plaintiff.

Yamnava was Yellappa's widowed daughter-in-law and defendant No. 1 was her daughter ; therefore, the gift by Yellappa to Yamnava can be supported as a gift on account of natural love and affection. A father governed by the Mitakshara is competent to make such gift of moveable property though it is ancestral.

JUDGMENT.

RANADE, J.—The minor appellant-plaintiff in this case brought the original suit to set aside two deeds of gift passed by his grandfather [551] Yellappa, one in favour of his daughter-in-law Yamnava, and the other in favour of his granddaughter, respondent No. 1, on the ground that Yellappa could not make valid gifts of joint ancestral property. The gift to Yamnava consisted of a house worth Rs. 500 and certain ornaments worth Rs. 2,000, and the gift to the respondent No. 1 was of a house worth Rs. 300. Yamnava made a second gift of the property given to her by Yellappa to respondent No. 1, her daughter, who is thus in possession of the whole of the property. The Court of first instance held that the property was joint ancestral, and that, therefore, Yellappa could not make a valid gift of the same. In appeal, the District Judge held that, as regards the house given to respondent No. 1, the appellant-plaintiff's claim was *res judicata* by a previous litigation between the parties, and that as regards the ornaments, they were not proved to be ancestral and were presumably self-acquired property of which Yellappa could make a valid disposition. The other house was held to be ancestral, and the gift in regard to it was set aside, and the claim as regards the other house and

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ornaments was disallowed. In second appeal the principal points raised are whether the claim for the smaller house is *res judicata*, and whether the ornaments were the self-acquired property of Yellappa.

The undisputed or proved facts in the case are that Yellappa died possessed of moveable and immoveable property worth about Rs. 23,000. He had two sons who died before him, and in 1887 he made a will giving the whole of his property to his grandson, the appellant-plaintiff, who was then, and is still, a minor. Later on, Yellappa changed his mind, and in April, 1890, he executed two deeds of gift, one in favour of his widowed daughter-in-law Yamnava and the other in favour of her daughter, respondent No. 1. Yamnava transferred in 1893 to the same respondent the property given to her. Respondent No. 1 was apparently dispossessed of the smaller house given to her, and in 1894 she brought a suit against the minor plaintiff-appellant represented by his guardian the Nazir, and obtained an *ex-parte* decree. In 1895 the Nazir as guardian applied to set aside the *ex-parte* decree, but the application was disallowed, and thereupon the present suit was instituted in 1896 by the certificated [552] administrator of the minor to set aside both the alienations made by Yellappa.

As regards the alienation of the smaller house, the defence was that plaintiff's claim was *res judicata*. In the first Court this contention was disallowed on the ground that the Nazir had been guilty of wilful negligence in the prosecution of the claim, and that, therefore, the minor plaintiff-appellant could bring a suit to establish his right. The District Court in appeal held that the Nazir was not guilty of any negligence and that, therefore, the present suit was *res judicata* in regard to this house. The Nazir was only appointed by the Court after notice had been issued to the present administrator of the minor's estate, and he failed to take any action. It appears that the Nazir's attempt to set aside the *ex-parte* decree failed, because he received no instructions from those who were interested in the proper management of the minor's estate. It cannot, therefore, be maintained that the present suit was not barred by the former litigation. There is really no conflict between the decision of this Court in *Cursandas* v. *Ladkavahu* (1) and the ruling in *Lalla Sheo Churn Lal* v. *Ramnandan Dobey* (2), such as was noticed in the judgment of the first Court. It is only where fraud and negligence is proved on the part of the guardian of the minor that the right to bring a suit to set aside the previous decision can be claimed by the minor or his administrator. In the Calcutta case gross negligence was held proved, and that has always been held to be a good ground, like fraud or collusion, to extend the protection of the Court in the interest of the minor. The Bombay ruling assimilates negligence of this sort with fraud. As no such negligence has been proved in the present case, the District Judge rightly held that the decision in the former proceedings barred the present claim.

The more important point relates to the validity of the gift of the ornaments. The Court of first instance held that the ornaments were part of the ancestral estate in which Yellappa and the appellant had common ownership, and that, therefore, Yellappa could not make a valid gift of the same. The District Court [553] held that the burden of proof lay on the appellant, and as he failed to discharge it, it decided that the ornaments were presumably the self-acquired property of Yellappa. It is now contended before us that the burden was wrongly placed on the

(1) 19 B. 571.

(2) 22 C. 8.

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appellant and that the presumption was that the property was joint and ancestral. It appears, however, from the judgment of the first Court itself that Yellappa's father, Keshav, was comparatively in poor circumstances. He kept a grocer's shop, and was stated to be in possession of an estate worth about Rs. 1,000 in 1825. In 1841-42 he is shown to have owned two houses for which he paid Rs. 24 a year as house-tax, and his means had not much improved when he died in 1850. Yellappa, on the other hand, admittedly prospered in his business. He owned seven houses for which he paid taxes. He also paid license tax, and the will made by him shows that he was worth about Rs. 23,000. His circumstances were, therefore, in every way superior to those of Keshavappa. The presumption, therefore, that the gold ornaments were acquired by Yellappa was properly drawn by the District Court in the absence of any evidence to the contrary.

The further question still remains whether, as Yellappa and his two sons worked and lived together, the property acquired by Yellappa was one in which the appellant-plaintiff and Yellappa had joint interest to such an extent as to debar Yellappa from making a valid gift of the same without his grandson's consent. It appears from the will that these ornaments had been given by Yellappa to Yamnava, the widowed wife of his other son, and these ornaments were to remain with Yamnava till her death, having been given to her for use. When Yellappa changed his mind later on, he made a gift of them to Yamnava. The real question, therefore, is whether Yellappa could not make a gift of these ornaments to his daughter-in-law out of his own acquisitions even though the appellant-plaintiff was joint owner with Yellappa of the property. The power of the father to dispose of moveables acquired by him in a state of union with his sons has always been admitted to be much larger than what he has over immoveable property. The Mitakshara in express words recognizes this distinction, and gives the father power **[554]** over moveables for indispensable acts of duty, and for purposes prescribed by law, such as gifts through affection, support of family, release from distress, and so forth. Apart from these special causes, the power of the father over joint moveables has been regarded as being subject to the same restraint as the immoveables. The question is not free from difficulty, and Mr. Mayne in s. 310 discusses the views held on the point by the different High Courts; and finally arrives at the conclusion that though the father has a larger power of dealing with joint ancestral moveable property, he can only do so for certain special purposes specified by the Mitakshara. This view of the law is supported by the decision of the Privy Council in *Lakshman Dada Naik* v. *Ramchandra* (1), where the Privy Council set aside the father's will as being valid neither as a gift, nor as a partition, when it gave the whole of the moveable property to one son to the exclusion of the other. The gift in the present case made by Yellappa of the ornaments is, however, not open to the objection which proved fatal in *Lakshman Dada's* case, as in the present case there is no exclusion of one son from the whole property in preference to the widow of another. It must be treated as a case falling within the exception where the power of the father to make gifts of affection has always been upheld. The ornaments had been given to Yamnava for her use, even in the will which gave the whole property to the appellant-plaintiff, and when Yellappa changed his mind, all that he did was, he gave the property in the ornaments to

(1) 7 I.A. 181 = 5 B. 48.

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Yamnava. The decision in *Lakshmam Dada* v. *Ramchandra* (1), therefore, does not affect the gift in the present case. As regards his own acquisitions of moveable property, the decision in *Baboo Beer Pertab* v. *Maharajah Rajender Pertab* (2) shows that a man may dispose of self-acquired property, if moveable, with the qualification that he cannot disinherit any of his sons altogether. The case of *Bhujangarav Ghorpade* v. *Malojirav* (3) was a case of such disinherision, and, therefore, does not apply. See also the ruling in *Akoba Dada* v. *Sakharam* (4). These cases do not really affect the father's power of [555] making a gift for special purposes. In *Baba* v. *Timma* (5), Chief Justice Turner has discussed the question of the father's power to alienate self-acquired moveable estate and his share in ancestral moveable and immoveable property, and he lays down, as the effect of the Mitakshara texts taken together, that though the son is recognized as co-owner with the father, both in the ancestral and self-acquired property, the father has power to dispose of, at his pleasure, self-acquired moveables, and, with consent of the sons, self-acquired immoveables. He has also power to dispose of ancestral moveables for specified purposes inculcated by the texts, and of all property for indispensable acts of duty. The case of *Rayakhal* v. *Subbanna* (6), where a father's conveyance by way of gift to his wife and daughter was set aside at the instance of his son, related to the alienation of ancestral immoveable property, and, therefore, has no bearing on the present case. In *Raghunath* v. *Gobind* (7) an alienation by a father without the son's consent of joint ancestral property by way of a provision for a family idol was upheld against the son, and the decision rests on the Mitakshara texts noted above, permitting gifts of affection and pious and charitable gifts. In that case the property alienated was worth Rs. 693 out of an entire estate worth Rs. 4,000. In the present case the gift of affection represents less than a sum of Rs. 2,000 out of an estate worth about Rs. 23,000, and the gift was made to a widowed daughter-in-law. It is, therefore, a genuine gift by way of affection, and such a gift of a small share of moveable property, most of which was acquired by the donor while in union with his sons and grandson, cannot be impeached as being opposed to the principles of Hindu law. We, therefore, dismiss the appeal and confirm the decree of the lower Court with costs.

Decree confirmed.

(1) 7 I. A. 181=5 B. 48.
(2) 12 M I.A. 1.
(3) 5 B.H.C.R. 161.
(4) 9 B. 429.
(5) 7 M. 357.
(6) 16 M. 84.
(7) 8 A. 76.

24 B. 556 (P.C.)=2 Bom. L.R. 548=4 C.W.N. 517=27 I.A. 86=7 Sar. P.C.J. 710.

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[556] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Davey and Robertson and Sir Richard Couch.

[*On appeal from the High Court at Bombay.*]

PADAPA (*Original Plaintiff*), *Appellant v.* SWAMIRAO SHRINIVAS AND ANOTHER (*Original Defendants*), *Respondents.*

[16th February and 24th March, 1900.]

Vatan—Restriction upon alienation by a vatandar—Mortgage invalid to what extent—Reg. XVI of 1827*—Act III (Bombay) of* 1874.

An alienation by way of mortgage of vatan property, or any part of it, executed when Reg. XVI of 1827 was yet in force, had no operation beyond the life of the vatandar who mortgaged. The mortgage was in its inception void against the heir of the vatandar, and had not become validated against the heir by reason of the repeal of the sections in Reg. XVI of 1827, relating to this subject, by Bombay Act III of 1874.

Kalu Narayan Kulkarni v. *Hanmappa bin Bhimappa* (1) referred to and approved.

The childless widow of a vatandar, deceased in 1847, was the recognised vatandar in possession in 1865. She mortgaged two villages of the vatan to the father of the respondents. The latter two, after litigation, retained possession in 1886, by order of the Commissioner in the Revenue Department, until there should be a decree of Court to the contrary. The widow, according to the judgment below, had held the vatan adversely to her late husband's son, the plaintiff, who was born in 1848 of her co-widow, and he was the true heir, entitled from his birth. But the High Court gave effect to the adverse possession of the widow for the period of limitation supporting the mortgage. The plaintiff was the sole heir of the widow, his step-mother, who died in 1877.

The appellant contended that the vatan as inherited by him was free from the mortgage encumbrance, and that he was entitled to possession.

Held, reversing the decree of the High Court, that the mortgage was void against the heir, and had no force beyond the life of the vatandar who had executed it. The decree of the Subordinate Judge to that effect, and for possession, was maintained.

[R., 34 B. 175=12 Bom. L.R. 143 (147)=5 Ind. Cas. 866; 7 Bom. L.R. 135 (137); 15 Bom. L.R. 266.]

APPEAL from a decree (18th November, 1892) of the High Court reversing a decree (27th July, 1889) of the Subordinate Judge of Sholapur.

The suit was brought on the 16th August, 1887, by Padapa, now appellant, the son of Bhujangapa (named also Bhujangrao) a vatandar, deceased, on the 27th September, 1847, against the two sons of Shrinivas Swamirao, who died in 1880. [557] Bhujangapa left two widows, the junior of whom, Ramova, was the mother of the plaintiff. The senior widow Kalova obtained possession of the vatan in 1865, and on the 15th September in the same year executed a mortgage deed of two villages, part of the vatan property, in favour of Shrinivas, to whom as mortgagee possession was given. The object of Padapa's suit was to have that mortgage declared void against himself, and to have possession of the property free of the encumbrance.

Whether the mortgaged property as part of the vatan was free or not, was the question in this appeal. The circumstances of the transaction

(1) 5 B. 435.

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appear in their Lordships' judgment: see also *Swamirao* v. *Padapa bin Bhujangrao* (1), the report of the appeal to the High Court.

The plaintiff, born on the 16th September, 1848, was a minor at the date of the mortgage. On the 9th May, 1864, Kalova's right to the vatan estate was confirmed, and afterwards the vatan was made over to her upon the terms of what is called the "Gordon Settlement." This expression is explained in a judgment of the High Court in a case in 1888, *Appaji Bapuji* v. *Keshav* reported in I.L.R., 15 Bom., 13, to which a note in I.L.R., 18 Bom., the report of the present suit, refers.

The Subordinate Judge decreed the plaintiff's claim on the ground that the property which Kalova had dealt with in 1865 was vatan, and could not be alienated by her for more than her lifetime. Other grounds were given which appear in the report in I. L. R., 18 Bom., p. 26.

The High Court (Bayley, officiating C. J., and Candy, J.) reversed the decision of the Subordinate Judge. They were of opinion that Padapa, if the successor of Kalova to the vatan, was entitled to recover the lands free from any mortgage executed by his predecessor. But they decided that Kalova was not the rightful incumbent of the vatan, and that the plaintiff was not her successor as vatandar. They considered that Padapa from the date of his birth in 1848 was himself the vatandar, and Kalova was without title; that she was, unless she was the **[558]** manager acting on his behalf, a mere trespasser. Thence they inferred that Padapa, if she was to be so regarded, though Bhujangapa's son and heir, had lost by lapse of time and Kalova's adverse possession his right to recover the lands as vatan, free from the mortgage encumbrance. They added that there was good reason to suppose that in 1865 Padapa was cognizant of the mortgage and, after it, acquiesced in the transaction. They allowed the plaintiff to redeem the villages mortgaged, that being a right which he inherited, on payment to be made within six months, of Rs. 9,000, with 12 per cent. simple interest thereon from April, 1881, to January, 1887, with, in default, foreclosure.

The judgment appears in full at p. 28 of the report of *Swamirao* v. *Padapa bin Bhujangrao*, in I. L. R., 18 Bom.

Mr. *O. W. Arathoon*, for the appellant, argued, as the principal reason against the validity of the mortgage of the 15th September, 1865, that, as a consequence of the enactment in s. 19 of Reg. XVI of 1827, and the decisions thereupon, no mortgage could have operated to charge the vatan when the heir had become entitled to the possession of it on the death of the widow who, as vatandar, had mortgaged the vatan villages. The appellant as the sole surviving member of the vatandar family was entitled to succeed to the vatan either as heir to Bhujangapa or as heir to Kalova. As heir to either one of these he was entitled to possession on the death of his step-mother, and the property was freed by law from any encumbrance created by his predecessor. It was an untenable view of the High Court that Padapa had so acted, by acquiescing in the transaction, that he must be taken to have consented to the charge upon the property having been valid against himself. It had not been proved that Kalova had had an adverse possession for more than twelve years; but even if that were assumed, the inalienable character of the property affixed to it as vatan would have remained unchanged. Kalova could not have charged the vatan, or any part of it, for a period beyond her own life. The Courts below had both referred to the inalienable character of the

(1) 18 B. 22 (28).

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vatan property, and it was submitted that here there had been nothing to constitute this case an exception.

The respondents did not appear.

JUDGMENT.

[559] On the 24th March their Lordships' judgment was delivered by

LORD DAVEY.—This is an appeal from a decree of the High Court of Bombay dated the 18th November, 1892, which reversed the decree of the Subordinate Judge of Sholapur dated the 27th July, 1889. The sole question is whether the appellant is entitled to possession of two villages free from any incumbrance by the respondents, or whether they have a mortgage on the property which is valid and effectual against him. The High Court decided in favour of the respondents.

The facts of the case are complicated, but so far as material for the present purpose are as follows :—

The villages in question form part of certain vatan lands formerly belonging to Bhujangapa, the vatandar. He died on the 27th September, 1847, leaving two widows, Kalova and Ramova. The senior widow Kalova was childless. The appellant is the son of Ramova born on the 15th September, 1848. The legitimacy of the appellant's birth was at one time disputed and is denied by the respondents in their statement of defence in this suit. Both Courts below agree in holding that the appellant has in previous litigation and in this suit established his status as legitimate son and heir of Bhujangapa.

Before the appellant's birth the Revenue authorities placed the vatan under sequestration, and it so remained until an order was made by Mr. Gordon, President of the Special Commission, on the petition of Kalova recognising her title to the vatan. This order bears date the 10th August, 1863, but she does not appear to have been put in actual possession until some time in 1865. No sanad from the Government to Kalova is produced, but possession was given on the terms of what is called the Gordon Settlement which were ratified by the Bombay Act III of 1874. By this settlement the services were commuted for one-fourth of the income, but the tenure continued to be vatan.

On the 15th September, 1865, Kalova made the mortgage in question of the vatan to Shrinivas, the father of the respondents and she subsequently made further charges on the property in his favour. Litigation ensued between Kalova and Shrinivas **[560]** with the result that on the 31st August, 1875, Shrinivas was placed in possession of the property and he was in possession at Kalova's death, which took place in November, 1877.

By an order of the Collector of Bijapur dated the 4th April, 1881, the appellant was placed in possession of the revenues of the villages. But that order was reversed by an order of the Commissioner of the 20th March, 1886, on the erroneous ground that the prohibition against alienation of vatan property did not preclude the making of a mortgage, and the respondents were by the Commissioner's order restored to possession until the appellant should bring a decree of a competent Court to the contrary.

The appellant thereupon obtained from the Government a sanad dated the 22nd December, 1886, whereby the villages were conferred upon him subject to a fixed annual payment in lieu of services, and it was provided that the said lands and cash allowances should be continued without

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demand of services and without increase of land tax over the above fixed amounts and without objection or question on the part of Government as to the rights of any holders thereof so long as any male heir to the vatan —lineal, collateral or adopted within the limits of the vatandar family— should be in existence.

The present suit was commenced by the appellant on the 16th August, 1887, against the respondents, who are the two sons of Shrinivas now deceased. The prayer of the plaint, so far as material, was for an order that the villages in suit being in the nature of vatan property the mortgage was not binding after the death of Kalova and for possession.

The material defences were (1) that the villages were not vatan property, (2) that Kalova's and their own possession under a title derived from her had been adverse, and so the suit was barred by limitation.

The Subordinate Judge in his judgment dated the 27th July, 1889, found (1) that the cause of action arose in the month of February, 1886, (2) that the property was vatan and consequently not liable for the debt (even if proved) after Kalova's death, and (3) that the appellant was entitled to possession. Accordingly the **[561]** Subordinate Judge made a decree that the appellant should recover possession and that the investigation of mesne profits be reserved—all costs on the respondents.

The respondents appealed to the High Court. By their judgment the learned Judges held that the property was vatan and there was nothing in the sanad granted to the appellant to take the property out of the well-established rule (which was in force in 1865 when the mortgage to Shrinivas was executed) that alienation by way of mortgage of any portion of vatan property had no force beyond the life of the vatandar mortgagor. They referred to the case of *Kalu Narayan Kulkarni* v. *Hanmapa bin Bhimapa* (1). It was there held that a mortgage by a vatandar of vatan property executed in 1871, when Reg. XVI of 1827 was yet in force, was in its inception void against the heir of the vatandar, and did not become validated against the heir by reason of the repeal of that Regulation by Act III (Bombay) of 1874. Their Lordships agree with that decision and think it is directly applicable to the present case.

The learned Judges, therefore, held that *prima facie* the appellant (if the successor to Kalova) was entitled to recover the lands free from any mortgage executed by his predecessor. But they considered that Kalova was not the incumbent of the vatan, and the appellant was not her successor. Having established his legitimacy he was the vatandar from the date of his birth and Kalova was a trespasser. It followed that his title to recover the lands free from any incumbrance on the ground that he is the vatandar has been lost by limitation. True he is also the heir of Kalova, but in that character his only right was to redeem Kalova's mortgage.

It may be useful to recapitulate the material dates in the case. The appellant was born on the 15th September, 1848, and, therefore, attained his majority on the 15th September, 1866. Kalova died in November, 1877. At her death, therefore, the appellant was not barred from asserting his original title as heir of Bhujangapa. But on the 15th September, 1878, it would seem that he became barred and his title as son and heir of Bhujangapa was extinguished. Thereupon Kalova's heir would *prima facie* be **[562]** entitled to the vatan and if he found other persons in possession also claiming under Kalova he could maintain an action against them in which

(1) 5 B. 435.

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their title as against him would be determined. The question would then come to be who has the best title through Kalova, she being assumed to have been the rightful owner of the land. If the persons in possession did not claim under Kalova, but were independent trespassers, other considerations would arise.

Unfortunately their Lordships had not the advantage of hearing counsel for the respondents in support of the ingenious argument which found favour in the High Court. But giving it their best consideration they think it errs in leaving out of sight the incidents of the tenure and Kalova's true position.

Assuming that the appellant was barred by limitation from recovering the lands as heir of his father from those claiming under Kalova, and consequently his title as vatandar from his own birth was extinguished, that circumstance did not alter the tenure. The lands remained vatan and Kalova was vatandar *de facto* with all the rights and subject to all the restrictions incident to that tenure. In the order of Mr. Gordon, under which Kalova obtained possession, it was conferred on her as vatan and in the mortgage made by her the lands are described as vatan. And in all the proceedings in the Collector's office she is recognised as vatandar. It is clear, therefore, that she held possession as vatandar and in no other character. Consequently, she could not make any alienation which would be valid against her own heir whether that heir was the appellant or another. And on the assumption that the appellant's earlier title is extinguished by limitation there is nothing to preclude him from asserting his title as Kalova's heir. The argument seems to give greater right to possession as vatandar by wrong or usurpation than would be enjoyed by a rightful vatandar.

The learned Judges seem also to have thought that the appellant had in some way adopted the mortgage.

Their Lordships think the evidence insufficient to support this finding. But it is unnecessary to discuss this topic further, because if the mortgage was void against the appellant, and not **[563]** merely voidable, no amount of acquiescence short of the period of limitation would give it validity as against the appellant.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the High Court should be reversed, and instead thereof the appeal to that Court should be dismissed with costs. The respondents must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant :—Messrs. *T. L. Wilson and Co.*

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Before Sir L. H. Jenkins, Kt., Chief Justice and Mr. Justice Russell.

MULJI PURSHOTUM AND ANOTHER, (*Plaintiffs*) *v.* CURSANDAS NATHA AND OTHERS (*Defendants.*)* [20th and 27th July, and 16th August, 1900.]

Hindu law—Inheritance—Deceased brother's son—Sister—Daughter of a predeceased son.

A brother's son succeeds as heir in preference to a sister or a grand-daughter (daughter of a predeceased son).

In the island of Bombay the sister's place as heir is to be determined by the text of Mayukha.

Both under the Mayukha and the Mitakshara, the sister comes in as a *gotraja sapinda* and, as such, must be postponed to the brother's son, who is a *sapinda*.

[R., 23 Ind. Cas. 239 = 10 N.L.R. 24; 28 B. 82; 32 B. 300 (304) = 10 Bom. L.R. 389; 7 Bom. L.R. 232 (234); 38 B. 438 = 16 Bom. L.R. 283 = 23 Ind. Cas. 944.]

ORIGINATING summons taken out by executors to determine who was entitled to the undisposed of residue of the property of Kessowji Jadhavji, who died on the 9th February, 1886, leaving a large amount of self-acquired moveable and immoveable property.

By his will which was dated the 8th February, 1886, and of which probate was obtained on the 7th May, 1886, he directed that his daughter-in law (widow of his predeceased son Liladhar) should adopt one Karamsi Madhavji, and he bequeathed the residue of his property to the said Karamsi Madhavji.

The executors filed a suit (No. 185 of 1887) to have the will construed, and it was finally determined by the Privy Council in 1898 (1) that Karamsi Madhavji took no interest in the estate. **[564]** In consequence of this decision (2), there was an intestacy as to the residue, and the executors filed the present suit, in order to ascertain who was the person entitled to it.

The testator at the date of his death had only four near relations, namely,

(1) a nephew, Cursandas Natha (defendant No. 1) the son of his predeceased brother;

(2) a daughter-in-law Ladkavahu, the widow of his predeceased son Liladhar;

(3) a grand-daughter Bai Kesserbai (defendant No. 8), the daughter of his son Liladhar and Ladkavahu; and

(4) a sister Devabai.

The said Devabai died subsequently to the testator (on the 4th October, 1897) and her representatives were made defendants.

The executors submitted that either the nephew or the sister or the grand-daughter of the testator was entitled to the estate as his heir.

Viccaji and *Bhownuggree*, for plaintiffs.

Lang (Advocate General) and *Starling*, for first defendant (the brother's son).

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* Suits Nos. 66 and 503 of 1900.

(1) 23 B. 271.

(2) *Vide* also 12 B. 185; 19 B. 571; 20 B. 713.

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As to defendant No. 8 (daughter of the predeceased son of the testator) being not entitled, he cited *Venilal* v. *Parjaram* (1); *Nallanna* v. *Ponnal* (2).

As to brother's son being preferred to sister, he cited Mitakshara, Chap. II, s. iv, pl. 1—7; Mayukha, Chap. IV, s. 8, pl. 16 and 19; Stokes' Hindu Law, pp. 8, 88, 89 and 443; West and Bühler, pp. 11, 460, 468.

There is no competition between "brother's son" and "sister." Mayukha gives to brother's son a place higher than the sister. No case gives the sister priority over him. Council also cited *Vinayak* v. *Lakshmibai* (3); *Thakoorain Sahiba* v. [565] *Mohun Lall* (4); *Sakharam* v. *Sitabai* (5); *Kesserbai* v. *Valab Raoji* (6); *Bhagirthibai* v. *Kahnujirav* (7); *Vijiarangam* v. *Lakshuman* (8).

Setlur (*Rivett-Carnac* with him), for defendants Nos. 2, 2*a*, 2*b* and 2*c*. In addition to the above cases he cited *Lallubhai* v. *Mankuvarbai* (9); Nirnaya Sindhu; *Manilal* v. *Bai Rewa* (10); *Vithaldas* v. *Jeshubai* (11); *Nahalchand* v. *Hemchand* (12).

Sayani and *F. S. Taleyarkhan*, for defendant No. 5.

Setalvad (*Branson*, *Raikes* and *Bhandarkar* with him) for defendant No. 8. (son's daughter) cited Sarvadhikari, p. 110, 482; Colebrooke, p. 342; *Lallubhai* v. *Mankuvarbai* (9); *Kesserbai* v. *Valab Raoji* (6).

JUDGMENT.

JENKINS, C. J.—Kessowji Jadhavji, a wealthy Bhatia of Bombay, died on the 9th February, 1886. The day before his death he made a will, but it has been determined by successive decrees of this Court, confirmed on appeal by the Judicial Committee of the Privy Council, that the disposition he thereby purported to make of his residue failed, and an intestacy ensued. The question for our determination is who under the circumstances is by right of heirship entitled to the property comprised in the undisposed of residue. This property is composed of both moveables and immoveables, and is all self-acquired.

It is conceded on all hands (though Mr. Setlur on behalf of his clients was at one time disposed to contend otherwise) that the succession to the property must be determined by the Hindu law of inheritance prevailing in the island of Bombay.

The following table will show the state of Kessowji's family at the time of his death :—

(1) 20 B 173. (2) 14 M. 149. (3) 1 B.H.C.R. 117 (122).
(4) 11 M.I.A. 386 (402). (5) 3 B. 353. (6) 4 B. 188.
(7) 11 B. 285 (294). (8) 8 B. C. H. R. 244 (273).
(9) 2 B. 388 (445, 446). (10) 17 B. 758. (11) 4 B. 221.
(12) 9 B. 31.

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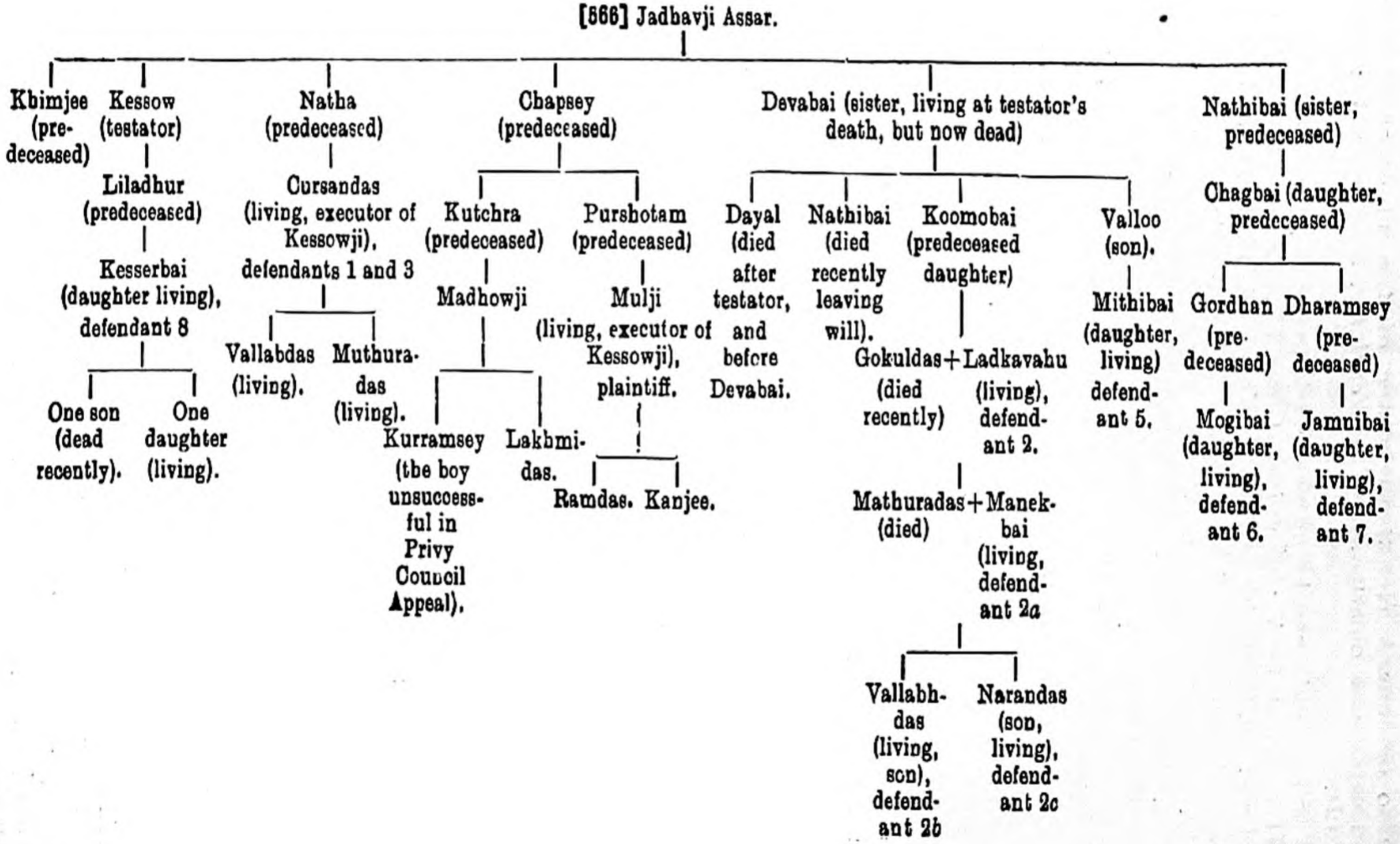

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[567] Of those whose names appear in this table the rival claimants are (1) the brother's son, Cursandas, the first defendant; (2) the sister Devabai, who is now represented by defendants Nos. 2, 2*a*, 2*b*, 2*c* and 5; and (3) the son's daughter, defendant No. 8.

I will first deal with the claims of the defendant No. 1 on the one hand and the defendants Nos. 2, 2*a*, 2*b*, 2*c* and 5 on the other, the contest as between them being whether a brother's son or a sister is the preferential heir.

It is only in this Presidency that these two could come in competition with each other; for neither in Bengal nor the North-West Provinces would a sister be admitted as an heir, while in Madras she only ranks as a *bandhu*. Here, however, she admittedly can claim a high rank in the line of heirs, and the question for our decision is whether she is to be included in, or postponed to, the compact series of heirs. For the sister, it is argued that she comes in that series and before a brother's son by virtue of that reading of the Mitakshara which would include sisters under the word "brethren" in the passage which runs: "On failure of the father, brethren share the estate' (Mit. II, iv. 1). For the brother's son, it is contended that the sister has no place in the compact series; and that she comes in as a *gotraja sapinda* in accordance with the view represented by Nilakantha.

Having thus indicated the general line of the argument before us on this point, I will now examine the relevant authorities, beginning with the text of Yajnavalkya, and then proceeding to deal in order with the Mitakshara, the views of Nanda Pandit and Balambhatta, the Mayukha, the *vyavasthas* of shastris, and last of all the decided cases.

The law of inheritance, so far as we are concerned with it, is based on the text of Yajnavalkya, which runs: "The lawfully wedded wife and the daughters also, both parents, brothers likewise, and their sons, gentiles (or agnates), cognates, a pupil and a fellow student; on failure of the first among these the next in order is heir to the estate of one who departed for heaven leaving no male issue; this rule extends to all classes." (Yajnavalkya II, 135-137.) Both Vijnanesvara in the Mitakshara and [568] Nilakantha in the Vyavahar Mayuka build on this same text their commentaries on the law of succession.

It is cited in the Mitakshara (Mitak., ch. II, i, 2), and the rights of brothers is elaborated in chap. II, s. iv. In the first verse of that section Vijnanesvara says: "On the failure of the father, brethren share the estate;" and in verse 7: "On failure of brothers also, their sons share the heritage in the order of their respective fathers." Then in the first verse of the next section it is laid down: "If there be not even brothers' sons, gentiles share the estate."

The only elaboration on the text of Yajnavalkya, so far as brothers are concerned, is the distinction between brothers of the whole blood and those of the half. There is no express mention in the text of the Mitakshara of sisters as heirs to the property of a divided male, nor is there any indication that the word "*bhratarah*" (brethren) includes sisters. This, however, was the reading of this passage of the Mitakshara adopted by two commentators Nanda Pandit and Balambhatta. Nanda Pandit on this point says: "The daughters of the father and other ancestors must be admitted like the daughter of the man himself for the same reason." But if this reasoning be adopted, and the analogy applied in its integrity, it is clear that the brother's son would have priority just as a man's grandson is preferred to his daughter.

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While an examination of Balambhatta's views shows that her opinion is based upon the theory that the male gender everywhere includes the female so that she admits not merely sisters under the word "brothers," but by the same process of reasoning she brings in the daughter's daughter, the brother's daughter and the sister's daughter, a result that in no school is accepted.

This brings me to Nilakantha, the author of Mayukha, a work of acknowledged authority throughout the Bombay Presidency and more particularly in Gujarat and the island of Bombay. This is how he deals with the question now in hand :—"In regard to the term '*bhratarah*' (brothers), that failing brothers sisters (succeed), because the word '*bhratarah*,' (as being) *virupaikasesha* (a speies of compound where out of **[569]** two dissimilar members, one only remains), means brothers and sisters in accordance with the grammatical rule of Panini—*bhratri putram swasrti duhitribhyam* (the words '*bhratri*' (brothers) and *putra* (son) when compounded with *swasri* (sister) and *duhitri* (daughter)), &c. But this is not so: there being no authority for the word '*bhratarah*' being construed as a *virupaikasesha* compound."

"If the sons of brothers have their fathers alive at the time of the death of a paternal uncle, and on this account have no share in the wealth of a paternal uncle, they shall take the share of their father by a division with the other paternal uncles by the analogy of the rules in the case of sharers with different fathers, the allotment of shares according to the fathers (*i. e.* per stirpes).

"In default of brothers' sons come the *gotraja sapindas*, gentile relations. Among them first is the paternal grandmother.

"In default of her comes the sister, for, says Manu (Chap. IX, v. 187) 'the wealth of the deceased goes to whoever is next among *sapindas* and the rest.' Similarly Brihaspati—"When a childless man leaves several clansmen, *sakulyas* (kinsmen) and *bandhavas* (relations), whoever of them is the nearest takes the wealth of the deceased. Being begotten in her brother's family (*gotra*) she possesses the qualifications of a *gotraja*. The community of *gotra* does indeed not exist in the case of a sister. But the quality of being a *sagotra* is not mentioned here as being a condition of the right of taking the wealth as heritage." Nilkantha, therefore, it will be seen, not only controverts that which for brevity I will hereafter call the doctrine of Balambhatta, but assigns to the sister a place which is out of harmony with it.

This brings me, in order of date, to the *vyavasthas* of the shastris, the more pertinent of which are collected in Messrs. West and Bühler's work on Hindu Law (3rd Ed.) at. pp. 463—469. There seven cases with the opinions of the shastris on the claim of a sister to rank as an heir are cited. In all of them, but two, the Mayukha as well as the Mitakshara appears to have been the **[570]** authority relied on, the Mayukha being always mentioned first and the two exceptions apparently come neither from Gujarat nor the island of Bombay. At the same time in none of them is any reference made to either Balambhatta or Nanda Pandit, and I find at p. 17 of Messrs. West and Bühler's work the following remarks as to Balambhatta :—"She generally advocates latitudinarian views, and gives the widest interpretation possible to every term of Yajnavalkya; instances of this tendency may be seen in the quotations given below. Her opinions are held in comparatively small esteem and are hardly ever brought forward by the shastris, if unsupported by other authorities." Not only, however, do the shastris in the cases cited in pp. 463-469

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omit mention of Balambhatta and Nanda Pandit, but at p. 461 there is set out a case in which it is obvious that the opinion was founded on a view opposed to Balambhatta's doctrine. It was a case from Surat decided apparently on the 11th October, 1845, and though the Mayukha was not cited as an authority, but the Mitakshara, preference was accorded to the nephews as against the sister. I am not concerned with the correctness of the shastris' views: the point I desire to make is that though they admit the sister into the line of heirs, they do not reach that result by Balambhatta's doctrine, but rather by the view of the Mitakshara that Nilakantha propounds. And here it must be noted that the reference by the shastris is to that passage of the Mitakshara, which cites the leading text of Yajnavalkya, so that there is nothing in the reference itself which demands the conclusion that reliance was placed on Balambhatta's doctrine rather than on that of Nilakantha. If the matter rested here, therefore, I should have thought the more probable inference was that these shastris based their opinions on the Mayukha and Nilakantha's view of the construction to be placed on the words "brethren" and "gentiles," with which they obviously were acquainted, than on the doctrine of Balambhatta, to which, so far as appears, they never referred.

But at this point the dicided and reported cases of the Courts come in, and demand consideration: for it is on what appears in them that Mr. Setlur has based his argument.

[571] The earliest case cited before us is *Vinayak Anandrav* v. *Lakshmibai* (1) decided in the Supreme Court on the 28th of March, 1861, and in the Privy Council on the 17th of February, 1864. It was a suit brought by the first cousins of the propositus (sons of the father's brother) against his mother and sisters for a declaration that the plaintiffs were entitled to the estate and effects as the ultimate heir in remainder on the decease of the mother, and that the mother might be restrained from selling or disposing of any part of the estate, from committing waste, and from adopting. The defendants demurred on the ground that the plaintiffs had not shown themselves to be entitled on the mother's death, and the case was argued and determined on demurrer by two of the Judges of the Supreme Court, Sausse, C. J., and Arnould, J. The judgment, after quoting the passage in the Vyavahar Mayukha to which I have already referred, proceeds as follows:—"Considering the high authority of the Mayukha on this side of India, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance of the paternal grandmother; but according to certain commentators on the Mitakshara, the sister comes next in order of inheritance after the brother." And then reference is made to the passage of the Mitakshara I have already read and the views of Nanda Pandit and Balambhatta. Then after dealing with Sir Thomas Strange's adverse comments on this reading of these two commentators, the learned Judges say:—"The expression, therefore, in Sir T. Strange's first volume that the opinion in question stands controverted (if by such expression he meant "is conclusively or finally controverted)" must be regarded as too strong. A similar construction should apparently be given to the words 'parents' and brethren'. He, no doubt, adds, on the authority of Mr. Colebrooke, that Jagannath observes that it is nowhere seen that sisters inherit the property of their brothers, but Jagannath, whatever the case may be on the other side of India, is

(1) 1 B.H.C.R. 117.

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not of binding authority on this. It would on the whole appear a safe proposition to lay down that in this part of India, even if the opinion be not established that the term 'brethren' includes 'sisters' and, therefore, if sisters do not inherit on failure of brothers or brother's son, yet at all events that the doctrine [572] of the Mayukha must be held to prevail, and that sisters come next in succession to the paternal grandmother. Either doctrine, however, will entitle the sister here to succeed to the inheritance of Gajanan upon the death of Lakshmibai." The demurrer was in the end allowed. It is important here to observe, that though the learned Judges referred to the doctrine of Balambhatta, and with an apparent leaning towards it, they never state that this view had been generally adopted in this Presidency either by the shastris or the Courts, and they are careful to make the passage in the Mayukha the ultimate basis of their decision. The case then went on appeal to the Privy Council, whose judgment was delivered by Knight Bruce, L.J. In the course of it the L.J. says: "Now upon the question of the capacity of the sisters to be heirs to their brothers, different views of the law appear to have been taken in different parts of India, and a general leaning in favour of excluding the sister in such a case appears to prevail in Bengal, but appears not to prevail in the territories of Bombay. It is a point on which probably it may be said that a reasonable difference of opinion may be entertained; but the authorities most regarded in Bombay, whence this case comes, seem to be in favour of preferring the claim of the sisters to the claim of the male paternal relatives, the cousins. The Chief Justice, in giving his judgment in the present case, quotes a book with which we are not familiar here, but which seems to be well known in Bombay and to be considered and treated as an authority there." Later, after quoting a portion of Sir M. Sausse's judgment, which deals with the application of the Mayukha and Mitakshara to this point, the judgment proceeds: "Their Lordships desire not to be understood as expressing an opinion that the general course said to be taken in Bengal upon this subject, or upon the construction of the word 'brethren' is wrong: but certainly neither are they satisfied that the construction put on the passage in the Mitakshara, which has been mentioned and generally adopted, as it seems, in Bombay wrong. Their Lordships come to the conclusion that the general rule in Bombay has long been, and is to treat the sisters as heirs to the brothers, rather than the paternal relatives of the description of the present plaintiffs. Accordingly their Lordships [573] think that they may safely and properly in the present instance adopt or accept that rule. They consider that, in Bombay at least, the sisters in such a case as this are heirs of the brother." Their Lordships then dismissed the appeal.

I have read at length from these judgments, because they are the foundation on which the whole of Mr. Setlur's argument for the sister has been built up, and because that argument went the length of suggesting, that these judgments, if not alone, yet in the light of the gloss latter on placed on them by Sir M. Westropp, were actually decisive of the point with which we are now concerned. The ratio, however, of the decision appears to me to be this, that in Bombay there was a general usage under which sisters were preferred to male consins, and that if this could not be supported by the text of the Mitakshara, a point on which no certain pronouncement was made, still it had the express sanction of the Mayukha, which alone was sufficient. In neither Court, as it seems to me, was it decided either that Balambhatta's view of the extended meaning to be given to the word 'brethren' was correct; or that, if it

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was, the exact position of the sister in the line of heirs was to be determined by the text of the Mitakshara as interpreted by Balambhatta and not by the Mayukha.

The next case in which the position of the sister in the line of heirs came directly in question is *Sakharam* v. *Sitabai* (1) heard in 1879 by the Chief Justice Sir Michael Westropp and Mr. Justice Kemball. The case came from the Thana District, where, in the opinion of the learned Judges, the law of the Mayukha prevails, and the competition was beween a sister and a half-brother ; it was held that the sister was the preferential heir.

Now, it must be noticed that, whether the Mitakshara as interpreted by Balambhatta or the Mayukha in fact governed the case, the result would have been the same, for, according to each, the sister is entitled to preference to the half-brother. Therefore, the relative value of these two authorities did not come in question. Still great reliance has been placed by Mr. Setlur on certain passages in Sir M. Westropp's judgment, **[574]** which attribute to *Vinayak Anandrav's case* the result of having decided that in Bombay Balambhatta's doctrine is established. The first of these passages is at p. 360 of the report, where the Chief Justice says : "It will be observed that Nilakantha declines to adopt the construction of the word 'brethren' maintained by Nanda Pandita and Balambhatta as a ground for introducing the sister into the order of heirs (Vyav. May., Chap. IV, s. VIII, pl. 16) but effects that purpose by treating her as a *gotraja sapinda* next to the paternal grandmother (*Ibid.* pl. 18, 19). His rejection of Nanda Pandita's and Balambhatta's construction of the word 'brethren,' which occurs as well in the original text of Yajnavalkya, II, pl. 135, 136, as in the Mitakshara, Chap. II, s. I, pl. 2, (where the order of succession to a man who dies separate and without leaving issue is set forth), and Chap. II, s. IV, pl. 1, was not adopted either by the Supreme Court, or by the Privy Council in *Vinayak Anandrav* v. *Lakshmibai* (2) in which the decision, whereby the sisters were preferred to paternal first cousins of the propositus, was rested as well on Nanda Pandita's and Balambhatta's construction of the term 'brethren' in the Mitakshara, as upon Nilakantha's mode of bringing in the sister as an heir. A perusal of the judgments of the Supreme Court and Privy Council shows clearly that they rested their decision on both grounds."

Then lower down the Chief Justice says (p. 363) : "The decision in *Vinayak Anandrav* v. *Lakshmibai* (2) was partly rested upon the Mayukha and partly, as we have seen, on the special construction given to the Mitakshara by Nanda Pandita and Balambhatta, and has been frequently followed ;" but a few lines further on I find this : "But the Mayukha, which was, as we have said, the main foundation of the decision of the Supreme Court and Privy Council, expressly gives to the sister a place in the order of heirs above half-brothers (*vide* Vyav. May., Chap. IV, s. VIII, pl. 16, 20)."

At p. 369 of the same volume is the case of *Dhondu* v. *Gangabai*, decided by Sir Michael Westropp and Mr. Justice F. D. Melvill, where, in a case also from the Thana District, it **[575]** was held that a sister succeeded in preference to a remote male relative. Beyond asserting the claim of a sister as an heir the decision throws no light on the present case.

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(1) 3 B. 353.

(2) 1 B.H.C.R. 117 (126).

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This brings me to the case of *Kesserbai* v. *Valab Raoji* (1) in which the principal contest was between a half-sister, a stepmother and an uncle's widow: the preference was accorded to the half-sister. The use that is sought to make of this case is the reiteration in it by Sir Michael Westropp of the acceptance in this Presidency of Balambhatta's doctrine, which would include sisters. Special reliance was placed on that portion of the judgment commencing at p. 202 of the report, where it is said: "In the present case of a half-sister it is important to remember that the law in this Presidency on the succession of the full-sister does not rest solely upon either of the two great authorities here, the Mitakshara and the Mayukha, but is built upon them both being taken conjointly. An examination of the cases as to the succession of a sister in West and Bühler's Work (2nd Ed., 182 to 185) shows that both of those authorities are quoted by the shastris in support of their opinions in favour of the sister. Their standing reference to the Mayukha is p. 140, line 1, corresponding with Chap. IV, s. VIII, pl. 19 in Borrodaile's translation. One of them also refers to p. 134, 1, 4, corresponding with Chap. IV, s. VIII, pl. 1 of Borrodaile's translation, which is merely a transcript of the text of Yajnavalkya, to which we are now about to refer. The only relevant reference of the shastris to the Mitakshara is fol. 55, p. 2, line 1, which corresponds with Chap. II, s. 1, pl. 2 of Colebrooke's translation. That passage, so translated, furnishes the order of succession on the failure of sons principal and secondary, and runs thus:—'The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, (*gotrajas*), cognates (*bandhavas*), a pupil and a fellow student; on failure of the first among these, the next in order is, indeed, heir to the estate of one who departed for heaven, leaving no male issue. This rule extends to all (persons and) classes.' This is only an echo of the texts 136, 137 in II Yajnavalkya (by Roer and Montriou) which are as follows:—

[576] 'If a man depart this life without male issue: (i) his wife, (ii) his daughters, (iii) his parents, (iv) his brothers, (v) the sons of brothers, (vi) others of the same *gotra*, (vii) kindred more remote, (viii) a pupil, (ix) a fellow student—these succeed to the inheritance; each class upon failure of the one preceding. This rule applies to all the castes. Amongst none of these nine classes is the sister expressly mentioned; but inasmuch as the shastris have referred to this passage in the Mitakshara in support of her right to inherit and her place in the order of heirs, they must have understood that she was included in one of these nine classes. Looking at the place which they have generally assigned to her, it appears to us, they must have intended to refer either to class iv, *viz.*, the brothers, or, to class vi, the *gotrajas* (gentiles); but bearing in mind the meaning in which the term '*gotraja*' is used by the Mitakshara, *viz.*, belonging to the same family' (West and Bühler, p. 179, 2nd Ed.), it is difficult to suppose that the shastris meant to refer to that class as found in the Mitakshara. Sisters, when married, belong to the *gotra* of their husband, not of their father or brother. There would remain, then, only the fourth class, 'brothers' as explained by the commentators on the Mitakshara, Balambhatta and Nanda Pandita; those observations are confined to the *vyavasthas* of the shastris so far as they call the Mitakshara to their aid. Some of them indeed style the sister a *gotraja*. That, however, must be in relation to the Mayukha's doctrine as to her, and in the sense that she was born in the *gotra*, not that she belonged to it after marriage.

(1) 4 B. 188.

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The leading Bombay case, *Vinayak Anandrav* v. *Lakshmibai* (1), on the question of sister's claim to succession, fully upholds the view that her right has been rested on the Mitakshara as well as upon the Mayukha, though perhaps mainly upon the latter. In saying that it has been based upon the Mitakshara, we mean, upon it as interpreted by Balambhatta and Nanda Pandita. On the passage in the Mitakshara (Chap. II, s. IV, pl. 1), where it is stated that 'brethren' rank next in succession after the father of the deceased propositus, Mr. Colebrooke's note as to the term 'brethren' is: "The commentators, [577] Nanda Pandita and Balambhatta, consider this as intending brothers and sisters in the same manner in which 'parents' have been explained 'mother and father' (s. III, pl. 2) conformably with an express rule of grammar (Panini, 1, 2, 68). They observe that brother inherits first, and, in his default, the sister. This opinion is controverted by Kamalakar and by the author of the Vyavahar Mayukha. The objection of the latter to this interpretation of the term 'brethren' occurs in the Mayukha, Chap. IV, s. VIII, pl. 16, but this portion of Nilakantha's doctrine was not accepted either by the Supreme Court or by the Privy Council in *Vinayak Anandrav* v. *Lakshumibai*.

Much, too, has been made of the passage at p. 207 of the report, where the learned Judges say: "Both the Mitakshara and the Mayukha agree in postponing half-brothers to full-brothers; but the Mayukha brings in the paternal grandmother in co-parcenary with the half-brother, a provision which has never been known to be enforced, and postpones the latter to the sons of the full-brothers, whom it also places before the paternal grandmother and the sister. Vandravan not having left any brother or brother's son, it is unnecessary to decide in this case whether a full-brother's son should be placed according to the Mitakshara, *i.e.*, afer half-brothers, or according to the Mayukha, *i.e.*, before both the paternal grandmother, the full sister and the half-brother although possibly the decision in the present case may affect that question. It has been decided that the full-sister ranks in this Presidency before the half-brother (*Sakharam* v. *Sitabai*) on the authority of the Mayukha and of the Mitakshara as interpreted by Balambhatta and Nanda Pandita."

It was suggested, that in the light of this passage there was an irresistible inference that it appeared to those learned Judges their decision covered the question as to how a sister's position was to be ascertained and that it was in favour of her ranking higher in the line of heirs than a brother's son.

I think the argument seeks to extract from this judgment more than it contains. If Sir M. Westropp's opinion be accepted as to the establishment of Balambhatta's doctrine in [578] Bombay—I will later refer to this point—then a conflict as to the position of the sister may arise. But except so far as the judgment seeks to bring that conflict into prominence, I see nothing in the judgment that affects the point. I say so, because, if the conflict exists there, it can only be settled by determining which is to carry the greater weight, the Mitakshara (perhaps it would be more correct to say the Mitakshara as interpreted by Balambhatta) or the Mayukha, and on that this particular judgment throws absolutely no light. And this for a good reason; because, to whichever authority recourse were had, the result would have been the same.

(1) 1 B. H.C.R. 117 (126).

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I have said that the judgment does bring into prominence the conflict between the Mitakshara and the Mayukha, and this demands a word of explanation.

In this case Sir M. Westropp did not rest with re-asserting that Balambhatta's doctrine was established by *Vinayak Anandrav's case*; but he at p. 203 expresses the opinion that the shastris must have relied on Balambhatta's doctrine. I have already dealt with this point in an earlier part of my judgment, and I need not here re-state my views on this point.

At p. 210 of the same volume is the case of *Lakshmi* v. *Dada* in which it was held that a full-sister is the heir of her deceased brother in preference either to his step-mother or paternal first cousin. But it throws no light on the present question.

At p. 214 is the case of *Biru* v. *Khandu*, which decided that a sister succeeds in preference to his cousin on the paternal side one degree removed. The direct bearing of the case on that now before us is the following remark of Sir M. Westropp on *Vinayak Anandrav's case* :—" Both the Privy Council and the Supreme Court there acted as well on the Mitakshara interpreted by Nanda Pandit and Balambhatta as on the Mayukha."

From this examination of the cases it will, I think, be seen that the authority in favour of the view that Balambhatta's doctrine has been accepted in Bombay is Sir M. Westropp's opinion to that effect. That opinion is entitled to the greatest respect even though it may not have been necessary for the **[579]** decision of the case in which it was pronounced. But, so far as it purports to rest on *Vinayak Anandrav's case*—and that seems to be its real basis—I think it proceeded on a misapprehension of what was actually decided in that case. In this connection the remarks of Sir Charles Sargent in *Parvati* v. *Ganpatrao* (1) are pertinent. He there says : " It was said that a 'son' is to be construed as including a 'daughter' as 'brethren' was interpreted as including 'sisters' by Nanda Pandit. But that mode of interpreting has been much controverted, as may be seen by the discussion of the authorities in the judgment in *Vinayak* v. *Lakshmibai* which was decided upon the authority of the Mayukha."

This is the last case which bears directly on the question whether Balambhatta's doctrine is part of the law of Bombay, but before leaving this subject I would wish to refer to the opinion of a very able lawyer and Sanskrit scholar, the late Mr. Mandlik, who was specially conversant with the law of this Presidency. At p. 370 of his Hindu Law he says: "Balambhatta alone includes two more females, namely, the sister and the daughter-in-law. Her reasoning is defective. If new reasons had to be given for the first time one or two *Smriti* texts may be cited to support the inclusion of the above two, but that would be making new law, and would be open to the charge of symbolical reasoning, which has been so often condemned."

The conclusion, therefore, to which I come on a consideration of all the authorities is that there is no actual decision that Balambhatta's doctrine has been accepted here, though there are the opinions to which I have referred in favour of that view ; and I further think that it has not been shown that the doctrine is part of the law to be administered in the island of Bombay.

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(1) 18 B. 177 (183).

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If I am right in this conclusion, no conflict arises; and both under the Mayukha and the Mitakshara as interpreted here the sister comes in as a *gotraja sapinda* and as such must be postponed to the brother's son.

But if I am wrong in this, and if the true view be that Balambhatta's doctrine has been accepted here, then it remains to consider whether that doctrine or Nilakantha's opinion is to prevail.

[580] Now for the sister it has been argued that in this view there is a conflict between the Mitakshara and the Mayukha, and in such a conflict the former must prevail. I feel some doubt as to whether the conflict is so much one between the Mitakshara on the one side and the Mayukha on the other, as a contest between Balambhatta's view and Nilakantha's view of the Mitakshara. Now, if it were merely a question as between Balambhatta and Nilakantha, there can I think be no doubt that Nilakantha would prevail.

But for the sake of argument I will assume that the conflict is between the Mitakshara and the Mayukha, and that it is necessary to determine which is to govern in this case to the exclusion of the other. Now it has to be borne in mind that in this case we are concerned with the succession to the property of a deceased resident of the island of Bombay, where admittedly the Mayukha is most highly esteemed.

The first case to which I will refer is *Vijiarangam* v. *Lakshuman* (1) decided in 1871 by Sir M. Westropp and Mr. Justice West. It was there said by the Chief Justice at p. 273: "The question of Hindu law arising from these facts is a difficult one; but looking (as I think we are in this island bound to do) to the Mayukha for the law to regulate this case, Thamabai must be regarded as the legal representative of Yesubai." Then in *Babaji* v. *Anandrav* (referred to in 12 Bom. H. C. R., p. 68) the doctrine of the Mayukha was preferred by Sir Charles Sargent to that of the Mitakshara in a case of inheritance between parties resident in the island of Bombay.

In *Lallubhai* v. *Mankuvarbai* (2) Sir M. Westropp says: "Manu, the Mitakshara and the Mayukha are the reigning authorities in this Presidency. In the island of Bombay a general—I do not, however, by any means say universal—predominance has been given by our predecessors in the Recorder's, Supreme and High Courts to the Mayukha over the Mitakshara, partly perhaps they found it more frequently quoted to them than the Mitakshara, and partly perhaps because the Mayukha was very much praised and followed in Gujarat. Bombay having formed a part of the **[581]** ancient kingdom of Gujarat before the cession of the former to the Portuguese, and partly because the Mayukha was the more modern treatise and might be supposed to embody to a considerable extent such variations in usage as had occurred during the long period which intervened between its composition and that of the Mitakshara." And at p. 421 he says: "Those authorities and instances of female *gotrajas* already specified render it unnecessary, I think, to endeavour to fortify our opinion by resort to the ambiguous case of a sister, whom Nilakantha in the Vyavahar Mayukha brings in as an heir after the paternal grandmother, which the sister undoubtedly is in this Presidency." Here, then, the Chief Justice declares himself in undoubting terms in favour of the view of the Mayukha, and against the doctrine of Balambhatta, and curiously he supports this opinion by reference to *Vinayak Anandrav's case*.

(1) 8 B.H.C.R. 244.

(2) 2 B. 388 (418).

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In *Chotay Lall* v. *Chunnoo Lall* (1) the point is thus referred to: "With regard to the case most relied on in the High Court of Bombay, it would seem to have been there admitted that, after the decisions which have taken place, the daughter's estate according to the Benares school was a restricted one. The family of Thakoordas is governed by the law of that school. Certainly it is not governed by the law of the Mayukha, which was held to be the governing law in the Bombay case."

Mr. Justice West in *Bhagirthibai* v. *Kahnujirao* (2) speaks of "the special and almost paramount authority which the Vyavahar Mayukha has gained in Gujarat and in the city of Bombay is not recognized in other parts of this Presidency."

The proper inference, as it seems to me, to be drawn from these authorities is that the sister's place as an heir in the island of Bombay must be determined by the text of the Mayukha, which must on this point prevail over the doctrine of Balambhatta. The result is in consonance with the view expressed by the shastris in the cases cited at pp. 461 to 467 of Messrs. West and Bühler's book, it accords with the opinion of Sir M. Westropp expressed in *Vijiarangam* v. *Lakshuman* to which I have already referred, and it agrees, for what it may be worth, with the order **[582]** in which these two claimants are entitled to perform the *pretashradhas* according to the Nirnaya Sindhu.

I now pass on to consider whether the brother's son or the deceased son's daughter has the better claim. Now it is clear that the brother's son finds a place in the compact series of heirs, while the son's daughter is not to be found there. Is she to be included by any rule or principle of Hindu law? Mr. Setalvad's argument for the son's daughter is that the compact series of heirs is not exhaustive, or exclusive, and judged by the test of propinquity,—that is to say, the number of common particles,—the son's daughter is entitled to come in above the brother's son.

The point is covered by an authority binding on us. I refer to *Venilal* v. *Parjaram* (3), where it was held by Jardine and Ranade, JJ., that a daughter's son was not a *gotraja sapinda*. If this be so, clearly she cannot claim to rank above any one in the compact series of heirs. But even if it were open to us to hold a daughter's son to be a *gotraja sapinda*, it would not help her claim here, for it is well established that persons who claim as answering a general description come in after those whose order of succession is specifically fixed. Therefore, I think, as against the son's daughter, the brother's son must have the better claim.

The result is that, in my opinion, Cursandas, the brother's son, is entitled to succeed.

The costs of all parties will come out of the estate, those of the executors as between attorney and client, and for the purposes of taxation the case will be treated as a long cause.

RUSSELL, J.—The original plaint in this suit was filed on the 3rd of February, 1900, by Mulji Purshotam and Cursandas Natha, the surviving executors of the last will of Kessowji Jadhavji, against the said Cursandas Natha and the other surviving representatives of the said Kessowji Jadhavji, praying that it might be declared who in the events that have happened is more entitled to the residue of the estate of the said Kessowji Jadhavji. The pedigree C to the plaint shows the present representatives of the

(1) 4 C. 744 = 6 I.A. 32. (2) 11 B. 285 (294). (3) 20 B. 173.

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said Kessowji Jadhavji. At the hearing on the 20th July, 1900, it [583] was directed that the son of Cursandas Natha should be struck out as one of the plaintiffs : and it was further directed that the plaint should be treated as an originating summons under the rules of this Court. An originating summons was accordingly taken out before me in chambers, and the suit must be treated as if an originating summons had been taken out, and a plaint filed therewith as usual, in the first instance.

The said Kessowji Jadhavji was a Cutchi Bhatia (*i. e.* by caste a Bhatia who came originally from Cutch) and died in Bombay on the 9th day of February in the year 1886, leaving moveable and immoveable property of very large value, which was admitted to have been entirely self-acquired by him during the many years he had carried on business there. He made his last will on the 8th of February, 1886, probate thereof was obtained on the 7th of March, 1887, and a copy thereof is annexed to the plaint and marked A. It having been held, in suit No. 185 of 1887 filed in this Court, by the final judgment of the Judicial Committee of the Privy Council on the 12th day of July, 1898, that Karamsi Madhavji, in the said will referred to, was entitled to no interest in the estate of the said Kessowji Jadhavji, it follows that there is an intestacy in respect of the residue of the estate of the said Kessowji Jadhavji.

The said Kessowji Jadhavji at the date of his death left him surviving only three near relatives, *i.e.*, the first defendant, Cursandas Natha, the son of his predeceased brother, Natha Jadhavji, his sister Devabai (who died on the 4th October, 1897, after him, leaving the representatives specified in the said pedigree and in paras 8 and 12 of the plaint), and the 8th defendant Kesserbai, daughter of his predeceased son Liladhar Kessowji.

The question in this case is whether, at the death of the said Kessowji Jadhavji, the first defendant his brother's son, the 8th defendant his predeceased son's daughter, or the said Devabai his sister, are or were his nearest heirs or legal representatives, respectively, according to Hindu law. This question has been so fully discussed in the judgment of the learned Chief Justice, which has just been delivered, that it is almost unnecessary for [584] me to deliver a separate judgment, and I only do so by reason of the importance of the question on a point of law and its importance to the parties concerned.

I propose, in the first place, to discuss the question as lying between the said first defendant, the brother's son of the testator, and his said sister, Devabai, and in doing so to cite the various texts and text books and other authorities on the point, and then to discuss the case of *Vinayak* v. *Lakshmibai* (1), which has been so strongly relied upon in the argument of Mr. Setlur for the representatives of the said Devabai.

In the Mitakshara, II, L. L., it is stated that " the wife and the daughters also, both parents, brothers likewise, and their sons, gentiles (*gotrajas*), cognates (*bandhus*), a pupil and a fellow student : on failure of first of these, the next in order is indeed heir to the estate of one who has departed for heaven, leaving no male issue." See Sarvadhikari, Tagore Law Lectures, Lect. XII, p. 564.

In the Vyavahara Mayukha, Chap. IV, s. viii, pl. 16, it is stated (*inter alia*) "in default of the mother the uterine brother, in default of him his son."

(1) 1 B. H.C.R. 117.

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Pl. 18 : " In default of brother's sons succeed the gentile relations (*gotrajas*) within the 7th degree, being connected by funeral oblations (*sapindas*). The first of these is the paternal grandmother, from this text of Manu : ' The mother also being dead, the father's mother shall take the heritage (on failure of brothers and nephews).' "

Pl. 19 : " In default of her, comes the sister : under this text of Manu ' To the nearest *sapinda*, male or female, after him, in the third degree, the inheritance next belongs."

Pl. 20 : " On failure of her, the paternal grandfather."

In Nirnaya Sindhu, p. 219, cited in 2 Beng. L. R. at p. 35 it is stated " The sister's son is expressly recognised," *e.g.* " In default of the brother's sons, the father, mother, daughter-in-law, the sister and her sons, are entitled to perform the *shradh* because they are the heirs."

[585] Messrs. West and Bühler (3rd Ed.), p. 11, say : "The law of Gujarat in some cases, it seems, alters the orders of the authorities and places the Vyavahara Mayukha before the Mitakshara. As an instance may be quoted the case of a sister's succession to her brother's estate, *immediately after the paternal grandmother*, which, in accordance with the Mayukha, is allowed in Gujarat." The same authors at p. 467 put Q. 7 : " A man separated from the rest of the members of his family. Afterwards he died. His sisters claim the right of inheritance. The grandmother and the nephew of the deceased have objected to their claim. The question is, which of these relations is the heir of the deceased ?

"Ans. If the deceased was a separated member of his family, and if he had no son, his nephew is his heir. When there is no nephew, the mother of the deceased's father, and in her absence, his sisters are his heirs. Surat, October 11th, 1845."

Again at p. 467. "Q. 4 : A man died. He has left neither a wife nor children. His sister and her son claim to be his heirs. The question is, which of these should be considered the heir ?

" Ans.—If there are none of the man's following relations, *viz.*:—

a son,	a daughter's son,	a uterine brother,
a wife,	the mother,	a half-brother and
a daughter.	the father,	a brother's son,

a *gotraja* relation becomes the heir, and among the *gotraja* relations, the father's mother is to be preferred to all others. The next *gotraja* and heir is the sister, and then the sister's son. Ahmedabad, April 20th, 1847."

It will be observed that both these answers come from Gujarat ; see also West and Bühler, p. 114.

In Mayne's Hindu Law (5th Ed.), s. 490, it is said : " In Western India, sister is considered a *sapinda* by virtue of her affinity to her brother (s. 488). She is also considered a *gotraja sapinda*, on the ground that this term is satisfied by her having been born in her brother's family, and that she does not lose her position as a *gotraja* by being born again in her husband's *gotra*, upon her marriage. That being so, her place among the *gotrajas* is determined by nearness of kin, and is settled to be between the grandmother and grandfather."

[586] In the year 1884, a bill entitled Khoja Succession Bill was drawn up ; and for the purpose thereof (as appears from the *Bombay Government Gazette*, 18th July, 1884, p. 35) a statement was prepared by the Honourable Mr. Melvill, the President of the Commission appointed to draw up the Bill, which shows the following order of succession to the separate property of a deceased Hindu in Bombay, according to Hindu

law, as follows :—(1) sons, (2) grandsons, (3) great-grandsons, (4) widow, (5) daughter, (6) daughter's sons, (7) mother, (8) father, (9) brothers, (10) half-brothers (11) brother's sons, (12) half-brother's sons, (13) grandmother, (14) sister (according to the Mayukha),(15) grand-father, (16) more distant relations.

No doubt by the decision in *Sakharam* v. *Sitabai* (1) it must be taken as established that the full sister takes precedence over the half-brother, but I shall hereafter show that that case does not establish the proposition that the full-sister takes before the brother's son, and, having regard to the authority upon such a question of the late Mr. Melvill, I think this table is entitled to considerable weight. Again, in *Vithalrao* v. *Ramrao* (2), Ranade, J., says: "The half-brother comes in only after brother, brother's son, grandmother and sister as a *gotraja sapinda* along with the grandfather."

It appears to me, therefore that the above texts and authorities would be sufficient to entitle us to hold that, according to Hindu law in Bombay, the brother's son takes precedence over the full sister.

Mr. Setlur, however, who argued the case in support of the claim of the sister, relied strongly upon the decision in *Vinayak* v. *Lakshmibai*(3) and certain other cases in which that was followed. It becomes, therefore, necessary to discuss these cases in some detail.

In *Vinayak Anandrav's case* (3) a suit was filed by plaintiffs, who were the sons of a separated brother of a Hindu who had died leaving a widow, an infant son, three daughters and a brother, the plaintiffs' father, to have themselves declared entitled to the **[587]** estate and effects of the deceased, their father's brother. The said deceased had left considerable self-acquired property. The defendants demurred on the ground that the plaintiffs were not the heirs or legal representatives of their deceased uncle or his son. The Bombay High Court in their judgment set out (*inter alia*) paras. 16, 17, 18 and 19 of the Mayukha, which I have above referred to, and continue as follows:—"Considering the high authority of the Mayukha on this side of India, this alone might seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother, but according to certain commentators on Mitakshara, the sister comes next in order of inheritance after the brother. The passage in the Mitakshara is contained in the first paragraph of chapter 2, s. 4 : "On failure of the father, brethren share the estate." Nanda Pandita and Balambhatta, says Mr. Colebrooke in his note on this passage, consider that as including " brothers and sisters " in the same manner in which " parents" have been explained "mother and father," and conformably with an expressed rule of grammar They observe that the brother inherits first, and in his default the sister. This opinion Mr. Colebrooke states is controverted by Kamalakar and by the author of the Vyavahar Mayukha. After discussing this question the judgment goes on : "It would appear on the whole a safe proposition to lay down that in this part of India even if the opinion be not established that the term 'brother' includes sisters and, therefore, if sisters do not inherit on failure of brothers or brother's sons, yet at all events that the doctrine of Mayukha must be held to prevail and that sisters come next in succession to the paternal grandmother. Either doctrine, however, will entitle the sisters' heirs to succeed

(1) 3 B. 353. (2) 24 B. 317 (338). (3) 1 B. H. C.R. 117.

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to the inheritance of Gajanan (the deceased's son) upon the death of Lakshmibai (the widow)."

In this passage, it appears to me that the words "or brother's sons" are of the utmost importance, for those words clearly put the brother's sons next to the brother. The Privy Council, after citing the abovementioned passages of the Mayukha, state that they are not prepared to say that the construction put upon the passage in the Mitakshara in question, and generally adopted as it seems in Bombay, is wrong. They go on to say. "Their Lordships [588] come to the conclusion that the general rule in Bombay has long been and is to treat the sisters as heirs to the brothers rather than the paternal relations of the description of the present plaintiffs * * *. They consider that in Bombay at least the sisters in such a case as this are the heirs of the brother." It will be observed that the Privy Council do not refer in any way to the brothers' sons and limit their judgment to considering the sisters in such a case as the present as the brothers' heirs. I cannot treat this judgment as laying down or intending to lay down any course of inheritance different from that which is stated in the authorities I have referred to. Moreover, that case was decided on demurrer, and was not directed to the locating of sisters in the line of inheritance, and the estate had been separately acquired by the father of the sisters. I observe also that at p. 117 of West and Buhler this case is cited in support of the statement "that in Gujarat and in the island of Bombay, the Mayukha partially prevails over the Mitakshara, and the sister is there allowed to inherit immediately after the paternal grandmother."

Again, in *Sakharam* v. *Sitabai*(1) the question lay between the full-sister and the half-brother, and the full-sister was held entitled to succeed as heir to the estate of her deceased half-brother. I cannot find anything in that case to lead to the conclusion that the sisters are entitled to preference before brothers' sons. On the contrary the texts cited at p. 363 of the report say that the sister is next entitled to take the share. "This concerns him who leaves no issue, &c."

Again, in *Dhondu* v. *Gangabai* (2), the sister was preferred to a very remote male relative of the deceased. In *Kesserbai* v. *Valab Raoji* (3), Kesserbai, the widow of one Soonderdas, filed the suit against the executors of one Hassibai and against the lessee of certain property, one Inderji Nursey. It appeared that one Jaitha, the brother of the plaintiff's deceased husband, married Maneckbai, who had a son Vandravan who married Avalvahu, both of whom died without issue in 1846. Jaitha married secondly Hassibai, who died in 1876. Hassibai had two daughters, [589] Ratan who died in 1854 and Ladcoover who died in 1863, both of whom were survived by their husbands, who were living at the date of the suit. The defendant executors contended that on the death of Vandravandas' widow his estate devolved either upon Hassibai as her *shridhan* or upon Ratan and Ladcoover, Vandravan's half-sisters, subject to Hassibai's right for maintenance. It was held that in Bombay the sister and half-sister inherit in priority to the step-mother and the paternal uncle's widow. After referring at p. 201 to the text which I have above referred to from I. L. R., 3 Bom., Westropp, C. J., in delivering judgment says at p. 207: "Both the Mitakshara and the Mayukha agree in postponing half-brother to full-brothers, but the Mayukha brings in the paternal grandmother in co-parcenary with the half-brother—a provision which has never been

(1) 3 B. 353. (2) 3 B. 369. (3) 4 B. 188.

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known to be enforced—and postpones the latter to the sons of full brothers whom it also places before the paternal grandmother and the sister. Vandravan not having left any brother or brother's son, it is not necessary to decide in this case whether a full-brother's son should be placed according to the Mitakshara, *i.e.*, after the half-brother, or according to the Mayukha, *i.e.*, before both the paternal grandmother, the full-sister and the half brother, although possibly the decision in the present case may affect that question. It has been decided that the full-sister ranks in this Presidency before the half-brother (*Sakharam* v. *Sitabai*, *ubi supra*) on the authority of the Mayukha and of the Mitakshara as interpreted by Balambhatta and Nanda Pandita." According to this dictum, therefore, it would appear as if the sister should take precedence of the brother's son; but I find at p. 491, I. L. R., 2 Bom. (*Lalloobhai* v. *Ladcooverbai*) the learned Chief Justice says: "Those authorities and the instances of female *gotrajas* already specified render it unnecessary, I think, to endeavour to fortify our opinion by resort to the ambiguous case of a sister whom Nilakantha in the Vyavahara Mayukha brings in as heir after the paternal grandmother, which the sister undoubtedly is in this Presidency."

The conclusion I have arrived at on this point is that the brother's son being a *sapinda* (see Mayne, s. 463) takes precedence over the sister, who is a *gotraja sapinda*. According [590] to the Mitakshara, Mayukha and Manu ix, 217, "*gotraja*" designates the paternal grandmother, (2) the *gotraja sapindas*. After the paternal grandmother the Mitakshara names the following *gotrajas* as entitled to inherit the property of a separated male Hindu:—(1) the paternal grandmother, (2) the father's brothers, &c.: see West and Buhler, p. 116. The Mayukha lays down the following order:—(1) The uterine sister, (2) the paternal grandmother and the half-brothers as joint heirs, &c., &c.,: see West and Buhler, 117. Consequently as between Devabai and the first defendant, the first defendant is entitled to succeed.

As to the 8th defendant Kesserbai, I am of opinion that the claim fails. Mr. Setalvad on her behalf was compelled to address to this Court the same argument as he addressed to the Court in *Venilal* v. *Parjaram* (1), but without success. That case seems to me to be directly in point, for there it was decided that according to Hindu law, the daughter of a predeceased son of the propositus is not a *gotraja sapinda*. Nor is this daughter mentioned in any of the sacred texts.

Costs of all parties out of the estate; those of executors as between attorney and clients. To be taxed as a long cause.

Attorneys for plaintiffs:—Messrs. *Nanu and Hormusji*.

Attorneys for defendants Nos. 1 and 3:—Messrs. *Nanu and Hormusji*.

Attorneys for defendants Nos. 2, 2*a*, 2*b*, 2*c*:—Messrs. *Little and Co.*

Attorneys for defendant No. 5:—Messrs. *Payne, Gilbert and Sayani*.

Attorneys for defendant No. 8:—Messrs. *Mansuklal, Damodar and Jamsetji*.

(1) 20 B. 173.

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[591] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

LAKSHMAN GOVIND AND ANOTHER (*Original Plaintiffs*), *Appellants* *v.* AMRIT GOPAL AND OTHERS (*Original Defendants*), *Respondents.**

[28th February, 1900.]

Evidence—Indian Evidence Act (I of 1872), ss. 13 and 43—Judgments—Judgments not inter partes—Admissibility of such judgments—Documents not objected to in first Court—Appeal—Practice.

Judgments not *inter partes*, though not conclusive as *res judicata*, are admissible in evidence under s. 13 of the Evidence Act (I of 1872) to show the conduct of the parties, or particular instances of the exercise of a right, or admissions made by the parties or their predecessors-in-title, or to identify property, or to show how it has been previously dealt with.

Where parties to a suit, in order to save delay or expense or for any other reason, have agreed or not objected to the admission of certain evidence given in some former proceedings, although it is not strictly admissible, and the first Court has allowed this to be done, it is not open to the appellate Court to take objection to such a procedure and exclude the evidence.

A, B and C were members of a joint Hindu family, each having a third share in the family estate. A assigned his interest in the joint estate to the plaintiffs, who in 1897 filed this suit to recover by partition their one-third share in the property. B and C pleaded (*inter alia*) that A had already relinquished his share in their favour by a release dated 7th August, 1885.

The plaintiffs relied upon the judgments in a former suit brought by certain creditors of A to establish A's title to a third share in the property. In that suit it had been decided that the release relied upon by B and C was a fraudulent and colourable transaction.

Held, that the judgments in the former litigation, though not *inter partes*, were admissible under s. 13 of the Evidence Act (I of 1872).

[F., 31 B. 143 (151) = 9 Bom.L.R. 65; 2 Bom.L.R. 651 (652); 4 Ind. Cas. 997 = 139 P.W.R. 1909; R., 14 C.W.N. 285 = 7 M.L.T. 57; 21 Ind. Cas. 319 = 25 M.L.J. 360 = (1913) M.W.N. 800; Cited, 14 Ind. Cas. 66 = 142 P.L.R. 1912 = 105 P.W.R. 1912.]

SECOND appeal from the decision of Rao Bahadur Vaman M. Bodas, Joint First Class Subordinate Judge, A. P., at Dhulia.

Defendants Nos. 1, 2 and 3 were members of a joint Hindu family, each having a third share in the joint estate.

Defendant No. 1 assigned his interest in the estate to the plaintiffs, who thereupon in 1897 sued for a partition of the property.

Defendant No. 1 did not oppose the claim.

[592] Defendants Nos. 2 and 3 pleaded that defendant No. 1 had relinquished his share in the property to them by a release dated 7th August, 1885.

This release had been held to be fraudulent and collusive in a former suit (No. 1556 of 1887) brought by certain creditors of defendant No. 1 to establish his title to a third share in the joint estate.

The Court of first instance sent for the record of the former suit and admitted in evidence the judgments of the original and appellate Courts in the previous litigation as well as the depositions of certain witnesses who had been examined in that case.

The defendants did not object to the admission of this evidence in the first Court.

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The Court held that the release was fraudulent and colourable, and awarded the plaintiffs' claim.

On appeal the Joint First Class Subordinate Judge, A. P., held that neither the depositions nor the judgments in the former suit were admissible in evidence. He further held that the release was a *bona-fide* transaction and rejected the plaintiff's claim.

Against this decision plaintiffs preferred a second appeal to the High Court.

N. V. Gokhale, for appellants.

D. A. Khare, for respondent No. 3.

JUDGMENT.

PARSONS, J.—The Judge of the lower appellate Court refused to look at certain evidence filed in the case. He says : "(Exs. 73 and 74) are copies of judgments in the two Courts. In the present case, the lower Court has solely relied on them in support of its conclusion. But it appears to me that those documents are not even relevant evidence in this case. The lower Court has also relied on (Exs. 75—79), which are certified copies of depositions of some of the witnesses examined in that case. It is admitted that all those witnesses are still living and yet none of them is examined in this case. It is clear then that (Exs. 75—79), as also the copies of his judgments, Exs. 73 and 74 in the former case, must be left out of consideration altogether."

[593] It is pointed out to us that the statement is not quite accurate, for (Ex. 75) is the deposition of a witness who was examined in the present case (Ex. 45). It is further argued that the judgments were, if not conclusive, at least relevant evidence, since in that former case the creditors of the defendant No. 1 claimed to attach the property as being that of the defendant No. 1, and the defendants Nos. 2 and 3 relied on the partition deed of the year 1885 to prove that the defendant No. 1 had given his share up to them, while in the present case the plaintiffs claimed the property as the purchasers from the defendant No. 1, and the defendants Nos. 2 and 3 set up the same partition deed in proof that the defendant No. 1 had no title, so that in both cases the point at issue, namely, the genuineness of the partition deed, was the same, and the parties also the same, namely, the defendant No. 1 by his creditors and assignees on the one side impeaching the deed, and the defendants Nos. 2 and 3 on the other contending for the deed.

There is a difficulty in accepting the argument as to the conclusive nature of the evidence, because the defendant No. 1 was not a party to the former suit, and his creditors and assignees do not litigate under the same title. The matter, therefore, is not *res judicata*, and the judgments would not be relevant,—that is, conclusive evidence under the provisions of s. 40 of the Indian Evidence Act. The argument, however, that the judgments are relevant evidence must be accepted. The existence of a judgment declaring that the partition deed set up by the defendants Nos. 2 ant 3 was fraudulent, colourable and void as against the creditors of the first defendant is relevant in a case where the assignee of the first defendand sues and the defendants Nos. 2 and 3 set up the same deed as a defence to the action. This is, we think, clearly provided for by s. 43 of the Indian Evidence Act as deducible from the decision of their Lordships of the Privy Council in the case of *Bitto Kunwar* v. *Kesho Prasad* (1).

(1) 19 A. 277.

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The relevancy of the evidence given by the witnesses in the former suit stands on a different footing. No doubt this evidence was not admissible in the present suit, because the witnesses who were alive ought to have been called and examined. The evidence [594] was, however, allowed to go in without protest on the part of the defendants, and, as a consequence thereof, the plaintiff cancelled his application to have his witnesses summoned. Under these circumstances it was not fair of the Judge of the appellate Court to have questioned the admissibility of this evidence or right of him to have left it out of consideration altogether. When the parties, in order to save delay or expense or for any other reason, had refrained from calling persons who were alive and had agreed or not objected to the admission of evidence given by them in some former proceeding, albeit it was not strictly admissible, and the Judge of the first Court had allowed this to be done, the Judge of the appellate Court ought to have accepted the evidence, and it was too late for him to have taken objection to the procedure. He might, no doubt, have required the party who had tendered the evidence to bring the witnesses before him to be examined, but in that case he was bound to give him an opportunity of doing so. In no case was he justified in excluding the evidence altogether and deciding the case on the remaining evidence on the record.

For this reason we reverse the decree and remand the appeal for a fresh decision on the merits, making all costs heitherto incurred costs in the appeal.

RANADE, J.—In this case, the original suit was brought by the appellant-plaintiffs as purchasers of the rights of respondent-defendant No. 1 to recover possession of his $\frac{1}{3}$ share of the ancestral property which belonged in common to respondent-defendants Nos. 1, 2 and 3. Respondent-defendant No. 1 admitted the claim. Respondent-defendants Nos. 2 and 3 stated that respondent-defendant No. 1 had no rights left in the property, as he had relinquished his rights by executing a deed of partition in favour of respondent-defendants Nos. 2 and 3 on 7th August, 1885. In the Court of first instance, this release or partition was held to be colourable and fraudulent, and the appellants' claim as purchasers was decreed for a third share in the entire property. In arriving at this conclusion, the Court of first instance laid stress on the fact that in a previous suit, No. 1556 of 1887, brought by certain creditors of respondent-defendant No. 1 against present respondents Nos. 2 and 3 for a declaration that respondent No. 1 [595] was entitled to a third share in the property, the partition deed of 7th August, 1885, had been held to be fraudulent and collusive. The decrees passed in suit No. 1556 of 1887, and in appeal therefrom (Exs. 73, 74), were recorded as evidence by the Court of first instance in the present case; and the depositions of defendants Nos. 2 and 3 and of certain other witnesses examined in the case (Exs. 75--79) were also admitted as evidence. In appeal, the District Judge held that (Exs. 73 and 74), copies of judgments in the former litigation, were not relevant evidence in the present case, and the depositions in the former case (Exs. 75—79) could not be admitted as evidence in the present case, as some of the witnesses were alive, and they had not been examined as witnesses in the present case. The lower appellate Court accordingly excluded this evidence of the previous judgments and depositions, and held that the partition of 1885 was a *bona-fide* transaction, and rejected the claim for the $\frac{1}{3}$rd share brought by the

plaintiffs in the present case. In the appeal before us, the principal point argued was that the lower appellate Court was in error in excluding the judgments in the former suit, which established the fraudulent and collusive character of the partition deed of 7th August, 1885, and that it was in error also in excluding the depositions (Exs. 75--79) which had been admitted in evidence in the first Court without objection, and it was contended that the lower appellate Court had no power to exclude this evidence from its consideration. The two principal points to be considered in the present appeal are thus: (1) whether the lower appellate Court was wrong in holding that the judgments, (Exs. 73 and 74), were inadmissible in evidence and (2) whether the depositions, Exs. 75—79, were improperly excluded when no objection had been taken to their admissibility in the first Court.

On both these points I feel satisfied that the lower appellate Court was in error in excluding the judgments and depositions from its consideration. The record of the case shows that the present appellant-plaintiffs applied to the Court on 1st December, 1897, to send for and examine the record in the previous suit, No. 1556 of 1887. This application, as also an application made on the same day for additional witnesses (Ex. 57), was granted. **[596]** The Court of the first instance examined the record in the former case and admitted the judgments in the former suit and appeal, (Exs. 73 and 74), as also the depositions of the defendants and other witnesses (Exs. 75— 79) of the Court's own motion on the 19th January, 1898, and thereupon appellant-plaintiffs' vakil dispensed with the evidence called for by him in Ex. 57 on the same day. The appellant-plaintiffs appear to have been satisfied with the evidence recorded by the Court of its own motion from the record of the former case; and, apparently, no objection was taken to this procedure by the pleader for the respondents. Under s. 137 of the Civil Procedure Code, the Court of first instance had the right to send for the record of its own accord, or on the application of any of the parties to the suit, and inspect the same. Of course, this section does not empower the Court to use in evidence any document which would be inadmissible under the Indian Evidence Act. As stated above, no objection was made on behalf of the respondent-defendants Nos. 2 and 3, though in their appeal to the District Court they raised the point that the documents were not relevant evidence, and the judgments and depositions should not have been admitted as evidence. The lower appellate Court upheld the objection raised about the admissibility of this evidence, but this it could not do under the circumstances stated above. At least, it should have remanded the case and permitted the appellants to give the evidence which they had dispensed with by reason of the recording of the judgments and depositions in the old case as evidence in this suit. In *Chimnaji* v. *Dinkar* (1), where a copy of a copy had been admitted in evidence in the first Court without objection, and the appellate Court had excluded the evidence as inadmissible, it was held by Sir Raymond West that the appellate Court had no power to reject such evidence at that stage. This was also the view taken in *Shivram* v. *Nawji* (2), where the District Judge had declared certain exhibits to be inadmissible in evidence. Under these circumstances, the rejection of the depositions solely on the ground that some of the persons were alive and might have been examined, seems to be without sufficient justification. At least the lower appellate Court should have allowed the appellants an opportunity to give the evidence **[597]** they had already

(1) 11 B. 320.

(2) P. J. (1884), 259.

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tendered. That evidence included the examination of respondent No. 2 (Ex. 76) and of respondent No. 1 (Ex. 75).

As regards the judgments in the former suit, the appellants' contention was that the judgments operated as *res judicata*. The Court of first instance took this view, but the lower appellate Court held that they were not *res judicata*, and were not even relevant evidence. There can be no doubt that the lower Court was right in holding that they were not *res judicata*, because the decision was not *inter partes*, though it related to the same subject-matter; but while the lower Court was right so far, it was wrong in holding that these judgments were not admissible in evidence. There has, no doubt, been some conflict of opinion on this point. On the one hand there is the judgment of the Full Bench in *Gujju Lall* v. *Fatteh Lall* (1), where it was held by four Judges that former judgments which are not of the nature of judgments *in rem*, nor judgments relating to public matters, cannot be admitted in evidence, where the parties are different, either as "transactions" under s. 13 or as evidence of relevant facts under s. 11 or under any other section of the Act. This ruling in *Gujju Lall* v. *Fatteh Lall* was followed in *Mahendra Lal* v. *Rosomoyi Dasi* (2), *Radha Gobind* v. *Rakhal Das* (3), *Surender Nath* v. *Brojo Nath* (4), *Ranchhoddas* v. *Bapu* (5), *Subramanyan* v. *Paramaswaran* (6). On the other hand, previous judgments not *inter partes* were held admissible as evidence, for certain purposes—*Ramasami* v. *Appavu* (7), *Nilakanta* v. *Imamsahib* (8), *Dost Mahomed Khan* v. *Soolochana Dabia* (9). The leading case is *Ramessur Persad Narain Sing* v. *Koonj Behari Pattuk* (10), where the Privy Council admitted as evidence a certain *rajinama* made between the tenants and acted upon by the landlord, and held it to bind the landlord in a subsequent suit, though the plaintiff was not a party to the previous *rajinama*. In two more recent cases, the same principle was affirmed by the Privy Council. In the first [598] of these cases—*Ram Ranjan* v. *Ram Narain Sing* (11)—certain decrees passed in 1817 and 1845, to which the plaintiff jamindar's predecessors-in-title were not parties, were admitted as evidence on behalf of the defendants' claim to ancient possession. In the other case—*Bitto Kunwar* v. *Kesho Prasad* (12)—a decree obtained against the defendant that the will was revoked was held not to be *res judicata* in a suit against him brought by other plaintiffs, but was held to be admissible as evidence against him. In an earlier Calcutta case—*Neamut Ali* v. *Gooroo Doss* (13)—Sir R. Couch had held that the word 'transaction' in s. 13 included judgments, not conclusive, but still admissible as evidence for what they are worth, even when they might not be admissible under ss. 40 to 43. The Allahabad High Court in a recent case of *The Collector of Gorakhpur* v. *Palakdhari Singh* (14) has noticed the decision in *Gujju Lall* v. *Fatteh Lall* (1) and held that though the judgment as to whether a certain person was or was not heir, was not a transaction or fact under ss. 13 and 11, yet it was admissible under s. 13 as showing an instance in which the right was claimed; only in such cases the whole record, and not the judgment, should be admitted as evidence. Former judgments and other documents were held admissible on these and other grounds in *Venkatasami*

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(1) 6 C. 171. (2) 12 C. 207. (3) 12 C. 82.
(4) 13 C. 352. (5) 10. B. 439. (6) 11 M. 116.
(7) 12 M. 9. (8) 16 M. 361. (9) 1 W.R. 270.
(10) 4 C. 633 = 6 I. A. 33. (11) 22 C. 533 = 22 I. A. 60. (12) 19 A. 227 = 24 I.A 10.
(13) 22 W.R. 365. (14) 12 A. 1.

v. *Venkatareddi* (1) ; *Vythilinga* v. *Venkatachala* (2) ; *Ashruffoonissa Begum* v. *Rughoonath Sohoy*(3); *Roop Chand Bhukut* v. *Hur Kishen Doss*(4). It is not easy to reconcile this conflict of views in particular instances, but apparently, the cases, which decide that judgments, not *inter partes*, are not admissible in evidence proceed chiefly on the ground that those judgments are sought to be used as having the effect, more or less, of *res judicata*. For that purpose, a judgment *inter partes* alone can be admitted in evidence, but for other purposes where judgments are sought to be used to show the conduct of the parties, or show particular instances of the exercise of a right, or admissions made by ancestors, or how the property was dealt with previously, they may be used under s. 11 or 13 as exceptions recognised under [599] s. 43, as relevant evidence—*Venkatasami* v. *Venkatreddi* (1) *Naranji* v. *Dipa Umed* (5) ; *The Collector of Gorakhpur* v. *Palakdari Singh* (6) ; *Krishnasami* v. *Rajagopal* (7) ; *Omer Dutt Jha* v. *Colonel James Burn* (8) ; *Guttee Koiburto* v *Bhukut Koiburto* (9). In the present case, the judgments in the former suit raised the question now in issue in a pointed manner. It is true that the former suit was brought by certain creditors of respondent No. 1, while the present suit was instituted by a purchaser from respondent No. 1. This is, however, a difference which did not affect the merits. The real question at issue was the same, *viz.*, the *bonafide* character of the partition deed of 1885. Though the decision in the former suit will not estop the respondent-defendants from contesting the claim as being *res judicata*, still the record and the judgment in that case, showing the conduct of the parties, and their admissions, would be admissible in evidence under s. 13. The interpretation placed upon the words 'right' and 'transaction' in *Gujju Lall* v. *Futteh Lall*(10) seems not to have been accepted by the Privy Council, and its correctness is questioned in the Full Bench judgment of the Allahabad High Court in *The Collector of Gorakhpur* v. *Palakdhari* (6), in so far as the exclusion of such judgments from being received as evidence under any section is concerned. Except where there are judgments *in rem*, or where they relate to public matters, judgments not *inter partes* have been always held to be not *res judicata*, but they cannot be wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property. The cases show that such judgments may have very high value as evidence, and may even shift the burden of proof—*Neamut Ali* v. *Goooro Doss* (11). In this view of the matter, it is clear that the lower appellate Court was in error in excluding these judgments from its consideration. I would, therefore, reverse the decree of the lower appellate Court, and remand the case for fresh decision after giving due consideration to the judgments (Exs. 73, 74), and depositions Exs. 75 to 79.

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(1) 15 M. 12.
(2) 16 M. 194.
(3) 2 W.R 267.
(4) 23 W.R 162.
(5) 3 B. 3
(6) 12 A. 1.
(7) 18 M. 73.
(8) 24 W.R. 470.
(9) 22 W. R. 457.
(10) 6 C. 171.
(11) 22 W. R. 365.

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24 B. 600=2 Bom. L.R. 395.

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[600] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

SHASTRI RAMCHANDRA (*Original Plaintiff*), *Appellant v.* THE AHMEDABAD MUNICIPALITY (*Original Defendant*), *Respondent.**

[28th February, 1900.]

Municipality—District Municipal Act (Bombay Act VI of 1873), s. 24—Acquisition of land for widening a street—Powers of a Municipality—Civil Court's jurisdiction to interfere—Injunction.

Where a District Municipality purchased through Government a narrow strip of land at the entrance of a private street for the purpose of widening the street in order to facilitate the effective use of fire-engines,

Held, that the acquisition of land for such a purpose was within the powers of the Municipality, as it was conducive to the promotion of public health, safety and convenience; and that the Civil Court had no jurisdiction to restrain the Municipality from exercising such powers.

SECOND appeal from the decision of Rao Bahadur D. G. Gharpure, Additional First Class Subordinate Judge, A.P., at Ahmedabad.

Plaintiff Ramchandra was the owner of a house in Jati's *pol* in Sankadisheri at Ahmedabad. In front of his house there was a small strip of open land at the entrance of the *pol*.

The Ahmedabad Municipality being desirous of purchasing this piece of land for the purpose of widening the street, in order to facilitate the effective use of fire-engines, applied to Government to acquire the land under the provisions of the Land Acquisition Act (I of 1894).

On the 4th December, 1896, Government issued a notification, under s. 6 of Act I of 1894, to the following effect:—

"No. 9825.—Whereas it appears to the Governor of Bombay in Council that land is required to be taken by Government at the public expense for a public purpose, *viz.*, for widening the road in Jati's *pol* in Sankadisheri, Ahmedabad; it is hereby declared that for the above purpose the land described below is required within the limits of the city of Ahmedabad."

Thereupon plaintiff as a rate-payer brought the present suit for an injunction restraining the Municipality from expending municipal funds in the purchase of the land.

[601] Plaintiff alleged that the *pol* was a private street and that the widening of the street was not for any of the purposes contemplated by the District Municipal Act (Bom. VI of 1873).

The Municipality contended (*inter alia*) that the *pol* was a public street; that the widening of the street was necessary for the safety and welfare of the residents of the *pol*; and that they were within their rights in acquiring the land.

The Court of first instance held that the *pol* was a private street; that the widening of the street was not a purpose contemplated by the District Municipal Act; and that it was not necessary to buy the strip of land.

The Court, therefore, granted the injunction prayed for.

On appeal, the District Judge reversed this decision, holding that the Government declaration under s. 6 of the Land Acquisition Act was

* Second Appeal No. 726 of 1899.

conclusive on the question that the land was required for a public purpose and that the widening of a street was one of the purposes upon which municipal funds could be expended.

Against this decision plaintiff preferred a second appeal to the High Court.

Bicknell, Merwanji and Motilal, for appellant.

Rao Bahadur *V. J. Kirtikar*, Government Pleader, for respondent.

JUDGMENT.

PARSONS, J.—This suit was brought to obtain an injunction restraining the defendant-Muncipality from purchasing through the medium of Government a small piece of land, the alleged property of the plaintiff. It appears that the Municipality being desirous of obtaining this land applied to the Government to acquire it for them under the provisions of the Land Acquisition Act, and the Government published the following declaration dated 4th December, 1896, respecting it:—"No. 9825.—Whereas it appears to the Governor of Bombay in Council that land is required to be taken by Government at the public expense for a public purpose, *viz.*, for widening the road in Jati's Pol in Sankadisheri, Ahmedabad; it is hereby declared that for the above purpose the land described below is required within the limits of the city of Ahmedabad."

[602] Section 6 of the Land Acquisition Act, 1894, enacts that the said declaration shall be conclusive evidence that the land is needed for a public purpose. This, therefore, cannot be questioned. Section 25 of the Bombay District Municipal Act, however, provides that "when there is any hindrance to the permanent or temporary acquisition, upon payment, of any land or building required for the purposes of this Act, the Governor in Council may, after obtaining possession of the same for Government under the Land Acquisition Act, 1894, or other existing law, vest such land or building in the Municipality on their paying the compensation awarded." A Municipality, therefore, can only acquire land when it is required for the purposes of that Act. They are also forbidden to apply their funds otherwise than as trustees for the purposes of the Act. The Court has, therefore, to see whether the acquisition of this land is for a purpose sanctioned by the Act.

If we take the purpose stated in the declaration, namely, for widening the road in Jati's *pol*, and that alone, no doubt, as argued by the pleader for the appellant, it would not come within the terms of the Act, for the the Act deals only with public streets, it vests these only in the Municipality (s. 17), and allows them to light, water, cleanse, construct, alter and maintain them (s. 24). I think, however, that it is open to the defendant to show that the purpose stated in the declaration is not the only purpose for which the land is required, or rather that the achievement of that purpose will render it possible to carry out the avowed purposes of the Act. For instance, s. 24 of the Act says that it shall be the duty of every Municipality to make adequate provision, out of the municipal property and funds, for certain matters, and among these matters are the extinguishing of fires, the reclaiming unhealthy localities and any other measure likely to promote the public safety, health, convenience or education. If it were shown that the widening of this *pol* was conducive or necessary in order to provide for any of these matters, then I conceive that the defendant-Municipality would have the power to expend municipal funds in the acquisition of land to widen the *pol*. The Judge of the lower appellate Court has found as a fact that

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this has been proved, and the finding is one that this Court must accept. The existence of a very narrow passage, only six [603] feet wide, in a crowded quarter of a city like Ahmedabad may be most dangerous and insanitary. Its widening may enable fire engines to be taken up it and thus to extinguish a fire that otherwise might cause the destruction of the whole quarter. It may also enable the locality to be better lighted and ventilated, and made more healthy.

In dealing with the case so far, I have used the term "widening the road," because that is the one used in the declaration, but it is misleading, inasmuch as it assumes that the land acquired will be thrown into, and become a part of, that road; this, however, clearly is not the case. The strip acquired will under the Act become vested in the defendant-Municipality and can be used by them for any purpose they choose which is sanctioned by the Act. It will obviously be useful to the Municipality for many public purposes, indeed its acquisition may be but the first step towards the making of a broad public street through this quarter of the town. Viewed in this light the acquisition of the land in suit is within the powers of the defendant-Municipality and a Civil Court has no jurisdiction to restrain them in the exercise of such powers.

We confirm the decree with costs.

RANADE, J.—The principal point in this appeal does not depend so much on the question whether the *pol* in dispute, the southern end of which has been acquired by Government, is a public or a private street, but whether the defendant-Municipality is lawfully entitled to apply its funds for the purchase of the said land for the purpose of widening the street as contemplated in the declaration of Government. The question whether the street is private or public has only an incidental relation to the main point in dispute. The Court of first instance, no doubt, raised this question in its first issue, but it is only the first part of that issue. The latter portion of that issue raised the more important question whether the Municipality was entitled to purchase this land, and it found on that issue that it was not so entitled, that such purchase was not necessary, that the defendant-Municipality was not authorized by law to make the purchase for the purpose in view of widening the street, and that it had no discretion in the matter. [604] The lower Court in appeal raised only two issues; and it held that the Government having made the purchase under the Land Acquisition Act, its declaration was conclusive on the point that the land was needed for the purpose, and it found further that the Municipality had a discretion in the matter, and that that discretion had not been abused. In the appeal before us it was contended that the lower appellate Court was bound to decide the question whether the street was public or private, as on the decision of that question depended the further point whether the street vested in the Municipality and whether it was authorized to widen the said street and to expend municipal funds for that purpose. It was also contended that the Government declaration did not debar the appellant from raising the question about the legality of the action taken by the Municipality.

The principal question, therefore, for consideration is whether the respondent-Municipality could, under Bombay Act VI of 1873, purchase the land in dispute for the purpose of widening the *pol* even supposing it to be a private street. The right of the Government to purchase any piece of land, whether private or public, was not seriously disputed in the argument before us. The expression "land" used in s. 4 of Act I of 1894 is not qualified in any way. Government has power to take up a land in

any locality needed for any public purpose, and its declaration under s. 6, that the land was needed for a public purpose, is conclusive evidence that the land was needed for such purpose. When land is so taken up, all private rights cease—*Collector of the 24-Pergunnahs* v. *Nobin Chunder* (1).

As regards the power of the Municipality, however, it is regulated by s. 17, which invests all public streets, &c., in the Municipality and constitutes the fund called the municipal fund under s. 18, and by s. 21 gives it power to impose taxes. Section 23 provides that all property vested in the Municipality, and all funds received or raised by it should be applied for purposes of the Act within municipal limits, and these purposes are specified in s. 24 as being connected with public safety, public health, instruction and convenience. Among the [605] purposes connected with public safety, provisions for lighting public streets, places and buildings are mentioned, and under public health are provisions for watering, cleansing and draining of streets; and among public convenience, the construction and maintenance of streets are referred to, and there is a general clause specifying all objects connected with the above purposes, and not repugnant to the above, or the spirit of the Act. In cl. 2 of s. 24, power is given to the Municipality to purchase land for any of the objects above named, and s. 25 provides that when land has to be so purchased, the Municipality should proceed under Act X of 1870. Section 28 gives power to the Municipality to lay out and make new public streets or roads, and to widen, open or enlarge such streets or roads, and for such purposes it has the power to purchase the land necessary for new streets. Section 29 relates to the construction of new streets by private persons. Sections 30 and 42 relate to projections in public streets.

These are all the sections which relate to the powers of the Municipality with regard to the purchase of land and construtions and conservancy of streets. The contention of the appellant's pleader was that as only public streets are vested in Municipalities, its power of making a purchase in land and of spending municipal money on street improvement did not include private streets. This contention seems to be not well-founded. As stated above, the law makes a clear distinction between public and private streets for certain purposes, but not for all purposes. The word "street" has been defined (s. 3) to include ways, roads and streets, whether thoroughfares or not, over which the public have a right of passage or access, or over which they have passed or had access for twenty years. And it was contended that as the *pol* in dispute was not such a street, it was not a public street, nor was it a street as defined in s. 3; and that it was, therefore, a Court or private property—*Kalidas* v. *The Municipality of Dhandhuka* (2) and *The Ahmedabad Municipality* v. *Manilal* (3). Of course none but public streets are vested in the Municipality, but it does not follow that in regard to private streets or Courts the Municipality has no power to interfere in any way or in [606] regard to which the application of its funds will be unlawful under s. 24. The construction and maintenance of new streets and the acquisition of lands for such purposes are expressly provided for by ss. 24 and 25. Section 28 recognises this power in the Municipality and also of private persons (s. 29) of making new streets. Such new construction of streets has obviously no reference to the streets vested in the Municipality. Quite independently of this indication, the Municipality has power to make provision for the extinction of fires which obviously cannot be said to be

(1) 3 W. R. 27. (2) 6 B. 686. (3) 20 B. 146.

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not a danger in the case of private *pols*. In the present case the evidence shows that the enlargement of the *pol* at its southern end is intended for facilitating the effective use of fire-engines. Similarly, drainage works and water pipes have to be constructed and laid, and in fact have been constructed and laid in this *pol*, which is also lighted and scavengered. Lastly, there is the general clause which empowers the Municipality to carry out from municipal funds all objects connected with public safety, health and convenience. Its funds can be applied to all these purposes lawfully, and among these applications is the purchase of lands for such purposes. It can, therefore, hardly be said with correctness that if the Municipality thought that the *pol* at its entrance was not sufficiently broad, it had no discretion in the matter of widening that entrance to admit fire engines. The more reasonable construction of the Act would permit this discretion; and it is not open to a private person to take on himself to question the exercise of that discretion by the Municipality, because, in his opinion, the breadth of six feet is wide enough to admit of the manipulation of a fire-engine and to say that the inconvenience is only sentimental. It is also not open for him or the Civil Court to contend that the whole *pol* should be taken and not a particular portion needed for the purpose. All questions of relative necessity, advantage, or facility, are questions of municipal detail, and it is not within the province of a Civil Court to seek to regulate these details. As a matter of fact, the evidence shows that many of the residents in the *pol* admit the advantage of widening the street. It is only a minority of owners of twenty houses in the *pol* who take exception to this. For these reasons I feel satisfied that the defendant-**[607]** Municipality had a discretion in this matter, that its application of the municipal funds was proper and reasonable, and that it cannot be questioned in a Civil Court. It is not, therefore, necessary to consider the incidental question as regards the public or private character of the street or Court. I would confirm the decree and dismiss the appeal with costs.

Decree confirmed.

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24 B. 607=2 Bom. L.R. 417.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

MORAR (*Plaintiff*) *v.* BORSAD TOWN MUNICIPALITY (*Defendant*).*

[6th March, 1900.]

Municipality—House-tax—Municipal valuation—Civil Court's power to revise such valuation.

A Civil Court has no power to revise the valuation of houses made by a Municipality for the purpose of imposing a house-tax.

[R., 35 C. 859=7 C.L.J. 631 (636)=12 C.W.N. 709; D., 26 B. 294=3 Bom. L.R. 882 (883).]

REFERENCE under s. 617 of the Civil Procedure Code (Act XIV of 1882) by Rao Saheb Mohanrai D., Second Class Subordinate Judge of Borsad.

* Civil Reference No. 1 of 1900.

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The reference was in the following terms :—

" Plaintiff Morar Ramdas sues the Borsad Town Municipality for a refund of Rs. 14-10-0, being the excess amount of the house-tax levied from him in respect of his five houses mis-styled as shops, on the ground that the same have been over-valued as well as wrongly classed, the defendant maintaining that the valuation as well as classification is correct.

" The issues involved in these pleadings are only those of facts or of construction of the rule, but then at a late stage the defendant-Municipality's pleader has, by an application No. 13, questioned the jurisdiction of the Court in the matter, and has under instructions from its President desired me to submit the point for the disposal of the Honourable the High Court under s. 617, Civil Procedure Code.

" The question, therefore, for consideration is whether this Court is competent to take cognizance of this suit or not ; in other words, whether it can or cannot interfere in the matter of the **[608]** municipal valuation of the houses in the town at the instance of a party aggrieved.

" The defendant's pleader relying on the ruling at page 446 of the Indian Law Reports, Bombay Series, Vol. XXIII, has urged that this Court has no such jurisdiction to question the valuation of the Municipality, No. III of the Rules (Ex. 17) providing a remedy to meet cases of any such over-appraisements.

" There can be no doubt that the last para of the head-note, which in its turn is based on a certain passage in the judgment, is very general in its expression, but looking to the fact that there have been numerous instances of interference in municipal valuation of houses by Civil Courts, reported or otherwise (*vide e.g.*, Indian Law Reports, Vol. XVII, Bombay, p. 510) since the coming into operation of the Bombay District Municipal Act of 1882, I doubt whether the decision under consideration can appropriately be held to have any such sweeping effect in its application as urged for the defence.

" For the plaintiff it is stated in reply that the decision only applies to the special jurisdiction of a Magistrate under s. 84 of the Act (Bombay Act VI of 1873) and has no bearing on the jurisdiction of Civil Courts in such cases, but seeing that the '*ratio decidendi*' of the latter part of that judgment may *mutatis mutandis* be applied to the latter Courts as well, I have considered it expedient, whilst feeling doubtful anent any such general applicability, to refer the point for decision as desired to the Honourable the High Court, it being noted that the point is one of general importance and my decree is final in the case."

The reference came on for hearing before Parsons and Ranade, JJ.

M. N. Mehta, *amicus curiæ*, for plaintiff.

Branson (with *G. K. Parekh*), for defendant.

JUDGMENT.

PARSONS, J.—The question referred for our decision is whether a Civil Court can interfere in the matter of the municipal valuation of the houses. We answer that question in the negative.

The rules imposing the house-tax define " estimated value " to mean, with reference to a house or a shop.

[609] " (*a*) the market value of the site thereof, and

" (*b*) the present value of the buildings arrived at by the committee, appointed for this purpose by the Municipality by computing the probable

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cost of erecting the same and making a fair deduction on account of deterioration."

Thus the valuation in the first instance is placed in the hands of a committee. By a subsequent rule a remedy against over-valuation by this committee is provided in the shape of an appeal to the general committee. It is, we think, clear that a Civil Court cannot put itself in the place of, or over, either the committee or the general committee and revise the valuation made by them. The case is exactly similar to the case of *The Municipality of Wai* v. *Krishnaji Gangadhar* (1) decided by us on the 5th September, 1898; for, although in that case we dealt with the powers of a Magistrate, the powers of a Civil Court are no greater. It is bound to accept as conclusive the valuation come to by the only authority in whom the power of making the valuation is placed by law, and it cannot substitute for that valuation one made by itself.

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24 B. 609 = 2 Bom. L.R. 422.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

LAKSHMAN (*Original Defendant*), *Appellant* v. DAMODAR AND OTHERS (*Original Plaintiffs*), *Respondents.** [8th March, 1900.]

Registration—Receipt—Receipt by mortgagee setting forth a settlement of mortgage accounts—Evidence Act (I of 1872), s. 92, cl. 4—Registration Act (III of 1877), s. 17 (b). Excep. (n).

In 1875 certain lands were mortgaged for Rs. 675. The mortgage bond provided that the mortgagee was to enjoy the rents and profits in lieu of interest on Rs. 475, and that the remaining Rs. 200 were to carry interest at 6 per cent. per annum.

In 1880 a receipt was passed by the mortgagee to the mortgagor reciting that on taking accounts Rs. 525 were due on account of the mortgage, that Rs. 100 were paid on the day of the receipt, that a further sum of Rs. 100 were to be **[610]** paid in a month and a half, and that the rents and profits of the property were in future to be taken for the interest on the balance of Rs. 325 only.

In 1896 the mortgagor sued for redemption, and relied on the receipt in support of his case.

Held, that the receipt did not require registration. It purported to be a mere settlement of accounts and was not intended to modify or supersede the original mortgage contract. Clause 4, s. 92, of the Indian Evidence Act (I of 1872) had, therefore, no application to the case.

[R., 31 A. 528 = 10 A.L.J. 25 = 16 Ind. Cas. 179.]

SECOND appeal from the decision of M. P. Khareghat, District Judge at Ratnagiri.

Suit for redemption.

Plaintiffs had a $\frac{1}{12}$th *takshim* (share) in the village of Nigonda.

On 11th November, 1869, one Mukund purchased the *takshim* at a Court-sale.

In April, 1875, Mukund mortgaged the same for Rs. 675 to Govind Anant Bhagvat, father of the defendant, for a term of five years.

The mortgage bond provided that the profits of the mortgaged property were to be taken in lieu of interest on Rs. 475 and the remaining Rs. 200 were to bear interest at 6 per cent. per annum.

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* Second Appeal No. 707 of 1899.

(1) 23 B. 446.

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In October, 1880, the accounts of the mortgage transaction were settled, and a receipt was passed by the mortgagee to the mortgagor which recited that on taking accounts a sum of Rs. 525 was found due; that Rs. 100 was paid on that day; that a further sum of Rs. 100 was to be paid in a month and a half, thus reducing the balance to Rs. 325 for the interest on which amount only the profits of the property were to be taken.

In September, 1886, Mukund's son assigned the equity of redemption to the plaintiffs.

In 1896 plaintiffs filed the present suit for redemption.

They alleged that though the original mortgage was for Rs. 675, still the mortgagor had received only Rs. 525, that he had repaid Rs. 100 out of the same, and that, therefore, Rs. 425 only were now due under the mortgage.

In support of their case, plaintiffs relied upon the receipt passed by the mortgagee in 1880 to Mukund.

[611] Defendant pleaded (*inter alia*) that the mortgagor had received the full consideration, that he had not repaid Rs. 100, and that the receipt was false and inadmissible in evidence for want of registration.

The Subordinate Judge held that the receipt was inadmissible in evidence for want of registration, under cl. 4, s. 92 of the Indian Evidence Act, in so far as it was sought to be used as modifying the terms of the original mortgage contract.

He passed a decree allowing redemption on payment of Rs. 707 within six months.

On appeal the District Judge also held that the receipt required registration, but varied the decision of the Court of first instance by decreeing redemption on payment of Rs. 425 within six months.

Against this decision defendant Lakshman preferred a second appeal to the High Court.

D. A. Khare, for appellant.

N. G. Chandavarkar, for respondents.

JUDGMENT.

PARSONS, J.—The District Judge refused to take any notice of the agreement of the 5th October, 1880 (Ex. 23), in so far as it modified the contract of mortgage in favour of the defendant and not of the plaintiffs, because it was not registered, and he awarded the defendant Rs. 425 only as the principal sum due under the mortgage of 1875. Practically, therefore, his decision was that the agreement could be used as a receipt to show that the Rs. 200, which bore interest under the mortgage of 1875, and Rs. 50 of the Rs. 475, the interest of which was payable out of the profits, had been paid off, because "according to all the principles of justice and equity a payment made would have been first appropriated in payment of the amount bearing interest, and the balance in payment of the amount not bearing interest," but that it could not be used to show that what he called a new contract was made by which it was provided that the amount bearing no interest should be Rs. 325 in place of Rs. 475. We do not see, however, why the agreement should be thus narrowed. If it can be used as evidence of payments, as undoubtedly it can **[612]** (see s. 17 (*n*) of the Registration Act, 1877), there is no reason why it cannot also be used as evidence of appropriation of payments. The original mortgage was for Rs. 675, the profits were to be taken in lieu of interest on Rs. 475 and the remaining Rs. 200 were to bear interest at 6 per cent. In October,

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1880, accounts were taken and the principal sum then due was found to be Rs. 525, Rs. 100 were paid, Rs. 100 were promised to be paid in the course of a month and a half, and the amount, for the interest on which the profits were to be taken, was stated to be Rs. 325. The parties, therefore, must be held to have respectively paid off and received Rs. 150 of the Rs. 475, and Rs. 100 of the Rs. 200, and the result was to leave Rs. 325 due under the former, and Rs. 100 due under the latter, account. There is no variation of the contract made by this, but only a modification of the account in consequence of payments as is clearly pointed out in the case of *Shidlingapa* v. *Chenbasapa* (1). We might also refer to the cases of *Satyesh Chunder Sircar* v. *Dhunpul Singh* (2), and *Obai Goundan* v. *Ramalinga Ayyar* (3) as leading to the same conclusion. The Rs. 100, which were promised to be paid in a month and a half, were never paid, and can now be recovered with interest at 6 per cent. as provided by the mortgage-deed. Under the rule of *damdupat* applicable, the sum due will be Rs. 200. Rs. 525, therefore, are now payable in order to redeem the mortgage, and we amend the decree of the lower appellate Court by substituting this sum for the sum of Rs. 425. The six months' time allowed for redemption is extended so as to run from this date. We notice that in the Court of first instance the plaint was insufficiently stamped. It should have been stamped on a claim of Rs. 675, which is the principal money expressed to be secured by the instrument of mortgage. The Court below should call on the plaintiffs to make up the deficiency before it allows execution to issue. The plaintiffs are to pay the costs of the defendant in the Court of first instance as for a claim of Rs. 525, and in the Courts of appeal as for a claim of Rs. 200. The costs in excess of this are to be borne by the parties who incurred them.

[613] RANADE, J.—In this appeal, the original suit was brought for the redemption of a *takshim* in Nigonda, which belonged at first to the respondent-plaintiff No. 1. The *takshim* was purchased in auction by one Mukund in 1869, and Mukund mortgaged the same with the deceased father of the appellant for Rs. 675. Mukund and his sons subsequently re-sold their rights to the respondent-plaintiff, and the present suit for redemption was brought in 1896. The respondent-plaintiff's case was that, though the bond was for Rs. 675 only, Rs. 525 were paid as consideration, and out of that sum Rs. 100 were re-paid to the mortgagee, thus reducing the principal mortgage-debt to Rs. 425. The defence of the appellant and his brothers was that the full consideration of the bond had been paid, and that Rs. 100 had not been received in part-payment. They admitted that the original bond allowed the profits of the property to be received as interest on Rs. 475, and the remaining Rs. 200 carried interest, and they accordingly claimed the principal sum Rs. 675, *plus* 264 for interest and Rs. 65 more for other charges, in all Rs. 1,004. The Court of first instance held that the receipt (Ex 23), reduced the principal debt of the mortgage to Rs. 435, and the interest on the remaining sum Rs. 200, which carried interest, was Rs. 282. The other charges were held not proved, and a decree was passed for Rs. 707, to be recovered within six months, otherwise the redemption on the *takshim* was to be foreclosed. In appeal, the District Judge held that only Rs. 425 were due in respect of the mortgage, and he varied the decree accordingly. The principal contention is second appeal was that the receipt (Ex. 23), was inadmissible in evidence for want of registration, and that the lower

(1) 4 B. 235. (2) 24 C. 20. (3) 22 M. 217.

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Court was in error in holding that only Rs. 425 were due. The decision of the case turns entirely upon the admissibility of the receipt, Ex. 23. That receipt purports to be a settlement of the mortgage-debt made in 1880. After deducting payments and making remissions, it recites that Rs. 525 were found due out of the original mortgage of Rs. 675, and it states further that Rs. 100 were paid on that day, and Rs. 100 would be paid in one month and a half, thus reducing the balance to Rs. 325. Both the Courts have held the receipt to be inadmissible for different reasons. The Court of **[614]** first instance, however, allowed interest on the sum which carried interest, while the lower Court of appeal has disallowed this interest item altogether, and only decreed the claim for the secured principal balance. It appears to me that the District Judge was in error in refusing to admit the receipt in evidence. The receipt was obviously not intended to modify or nullify the original mortgage contract. Clause (4), s. 92 of the Evidence Act has, therefore, no application. The receipt was what it professes to be, a settlement of accounts. It does not purport to extinguish the mortgage-debt, and it, therefore, comes under the protection of the exception (*n*) to cl. (*b*) of the Registration Act, s. 17. Even before that clause was added by Act VII of 1888, this Court has always held that a receipt given by a mortgagee to the mortgagor for sums paid on account of the mortgage are not inadmissible in evidence for want of registration.—*Shidlingapa* v. *Chenbasapa* (1), *Basawa* v. *Kalkapa* (2), and *Annapa* v. *Ganpati* (3). The Madras and Calcutta High Courts have taken the same view—*Venkayyar* v. *Venkatasubbayyar* (4), *Sheikh Gugunfur Ali* v. *Mahomed Yaseen* (5). The Allahabad High Court took a different view in *Dalib Singh* v. *Durga Prasad* (6), where it held that receipts for sums paid in part satisfaction of a mortgage must be registered though at the same time it held that the payment may be proved by parol evidence. See also *Imdad Husain* v. *Tasadduk Husain* (7). However, in a more recent decision in *Jiwan Ali Beg* v. *Basa Mal* (8), the Full Bench of that Court has held that endorsements or receipts of payments passed by mortgagees to mortgagors did not fall within s. 17, and unless where they are so framed and worded as to purport expressly to limit or extinguish an interest in immoveable property, they did not come within the section, and did not require registration. The receipt in the present case falls under this category, and I would, therefore, hold that Ex. 23 was admissible in evidence. Of course every payment made has the effect of slightly altering the condition of the account between **[615]** the mortgagee and the mortgagor, but that does not make the receipt inadmissible in evidence, because it is not registered. Where receipts are intended to be used as a release of the mortgage claim and show the extinction of the mortgagee's right, they will be inadmissible in evidence if not registered—*Basawa* v. *Kalkapa*(2); *Mahadaji* v. *Vyankaji Govind*(9). The receipt, Ex. 23, was not intended to have that operation. I would, therefore, hold that Ex. 23 was admissible in evidence. That receipt shows that over and above Rs. 425 due on the mortgage there was a further debt of Rs. 100. That amount together with the interest on the same must be awarded to the appellant-mortgagee. The decree of the lower Court must accordingly be amended by adding Rs. 100 *plus* interest due on the same to the amount awarded by the lower appellate Court.

(1) 4 B. 235. (2) 2 B. 489. (3) 5 B. 181.
(4) 3 M. 53. (5) 20 W. R. 334. (6) 1 A. 442.
(7) 6 A. 335. (8) 9 A. 108. (9) 1 B. 197.

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24 B. 615=2 Bom. L.R. 427.

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Before Mr. Justice Parsons and Mr. Justice Ranade.

ANANDRAO AND OTHERS (*Original Plaintiffs*), *Appellants v.* JOTI AND OTHERS (*Original Defendants*), *Respondents.** [12th March, 1900.]

Registration—Registration Act (III of 1877), s. 17, cl. (b)—Assignment—Assignment of a right to recover assessment.

A passed to B a document by which he assigned his inam rights over certain lands held by *mirasi* tenants, including the right to recover the assessment fixed on them at Rs. 40 a year and also the right of succession to the full ownership of the lands, should the *mirasi* tenure on which they were held come to an end.

Held, that the document purported to assign a right, title and interest in immoveable property of the value of more than Rs. 100, and, as such, required registration under cl. (*b*) of s. 17 of the Registration Act (III of 1877).

SECOND Appeal from the decision of R. Knight, District Judge of Satara.

The facts of the case are fully stated in the judgment of this Court.

[616] The only question argued in second appeal was whether the document sued upon required registration.

B. A. Bhagwat, for appellants.

R. V. Desai, for respondents.

JUDGMENT.

PARSONS, J.—In 1873 the parties divided the village which they owned in *inam* and at the same time the defendants passed to the plaintiffs an agreement the terms of which are as follows :—

"The village of Ranebi in district Satara, sub-district Khanapur, was granted in *inam* for the expenses of the god Shri Revansidh and the maintenance of the whole family. It was acquired in *inam* while your and our ancestors were joint. The sanad for the *inam* was obtained in the name of your forefather, Sadashiv Bhagwant. In that village we have got an eight annas' share in the *inam* by proprietorship, while you with your kinsmen have got an eight annas' share in the *inam* by proprietorship. You have passed to us a partition deed of to-day's date for the income of the village that fell to our share. The remaining income belongs to you for your eight annas' share.

"The village was acquired while our family was joint, and the sanad was prepared in the name of Sadashiv Bhagwant, your forefather. You are the senior member of that branch. We, therefore, decided among ourselves that you should have some more income out of this village which is *inam*, and we give you tenants yielding an assessment of Rs. 40 on land that had fallen to our eight annas' share of the income. The details are as follows :—

Rs.	16	8	0	Khatedar Raghu bin Nathaji Patel holding lands as follow :—[description of the lands.]
"	20	0	0	Khatedar Dhondi bin Nathaji :—[description of his lands.]
"	3	8	0	Khatedar Ravlu bin Dattaji.
Rs.	40	0	0	

* Second Appeal No. 651 of 1899.

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"In this manner we have given to you tenants yielding an assessment of land of Rs. 40 that had fallen to our share. So you [617] three brothers should enjoy Rs. 30, and Mahadaji Ramchandra Rs. 10 from generation to generation in *inam* right, and make the vahivat. We have no right left over this income. You may recover the assessment from the said tenants direct or through the village officers according to your pleasure. We have no right or title left to recover the assessment from those tenants. If the *mirasi* right can be acquired through any circumstances over the lands held by the tenants, such right will belong to you. We have no *inam* right left over them at all."

The Judge of the lower appellate Court was of opinion that this document required to be registered under s. 17 (*b*) of the Indian Registration Act, 1877, and, as it was not, dismissed the suit. The point taken before us is whether the document does fall within cl. (*b*) of s. 17.

There can be no doubt that it assigns to the plaintiffs all the *inam* rights of the assignors over the lands held by the three *mirasi* occupiers mentioned therein, including the right to recover the assessment fixed on them and the right of succession to the full ownership thereof should the *mirasi* tenure on which they were held come or be brought to an end. As such it seems to us clear that it assigns a right, title, or interest in immoveable property. In *Madhavrav* v. *Jagannath* (1), it was held that registration was compulsory in the case of an assignment of the right to take the assessment, and in *Venkaji* v. *Shidramapa* (2), the assignment of the assessment of land and of its *vahivat* was held to fall within the wording and spirit of the definition of immoveable property contained in s. 3 of the Registration Act.

The value of the interest assigned "in present or in future" is, in our opinion, more than one hundred rupees. It was the *inam* rights over land assessed at Rs. 40 a year that were assigned, and the value of such rights would be at least twenty years' purchase. If, as was done in *Nago* v. *Babaji* (3), the stamp on the document be taken as a guide to the unexpressed value of claim to seniority, the stamp affixed, Rs. 16, would show a [618] consideration of some Rs. 1,500. We, therefore, confirm the decree with costs.

RANADE, J.—The only point of law raised in this case is whether the *farikat* and the contemporaneous agreement of 1873 required registration. The Court of first instance held that the appellant-plaintiffs' claim, based on the *farikat* and agreement, was proved, and it awarded the claim. The District Court held that the *farikat* was inadmissible in evidence for want of registration under cl. (*b*) of s. 17 of the Act. It was contended before us that the *farikat* and the agreement only declared the appellants' *vadilki* rights, and did not create any interest which did not exist before. Looking at the wording of the document, I feel satisfied that this contention is without foundation. The words used are words of express grant, and it has not been contended that, before the partition, any *vadilki hak* was enjoyed by the appellants of the nature created by this grant. The declaration in this case must be construed in the sense of a document creating or assigning an interest. It is only where a declaration states a mere fact, as in *Sakharam* v. *Madan* (4) and also *Faki* v. *Khotu* (5), that the document requires no registration. Where a document is a declaration of will creating a definite change of legal

(1) P.J. (1889), p. 75. (2) 19 B. 663. (3) 8 B. 610.
(4) 5 B. 232. (5) 4 B. 590.

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relation to the property of the persons executing it, such a declaration is compulsorily registrable. In the present case, the executing party admitted the appellants' right to recover Rs. 40 from certain tenants who were assigned to them for *vadilki hak*. Independently of this document, the appellants could not prove their claim. The cases cited on appellants' behalf have no application. The document in *Gireedhur Doss* v. *Nitto Gopal Doss* (1) admittedly contained no transfer of interest, but simply showed what particular income was to be used by the Shebait for the service of the temple. The ruling in *Kedarnath Dutt* v. *Sham Lall Khettry* (2) was expressly based on the fact that the deposit of the title-deeds and advance of loans had taken place prior to the execution of the document. Where the equitable mortgage was not prior to the document, it was held that the latter was compulsorily registrable—*Jaitha Bhima* v. [619] *Haji Abdul* (3). The case of *Nilava* v. *Rudraya* (4) related to a maintenance claim, and the document was in the nature of a family arrangement, and it was held that the value of the maintenance right was not the same as the value of the property itself. A claim for maintenance did not necessarily create a charge on the property—*Kalpagathachi* v. *Ganapathi Pillai* (5). When the property was worth more than Rs. 100, a partition deed relating to the division of the same must be registered—*Shankar* v. *Vishnu* (6)—even when mother and sons were parties to it—*Lakshmamma* v. *Kameswara* (7). The case of *Herambdev* v. *Kashinath* (8) related to an endorsement on a sanad, which endorsement was held not to create any interest, when the sanad was returned to the grantor. None of the rulings cited apply to the present case. The value of the interest created, being a claim to receive Rs. 40 a year must at the lowest calculation exceed Rs. 100, and, therefore, the document was inadmissible in evidence for want of registration. The *takid* had no independent efficacy of its own. It was only a subsidiary document intended to give effect to the partition. Apparently, it has not been acted upon for more than twelve years since the document was executed. The District Court, therefore, very properly dismissed the claim. I would dismiss the appeal.

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24 B. 619=2 Bom.L.R. 432.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

RAGHO SHITARAM (*Plaintiff*) *v.* HARI (*Defendant.*)*

[15th March, 1900.]

Indian Limitation Act (XV of 1877), s. 20—Part-payment of principal—Payment in kind.

A payment may be made not only in the current coin of the realm, but in any other medium that the creditor may choose to accept.

Where goods are delivered by the debtor and taken by the creditor in payment either of principal or interest as such, such delivery would be a good payment of principal or interest, as the case may be, so as to extend the period of limitation under s. 20 of the Limitation Act (XV of 1877).

[R., 29 M. 234 (236)=16 M.L.J. 99.]

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* Civil Reference No. 4 of 1900.

(1) 19 W. R. 291. (2) 20 W. R. 150. (3) 10 B. 634.
(4) 12 B. H.C.R. 141. (5) 3 M. 184. (6) 1 B. 67.
(7) 13 M. 281. (8) 14 B. 472.

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APPELLATE CIVIL.

24 B. 619 = 2 Bom. L.R. 452.

[620] REFERENCE under s. 617 of the Civil Procedure Code (Act XIV of 1882) by Rao Bahadur N. G. Phadake, First Class Subordinate Judge at Nasik.

The reference was in the following terms :—

"The plaintiff sues on an account stated and signed by the defendants on 26th August, 1896, for Rs. 300 as principal found due by adjustment of a former account and Rs. 135 as interest thereon at the rate of Rs. 1-4-0 per cent. per month. The cause of action is said to have accrued on the 27th August, 1896, the date of the suit being 24th August, 1899. It is alleged that no part-payments are made by the defendants.

"The defendants Nos. 1 and 2 contend that the suit is time-barred, the *khata* sued on being executed on 12th August, 1896, instead of 26th August of that year as alleged fraudulently in the plaint, that if the suit be at all within time, part-payments to the aggregate amount of Rupees 92-13-3 in the shape of corn and such other articles are made, and that they are willing and ready to pay the balance in eight instalments.

"The plaintiff admits in No. 26 that $1\frac{3}{4}$ *pallas* of rice of the value of Rs. 38-8-0 and $1\frac{1}{4}$ *maunds* of wheat of the value of Rs 12-8-0 were paid to him in satisfaction of interest. There is no dispute about the date of payments. Their date is 25th November, 1896. The payments appear to be made on the same date. The actual fact is that the deceased Ragho bought the articles, *viz.*, rice and wheat, from the defendants' shop without paying anything for them, and the defendants credited him with the same in the plaintiff's *khata* at theirs in respect of the dealing in suit. The defendants Nos. 1 and 2 are father and son, and are living together, and jointly keeping a shop and carrying on business as grocers.

"Here the question is 'do these part-payments in kinds extend the period of limitation under s. 20 of the Limitation Act?'

"I am of opinion that they do.

"The parties are professionally traders. The part-payments consist of purchases of $1\frac{3}{4}$ *pallas* of rice worth Rs. 38-8-0 and $1\frac{1}{4}$ *maunds* of wheat worth Rs. 12-8-0 made on credit by the deceased plaintiff from the defendants, who have, as already stated, credited him with the same in their account books.

[621] "Section 20 requires the payment of interest as such for the extension of the period of limitation. It does not say that payment should be made towards liquidation of interest as such *in express terms* or otherwise. A payment made 'by the debtor' on the silent understanding of its being availed of towards liquidation of interest, would be sufficient under the section. The defendant No. 2 admits in his *pursis* that the practice of trade is first to appropriate a part-payment towards the liquidation of interest due and then to use the surplus, if any, in satisfaction of the principal. When the payment of rice and wheat took place as said above there was evidently a mutual understanding on the part of both the parties that so much of the part-payment as amounted to interest due up to date of the payment was paid as interest and the remaining as a part of the principal. The facts of *Hanmantmal* v. *Rambabhai* (I.L.R., 3 Bom., 198) and of *Mackenzie* v. *Tiruvengadathan* (I.L.R., 9 Mad., 271) are quite different from those of the present one."

The reference was argued before Parsons and Ranade, JJ.

S. V. Bhandarkar (*amicus curiæ*), for plaintiff.

E. P. Patankar, for defendants.

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JUDGMENT.

PARSONS, J.—The question referred, *viz.*, "do these part-payments in kind extend the period of limitation under s. 20 of the Limitation Act," is, as appears from the statement, a double one and must be dealt with by us as such. First, the Judge asks the question as to part-payments made in kind generally, and we can at once answer this question in the affirmative. (A payment may be made not only in the currency coin of the realm, but in any other medium that the creditor may choose to accept. The law on this point is clear.) "Where it has been agreed between the debtor and the creditor that the latter shall receive goods in part-payment of his claim, the delivery of such goods to him operates as part-payment—*Hooper* v. *Stephens* (1)." Section 50 of the Contract Act enacts the same: "The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions": and illustration (*c*) is as follows:—"A owes B 2,000 rupees. B accepts some of [622] A's goods in reduction of the debt. The delivery of the goods operates as a part-payment."

Secondly, the Judge asks the question as to the particular payments made in the case before him. This, however, is a question of fact to which we can give no definite answer. It depends entirely upon the understanding or agreement between the parties, and the Judge must himself find what that was. All we can say is that if the goods in question were delivered by the defendant and taken by the plaintiff in payment either of principal or of interest as such, there would be a good payment made either of principal or of interest as the case may be.

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24 B. 622=2 Bom. L.R. 483.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BHIKANBHAI (*Original Defendant* No. 1), *Appellant v.* HIRALAL RAMDINSHET MARWADI (*Original Plaintiff*), *Respondent.**

[21st March, 1900.]

Lease—Condition—Breach of condition—Illegal contract—Contract Act (IX of 1872), *s.* 23—*Tolls Act (Bom. Act III of* 1875), *s.* 10†—*Amending Act (Bom. Act V of* 1881), *s.* 2.

Under s. 10 of the Tolls Act (Bom. Act III of 1875) Government leased to plaintiff the levy of tolls on certain conditions. One of the conditions was that plaintiff should not sublet the tolls without the permission of the Collector previously obtained. One of the clauses of the lease provided that for a breach of any of the conditions of the lease, the Collector might impose a fine of rupees two

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* (1835) 4 A and E. 71.

† Second Appeal No. 698 of 1899.

(1) Section 10 of the Tolls Act (Bom. Act III of 1875)—

10. It shall be lawful for the Government to lease the levy of tolls at such rates not exceeding the rates mentioned in the schedule annexed to this Act, upon any public road or bridge by public auction or private contract from year to year or for a longer period not exceeding seven years on such terms and conditions as the Government may deem desirable: provided that the lessee shall give security for the due fulfilment of such conditions, and that all sums payable under the terms and conditions of the lease shall be recoverable as a demand for the land revenue under the law for the time being in force so far as applicable.

hundred. The plaintiff sublet the toll to the defendants without the permission of the Collector, and sued to recover a certain amount which the defendants promised to pay for the sub-lease. The defendants contended that the contravention of the condition of the lease was illegal and opposed to public [623] policy; that, therefore, the contract was void under s. 23 of the Contract Act (IX of 1872), and that the plaintiff was not entitled to recover the amount.

Held, that the plaintiff was entitled to succeed. The agreement to sublet was not illegal or opposed to public policy merely because it was forbidden under a pecuniary penalty by conditions in the lease to the plaintiff. The penal consequences of the breach were limited to the specific penalty and did not make the contract void.

[R., 26 M. 156 (157); 35 M. 582=10 Ind. Cas. 126=21 M. L. J. 425=9 M. L.T. 459=(1911) 1 M.W.N. 371; 11 Ind. Cas. 527=14 O.C. 144; 9 P.R. 1902=17 P.L. R. 1903.]

SECOND appeal from the decision of J. B. Alcock, District Judge of Nasik, reversing the decree of Rao Saheb D.G. Gharpure, Joint Subordinate Judge.

The plaintiff, who had farmed certain tolls from Government, sublet two of them to the defendants and sued to recover Rs. 1,359-7-6 on account of the subletting.

The defendants answered that the plaintiff could not under the terms of his lease sublet the tolls without the previous sanction of the Collector in that behalf and that on the breach of any of the conditions of the lease the Collector was empowered under cl. 20 of the lease to levy a fine of two hundred rupees from the lessee. They, therefore, contended that the transaction in dispute was illegal and void, being opposed to public policy, and that the plaintiff was not entitled to recover anything on account of it.

The following is the translation of cl. 20 of the lease referred to in the written statement:—

"20. If I, or any of my servants, or sublessees (if there be a sub-lease) act in contravention of the Tolls Act that may be in force, or of any of the conditions of this lease, then the Collector has the authority to levy from me a fine of rupees two hundred for each of such offences, and if I do not pay the fine forthwith, he has the authority to recover it in any manner as provided for in the aforesaid clauses."

The Subordinate Judge found that the alleged agreement between the plaintiff and the defendants was proved, and that it was illegal and void. He, therefore, dismissed the suit.

On appeal by the plaintiff the Judge reversed the decree and allowed the claim to the extent of Rs. 1,351-6-0, which was the amount claimed in appeal.

Defendant No. 1 preferred a second appeal.

[624] *Macpherson* with *Sadashiv R. Bakhle*, for the appellant (defendant No. 1).—The agreement under which the plaintiff sublet the lease to the defendants was illegal as being against the express terms of the lease granted to the plaintiff. It is true that no penalties are prescribed under the Act for such sub-letting. But s. 10 having been added to Bombay Act III of 1875 by s. 2 of Bombay Act V of 1881, which enabled the Collector to impose any conditions he liked in the lease granted under the Act, the conditions thus acquire a statutory importance. They are conditions imposed under the express power granted to the Collector by the Act. A sub-letting, therefore, would be bad as being expressly forbidden by law. Such an agreement would also be void under s. 23 of the Contract Act.

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24 B. 622 = 2 Bom. L.R. 483.

Robertson with *Daji A. Khare*, for the respondent (plaintiff). — The conditions imposed by the lease are not statutory conditions. There is a penalty provided by the conditions, but it is for the Collector to decide whether he would enforce it. In this matter the Collector was approached, but he did not enforce the penalty. The condition imposed by the lease is really for the purpose of facilitating the collection of revenue. If the Legislature had intended to make such subletting illegal and void, it would have done so by an express provision in the Act as we find in the Abkari and Opium Acts. The observations on p. 281, Pollock on Contracts, 6th Ed., hold good in this case. The object in imposing the condition was not to provide for the maintenance of public order or morals; and, therefore, unless expressly forbidden by the Legislature the condition would not be void—*Gangadhar* v. *Damodar* (1).

JUDGMENT.

PARSONS, J.—Section 10, which is added to Bombay Act III of 1875 by s. 2 of Bombay Act V of 1881, provides that Government may lease the levy of tolls on such terms and conditions as the Government may deem desirable. One of the conditions on which the Government let the toll in question to the plaintiff was that he should not sublet it without the permission of the Collector previously obtained. Clause 20 of the lease also provided that for a breach of any of the conditions in the lease **[625]** the Collector might impose a fine of Rs. 200. We have not to consider the legality of this provision. The argument is that the contravention of the condition is illegal and opposed to public policy, and that, therefore, the contract by which the plaintiff sublet to the defendant is void under s. 23 of the Contract Act, and the plaintiff cannot recover the amount which the defendant promised to pay for the sublease. It is admitted that the defendant collected the tolls for the year for which the contract was made, and that there was no breach on the part of the plaintiff or interference on the part of the Collector. This being so, we think that the plaintiff is entitled to succeed. The Court cannot regard the object of the agreement to sublease as immoral or opposed to public policy merely because it is forbidden under a pecuniary penalty by conditions in the lease to the plaintiff. We think we ought to limit the penal consequences of the breach to the specific penalty and not to hold the contract void. "When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in course of such business or profession (*e*) are void, if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed; (*f*) are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, *e.g.*, the convenient collection of the revenue:" Pollock on Contract, 6th Ed., p. 281. In our opinion, this case falls within the latter class, because the statute itself does not forbid or attach a penalty to the transaction of subletting, but merely gives power to impose a condition under which it can be forbidden should the Collector see fit to do so for what can be only purely administration purposes. The Act imposing tolls is an Act passed for the benefit of the revenue and not an Act for the protection of public morals such as the Abkari and Opium Acts are in this

(1) 21 B. 522.

country and the Licensing Acts are in England, and to which different considerations apply.

We confirm the decree with costs.

[626] RANADE, J.—In this appeal the only point of law raised relates to the question whether the agreement on which plaintiff-respondent relies, is void under s. 10 of the Bombay Tolls Act V of 1881 and s. 23 of the Contract Act. The respondent-plaintiff brought the suit on a *khata* passed by the appellant defendant and two others. The execution of the *khata* was admitted by the defendants Nos. 1 and 2, but they pleaded that it was passed as a security for the proper management of two toll *nakas* which were entrusted to them by the respondent-plaintiff as his servants, and that as they paid over all the money that they received they were not liable to make any repayment, as they had not borrowed any sums from the plaintiff. The respondent-plaintiff in reply admitted that no money had been advanced by him, and that the *khata* had been passed as consideration for his making over to the defendants two of the toll *nakas* for which he had contracted with Government in 1897. On this statement of the plaintiff-respondent, the defendants raised the contention that the agreement about subletting was illegal and void under the Tolls Act. The Court of first instance upheld that contention and dismissed the claim. In appeal, the District Judge held that the agreement was not void, and awarded the claim. The Tolls Act III of 1875 was amended by Act V of 1881, which empowered Government to lease the levy of tolls to any person provided that the lessee shall give security for the due fulfilment of the conditions laid down by Government, and s. 11 provides that "such lessee and persons employed by him as his agents shall be deemed to be persons appointed to collect tolls." There is nothing in the Act which permits or forbids subletting, but the lessee can employ persons as his agents for collecting tolls. In the conditions which the lessee had signed, Ex. 23, there is a clause that the lessee would not sublet without the permission of the Collector previously obtained, and Ex. 65 shows that this permission to sublet under cl. 14 was refused. *Raja chitties* were, however, granted to the appellant describing him as having been employed by respondent as his servant in charge of tolls (Exs. 25 and 29). The question for consideration, therefore, is whether the plaintiff-respondent was debarred **[627]** from suing on his agreement of sub-lease by reason of the breach of the condition contained in Ex. 23 even though there was no provision in the Act against subletting, and no penalty was prescribed in the conditions against breach of the same.

As a general rule, the law does not forbid things in express terms, but imposes penalties for doing them, and the imposition of such penalties implies prohibition, and an agreement to do a thing so prohibited is unlawful under s. 23 of the Contract Act. This was the principle laid down in *Gosvami Shri Purushotamji Maharaj* v. *B. Robb* (1), where the case was of an agreement to pay a cess prohibited by law. As no penalty was imposed by the Act, the agreement to pay the cess was held not to be illegal, but, at the same time, the Court held that it could not be enforced, as it provided for the collection of a cess declared illegal. In *Raghunath* v. *Nathu* (2), the agreement was of a sublease granted without the permission of the Collector under the Opium Act. That case must be distinguished from the present, because under the Opium Act, s. 4, the selling of

(1) 8 B. 398. (2) 19 B. 626.

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opium by persons not licensed was expressly forbidden, and it was, therefore, held that the agreement was one forbidden by law and, therefore, void. No such provision is found in the Tolls Act, and the case more nearly resembles the ruling in *Gangadhar* v. *Damodar* (1), where the agreement was entered into by defendant by subletting a public works contract for a consideration of getting 10 per cent. profits. Such a contract was distinguished from contracts of subletting in the matter of excise licenses, which were intended to be held by law by the licensee himself. See also *Judoonath Shaha* v. *Nobin Chunder* (2). The nearest case in point is *Gauri Shankar* v. *Mumtaz Ali Khan* (3), where the contract was of a partnership in the lease of a ferry. Such a partnership was held to be legal, as there was nothing in the Act itself which prohibited such arrangements, and the object was not fraudulent, nor did it result in any injury to person or property, and there was nothing immoral or opposed to public policy, such as was the case in *Hari Balkrishna* v. *Naro Moreshvar* (4) ; **[628]** *Sharoda Pershad Roy* v. *Bholanath* (5) ; *Doorga Singh* v. *Sheo Pershad Singh* (6). The District Judge must, therefore, be held to have correctly decided the point of law raised in this appeal. As no penalties are prescribed under the Act, the agreement does not *prima facie* fall under the 1st clause of s. 23. It does not come under the 2nd clause also, as it does not defeat the provision of any law—*Debi Prasad* v. *Rup Ram* (7) ; *Hormasji Motabhai* v. *Pestanji Dhanjibhai* (8) ; *Raghunath* v. *Nathu* (9). The Act itself permits the employment of persons other than the lessee as agents. There is nothing fraudulent or immoral or opposed to public policy in such an agreement. I would, therefore, dismiss the appeal with costs.

Decree confirmed.

(1) 21 B. 522. (2) 21 W.R. 289. (3) 2 A. 411. (4) 18 B. 342.
(5) 11 W.R. 441. (6) 16 C. 194. (7) 10 A. 577. (8) 12 B. 422. (9) 19 B. 626.

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(2) See MINOR, 23 B. 146.

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(1) *Alimony—Charge on husband's immoveable property—Widow—Distributive share.*—By an order of the Parsi Matrimonial Court the deceased was directed to execute a proper instrument charging his immoveable property with the payment of Rs. 70 per mensem by way of permanent alimony to his wife during her life. The instrument was executed accordingly. On his death his widow was held entitled, in addition to the Rs. 70 per mensem charged on her deceased husband's immoveable property, to a distributive share in his estate. MOTIBAI v. MOTIBAI, 24 B. 465=2 Bom. L.R. 602 ... 842

(2) S. 36—See PARSIS, 23 B. 279.

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(1) S. 28—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 382.

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Ss. 6 *and* 14—*Rule* (6) *framed under the Act—Suit for recovery of varshasan allowance—Collector's certificate—Cancellation of certificate by Revenue Commissioner.*—When a certificate is granted by the Collector under s. 6 of the Pensions Act (XXIII of 1871), the presumption is, until the contrary is shown, that the order for granting the certificate was made, as is contemplated by the 6th rule framed under the Act, with the previous sanction of the Revenue Commissioner by the Collector himself. But the Revenue Commissioner has no power vested in him to cancel a certificate granted by the Collector, and there is no rule which provides for the revision by the Revenue Commissioner of the Collector's action in granting certificates or for the cancellation by him of the certificates granted by the latter. BHIMBHAT v. BHIKAMBHAT, 23 B. 676=1 Bom. L.R. 184 ... 452

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S. 22—*Master and servant—Master's liability for the criminal acts of his servant.*— Where the manager of a licensed vendor of arms, ammunition and military stores sold certain military stores without previously ascertaining that the buyer was legally authorized to possess the same,

Held, that the licensee was liable to punishment under s. 22 of the Indian Arms Act (XI of 1878), though the goods were not sold with his knowledge and consent.

The principle—"whatever a servant does in the course of his employment with which he is entrusted and as a part of it, is his master's act"—is applicable to the present case. QUEEN-EMPRESS v. TYAE ALLI, 24 B. 423=2 Bom. L.R. 52 ... 815

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(1) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 23 B. 698.

(2) *Ss.* 3 (*z*), 53 *and* 73—*Agriculturist—Plaintiff proved or admitted to be an agriculturist—Appeal—Special Judge—Jurisdiction.*—The plaintiff alleging that she was an agriculturist sued for redemption under chap. II of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Subordinate Judge raised an issue as to her status, and on that issue found that she was not an agriculturist. He, however, proceeded with the trial of the case and on the merits dismissed her claim. She thereupon applied to the Special Judge, who took up the case in revision, reversed the decree of the lower Court, and passed a decree in the plaintiff's favour, holding that she was an agriculturist.

Held, that the Special Judge had no jurisdiction. The Subordinate Judge had found that the plaintiff was not an agriculturist. Having done so it must be deemed that he went on with the trial only in his ordinary jurisdiction, and the decree passed was one not under chap. II of the Dekkhan Agriculturists' Relief Act, but under the general provisions of the Civ. Pro. Code (Act XIV of 1882). By s. 53 the Special Judge has jurisdiction only over decisions and orders passed by a Subordinate Judge under chap. II.

Per PARSONS, J.—It is only when the plaintiff is admitted and proved (not merely when he claims) to be an agriculturist that the Court has jurisdiction to try a suit under chap. II of the Act. The question of status ought to be raised and decided as a preliminary issue. LAKSHMAN v. RAMCHANDRA, 23 B. 321 ... 213

(3) *S.* 11—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 57—*Jurisdiction—Practice—Procedure when suit filed in wrong Court.*—Under s. 11 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), a suit in which there are several defendants who are agriculturists may be instituted and tried in a Court within the local limits of whose jurisdiction any one of such defendants resides and not elsewhere.

Where a suit was brought in the Court at Haveli, the plaintiffs alleging that some of the defendants who held lands within the jurisdiction of that Court were agriculturists, and the suit was dismissed because those defendants were found not to be agriculturists.

Held, that the proper procedure to be adopted in such a case was not to dismiss the suit, but to return the plaint for presentation to the proper Court. LADHAJI v. HARI, 23 B. 679=1 Bom. L.R. 176 ... 454

(4) *S.* 44—*Agreement filed under section and becoming a decree—Default in payment of instalments due under decree—Application to make decree absolute under s.* 89 *of Transfer of Property Act* (IV *of* 1882) *—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 179.—On the 21st October 1894, the plaintiff and the defendant entered into an amicable agreement before a conciliator for payment of a mortgage-debt due to the former by annual instalments. The agreement was forwarded to the Court on the 21st December 1894, to be filed under s. 44 of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879). Default having been made in the payment of the instalments, the first of which became due on the 25th January, 1895, and which also was not paid, the plaintiff applied for execution by sale of the mortgaged property. The application was made on the 6th September, 1897, and it was struck off the file for some formal defect on the 18th November, 1897. Subsequently on the 10th October 1898, the plaintiff, having applied for an order absolute for sale under s. 89 of the Transfer of Property Act (IV of 1882), questions arose as to the applicability of the section to agreements filed in Court under s. 44 of the Dekkhan Agriculturists' Relief Act and as to limitation.

Held, that (1) agreements filed under s. 44 of the Dekkhan Agriculturists' Relief Act, if relating to sale of mortgaged property, are subject to the provisions of s. 89 of the Transfer of Property Act (IV of 1882).

(2) Art. 179, sch. II of the Limitation Act (XV of 1877) applies to applications under s. 89 of the Transfer of Property Act.

Held, further, that in the present case the application of September 1897 should be treated as a step-in-aid of execution. BHAGWAN v. GANU, 23 B. 644=1 Bom. L.R. 136 ... 430

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(5) *S.* 72, *cl.* (*a*)—"*Written instruments*"—*Limitation.*—On the 7th April, 1888, an agriculturist in the Deccan passed a writing to his creditor to the following effect :—

"Receipt taken by Vasudeo from Ramkrishna, agriculturist. I have borrowed Rs. 1,045 from you from time to time for my private expenses. I have passed you no bond for the money. To-day I have taken Rs. 300 more, making Rs. 1,345 in all. For that I will give you a bond fifteen days hence. I have received the money."

This document was duly registered under s. 58 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

In June 1897 the creditor sued to recover the principal and interest due under this document.

Held, that the document sued upon was a "written instrument" within the meaning of s. 72, cl. (*a*), of the Dekkhan Agriculturists' Relief Act (XVII of 1879), and that the suit was, therefore, not barred, having been brought within twelve years from the date of the document.

Held, also, that the document was not a mere acknowledgment of a debt, but an agreement containing a distinct undertaking that the debtor would pass a bond for the debt within fifteen days. VASUDEO v. RAMKRISHNARAO, 24 B. 394=2 Bom. L.R. 122 ... 795

Act V of 1881 (Probate and Administration).

(1) Ss. 3, 8, 13, 154—See BANK OF BOMBAY, 24 B. 350.
(2) Ss. 3, 24, 25, 26 and 62—See PROBATE, 24 B. 8.
(3) S. 90—See HINDU LAW (WIDOW), 23 B. 342.

Act II of 1882 (Trusts).

S. 91—See VENDOR AND PURCHASER, 24 B. 400.

Act XV of 1882 (Presidency Small Cause Courts).

S. 38—Dismissal for default—Remedy of plaintiff—Practice—Procedure—Decree—Ex-parte decree—Appearance of party—Appearance by pleader or recognized agent—Appearance only for the purpose of applying for adjournment—Civ. Pro. Code (Act XIV of 1882), ss. 36, 37, 100, 102, 103—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 414.

Act IX of 1887 (Provincial Small Cause Courts).

(1) S. 25—See SMALL CAUSE COURT, 23 B. 334.
(2) Ss. 27 and 33—See SMALL CAUSE COURT, 24 B. 310.

Act VI of 1889 (Probate and Administration).

S. 14—See HINDU LAW (WIDOW), 23 B. 342.

Act VIII of 1890 (Guardian and Wards).

(1) See BANK OF BOMBAY, 24 B. 350.
(2) See LUNATIC, 23 B. 403.

(3) *Ss.* 7 (3), 8 (*a*), 13—*Claim to guardianship based on a will does not survive to claimant's representative—Appeal—Death of appellant pending appeal—Abatement.*—One Khashabai applied to be the guardian of the person and property of her minor son. Her application was opposed by Gangabai, the grandmother of the minor, who alleged that she had been appointed guardian by the will of the minor's father. The Judge found the will not proved, and he appointed Khashabai to be guardian. Gangabai appealed and pending the appeal she died. Gangabai's brother, one Madhavrao, thereupon applied for leave to prosecute the appeal as Gangabai's representative.

Held, refusing the application, that the appeal must abate by reason of Gangabai's death. Her appointment alleged to have been made under the will was a matter of personal preference and trust. A claim based on personal trust could not survive to her representative. GANGABAI v. KHASHABAI, 23 B. 719=1 Bom. L.R. 363 ... 481

(4) *Ss.* 13, 46 *and* 39—*Duty of District Court to hear all evidence—Decision based on evidence taken by a Subordinate Court illegal—Practice—Minor—Guardian.*—Section 46 of the Guardian and Wards

Act VIII of 1890 (Guardian and Wards)—(*Concluded*). PAGE

Act (VIII of 1890) does not control s. 13 of the Act, so as to authorize the District Judge to dispense with the hearing of evidence by himself and transfer the whole investigation of material issues of fact to a Subordinate Court. Nor does it empower the District Judge to use the evidence taken by the Subordinate Court.

An application was made for the appointment of a guardian to the person and property of a minor. The District Court sent the application to a Subordinate Judge for inquiry and report, and issued a notice calling upon any who objected to the appointment of the proposed guardian to appear before the Subordinate Judge, who would hear and dispose of the objections. The whole inquiry was held before, and all the evidence was taken by, the Subordinate Judge. Upon the evidence so taken, the District Judge disposed of the application.

Held, that the procedure adopted by the District Judge was illegal, and his decision based upon evidence not taken before him could not be accepted. GANESH VITHAL v. KUSABAI, 23 B. 698 =1 Bom. L.R. 185 ... 467

(5) Ss. 22, 45 and 47—See GUARDIAN, 24 B. 95.

(6) Ss. 29 and 30—See GUARDIAN, 23 B. 287.

Act IX of 1890 (Railways).

(1) S. 12—See WATER-WORKS, 23 B. 358.

(2) *S.* 110—"*Compartment*"—*Meaning of the word.*—*Per* JENKINS, C.J., and CANDY, J.—Good sense requires that to the word "compartment" in certain sections of the Indian Railways Act (IX of 1890) the quality of complete separation should be attributed, and it is with that force that it is used in s. 110.

Per RANADE, J.—The word "compartment" is used in s. 110 of Act IX of 1890 in the same sense in which it is used throughout the Act, and does not necessarily mean a completely partitioned division. *In re* DADABHAI JAMSEDJI, 24 B. 293=1 Bom. L.R. 688 ... 730

Act IV of 1893 (Partition).

(1) *S.* 3, *sub-ss.* 2, 4—*Suit by transferee for partition—Suit for partition by sharer against transferee—Procedure.*—Section 4 of the Partition Act (IV of 1893) applies only where the transferee sues for partition. Where the suit is brought by the sharer against the transferee, s. 2 must be applied.

In cases where s. 4 applies, the Judge should make a valuation of the share of the transferee only and direct its sale. BALSHET v. MIRANSHEB, 23 B. 77 ... 51

(2) *S.* 4—*Application of section—Dwelling-house belonging to undivided family—Re-acquisition by members of such family after it has been sold to a stranger does not give any right under the section as against such stranger.*—A dwelling-house belonged to four brothers, Krishnaji, Ramchandra, Vaman and Parashram, joint members of a Hindu family. In 1874 the shares of Krishnaji and Parashram were sold in execution of decrees against them, and in 1877 the remaining shares were sold, and finally the house became the property of the plaintiff and one Karandikar in equal moieties. The plaintiff sued Karandikar for partition and obtained a decree, but pending execution Karandikar conveyed his moiety back again to Ramchandra and Vaman. The brothers had continued to occupy the house notwithstanding the changes in ownership. Vaman now applied under s. 4 of the Partition Act (IV of 1893) to be allowed to buy the plaintiff's moiety.

Held, that he was not entitled to the advantage given by the section. It is ownership, not occupation, that gives the right. After the sales in 1877 the house no longer belonged to an undivided family. Vaman and his brothers were then either tenants in the house or trespassers. The question was whether the dwelling-house at the time the shares therein, which had not been sold to Karandikar, were transferred to the plaintiff belonged to an undivided family. When the plaintiff purchased his moiety, he and Karandikar became the owners in common of the house, and as between them s. 4 of the Partition Act had no operation. The subsequent purchase

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of Karandikar's interest by Ramchandra and Vaman did not confer upon them any rights which Karandikar did not possess. It was in their hands re-acquired ancestral property, but not property belonging to an undivided family within the meaning of s. 4. VAMAN v. VASUDEV, 23 B. 73 ... 48

Act VI of 1895 (Dekkhan Agriculturists' Relief,.

S. 3—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B. 321.

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See LANDLORD AND TENANT, 23 B. 510.

Act X of 1897 (General Clauses).

See MORTGAGE (SALE), 23 B. 348.

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S. 3—See BHAGDAR, 23 B. 710.

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Act I of 1865 (Bombay Survey and Settlement).

See LIMITATION, 24 B. 104.

Act II of 1865 (Bombay, Municipal).

See MORTGAGE (SALE), 23 B. 348.

Act III of 1865 (Bombay Wagers).

(1) See WAGER, 24 B. 227.
(2) S. 1—See INSURANCE, 23 B. 191.

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(2) S. 33—See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 24 B. 240.
(3) S. 48—See MUNICIPALITY, 23 B. 248.
(4) S. 84—See MUNICIPALITY, 23 B. 446.

Act III of 1874 (Bombay Hereditary Offices).

(1) See VATAN, 24 B. 556.
(2) S. 5—See VATAN, 23 B. 715.
(3) S. 51—See VATAN, 24 B. 484.

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S. 10, and Bom. Act V of 1881, s. 2—Lease—Condition—Breach of condition—Illegal contract—Contract Act (IX of 1872), s. 23—See LEASE, 24 B. 622.

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(1) Ss. 3, 5, 6, 7 and 9—Mamlatdar's Court—Possessory suit by a minor plaintiff represented by his guardian—Plaint signed and verified by the pleader of the guardian—Right of the minor to sue—Minor—See MINOR, 24 B. 238.
(2) S. 4—See JURISDICTION, 23 B. 47.
(3) S. 4—See WATER, 23 B. 506.
(4) S. 18—*Specific Relief Act* (I *of* 1877), *s.* 9—Res judicata—*Possessory suit in Mamlatdar's Court—Dismissal of suit by Mamlatdar on the merits—Subsequent suit in Civil Court under s.* 9 *of the Specific Relief Act* (I *of* 1877).—A possessory suit filed in the Mamlatdar's Court was dismissed by the Mamlatdar on the merits. The plaintiff thereupon filed another suit under s. 9 of the Specific Relief Act (I of 1877) in a Civil Court which allowed the claim and passed a

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decree in his favour. The defendant applied to the High Court in its extraordinary jurisdiction and contended that the plaintiff's claim was *res judicata* and that the Mamlatdar's decree barred the second suit.

Held, that having regard to s. 18 of the Mamlatdars' Courts Act (Bom. Act III of 1876) the Mamlatdar's decision was not conclusive, and that the plaintiff was entitled to bring the second suit under s. 9 of the Specific Relief Act (I of 1877). RAMCHANDRA v. NARSINHACHARYA, 24 B. 251 (F.B.)=1 Bom. L.R. 660 ... 703

Act V of 1879 (Bombay Land Revenue Code).

(1) *Ss.* 37, 38, 61—*Scope of s.* 37—*Survey—Omission to number lands at a survey—Effect of such omission on owner's rights—Summary settlement—Exclusion of land from summary settlement—Effect of such exclusion—Bombay Act* VII *of* 1863—*Sanad under the Act—Sanad.*—The plaintiffs, who were the inamdars of certain land, sued for a declaration of their ownership in and of their right to cultivate (*a*) two plots of land which (they alleged) formed part of their inam, and (*b*) the bed of a stream which flowed through their land. It was contended for the defendants as to these two plots of land that the plaintiffs had no right to cultivate them, as they had been made a part of a village site, and on that understanding they had not been numbered at the survey in 1863 and had been exempted from assessment for twenty years. As to the bed of the stream, it was contended that the stream was a public stream, and that the bed of the stream as it dried up belonged to Government and not to the plaintiffs.

It was held by the lower appellate Court that s. 61 of the Bombay Land Revenue Code (Bom. Act V of 1879) applied; that Government were competent to set apart a portion of the lands comprised in the sanad of the plaintiffs for a village site, and that as these lands had not been numbered at the survey of 1863 and had been exempt from assessment for more than twenty years, the plaintiffs had lost their right to cultivate them. On appeal to the High Court,

Held (reversing the decree of the lower Court), that the plaintiffs were entitled to the declaration prayed for.

Held, also (1) that s. 61 of the Bombay Land Revenue Code did not apply. That section relates back to s. 38 and both refer only to lands the property of Government in unalienated villages or unalienated portions of villages. They do not empower the Government to confiscate any land belonging to an inamdar and to confer it on the persons living in his village.

(2) That the mere omission to number the plots of land could not have the effect of turning them into a part of the village site, or take away the right of the plaintiffs. Nor did the omission of Government to assess these lands deprive the plaintiffs of them, or make them the property of Government.

(3) That the bed of the stream was the property of the plaintiffs, who owned the land upon its banks. VINAYAKRAO v. THE SECRETARY OF STATE FOR INDIA, 23 B. 39 ... 26

(2) Ss. 37, 39 and 135—Land presumably the property of the plaintiff—Plaintiff in uninterrupted possession—Revenue survey—Entry of the land in the register as Government waste land—Order of the Revenue Commissioner directing land to be given to defendant No. 2—Plaintiff's dispossession—Suit against the Secretary of State and defendant No. 2—Nature of Revenue Commissioner's order—Setting aside of the order—Limitation—Title—Cause of action—Limitation Act (XV of 1877), sch. II, art. 14—See LIMITATION ACT (XV OF 1871), 24 B. 435.

(3) Ss. 56, 57, 81 and 214 (cls. *c* and *i*)—See LANDLORD AND TENANT, 24 B. 34.

(4) *Ss.* 65 *and* 66—*Fine leviable for appropriation of land to a non-agricultural purpose—Collector's omission to acknowledge receipt of application not a good defence to the imposition of fine—Construction.—Per* PARSONS and CANDY, JJ.—Under ss. 65 and 66 of the

Act V of 1879 (Bombay Land Revenue Code)—(*Concluded*). PAGE

Bombay Land Revenue Code (Bom. Act V of 1879), where a person appropriates land to a non-agricultural purpose he must, in order to escape liability to the fine imposed by s. 66, be able to show either (*a*) that he first obtained the permission of the Collector, or (*b*) that he waited for three months from the date of the Collector's acknowledgment of his application for permission as to appropriate it. But the three months' time does not begin to run until such acknowledgment has been received, so that where a person is charged with thus appropriating his land, it is no defence to plead that the Collector, though he received the application, neglected to furnish the applicant with a written acknowledgment of the receipt of the application.

Per RANADE, J.—Where the Collector has received the application and omitted to send an acknowledgment, the occupant need only wait for three months from the time of his sending in the application. After the expiration of this time, if the occupant appropriates his land to a non-agricultural purpose, the Collector cannot levy the fine provided by s. 66. NAYAK PURSHOTUM v. SECRETARY OF STATE FOR INDIA, 24 B. 240=1 Bom. L.R. 669 ... 696

(5) S. 162—See LIMITATION ACT (XV OF 1877), 24 B. 23.

(6) *S.* 216—*Holder of an alienated village—Application for introduction of survey by co-sharer of an inam village.*—Under s. 216 of the Land Revenue Code (Bombay Act V of 1879) it is competent to one out of several co-sharers of an alienated village to apply on behalf of and with the consent of all the other co-sharers for the introduction of survey into the village; and it is not open to the cultivators of lands in the village the question to action of Government in introducing the survey on such application.

The section does not require that the application should be made or signed by all the sharers. GOPIKABAI v. LAKSHMAN, 24 B. 539 =2 Bom. L.R. 235 ... 890

Act VII of 1879 (Bombay Irrigation).

S. 48—See MAMLATDAR, 23 B. 761.

Act I of 1880 (Bombay Khoti Settlement).

(1) S. 5—See KHOT, 23 B. 769.

(2) S. 16 See KHOT, 24 B. 533.

(3) Ss. 20, 21 and 22—See LANDLORD AND TENANT, 24 B. 426.

(4) *S.* 33—*Khot—Occupancy tenants—Thal—Thal to be determined by Survey Officer and not by Civil Court—Rent suit.*—Under s. 33 of the Bombay Khoti Act (Bom. Act 1 of 1880) it is the duty of the Survey Officer to determine the *thal* or customary rent payable to a khot by an occupancy tenant.

Until a new determination has been made by the Survey Officer, under s. 33, of the rent payable to the khot, a Civil Court must award rent at the old rate legally fixed. BAPUJIRAO v. GANU, 24 B. 489 =2 Bom. L.R. 376 ... 857

(5) S. 39 (E)—See LIMITATION ACT (XV OF 1877), 24 B. 23.

Act V of 1881 (Bombay Tolls on Roads and Bridges Act Amendment).

S. 2—See LEASE, 24 B. 622.

Act II of 1884 (Bombay District Municipal Act Amendment).

See MUNICIPALITY, 23 B. 446.

Act V of 1886 (Bombay Hereditary Offices Amending Bom. Act III of 1874).

(1) See HINDU LAW (ADOPTION), 24 B. 260.

(2) See VATAN, 23 B. 715.

(3) S. 2—See VATAN, 24 B. 484.

Act III of 1888 (Bombay, City of Bombay Municipal).

(1) Ss. 222, 265—See WATER WORKS, 23 B. 358.

(2) S. 249—See MUNICIPALITY, 23 B. 528; 24 B. 75.

(3) Ss. 342, 345—See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 24 B. 240.

(4) S. 381—See MUNICIPALITY, 24 B. 125.

Act II of 1890 (Bombay Salt). PAGE

S. 47 (*A*)—*Possession of salt water with the intention of manufacturing salt.*—The mere possession of salt water with the intention of manufacturing salt thereform is not an offence under the Bombay Salt (Act II of 1890). QUEEN-EMPRESS v. DABHAI KABHAI, 23 B. 788=1 Bom.L R. 345 ... 528

Adjournment.

See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 414.

Administrator.

See PARTNERSHIP, 23 B. 544.

Administrator-General.

Administrator-General's Act (II *of* 1874), *ss.* 17 *and* 18—*Order to collect assets—Decree against deceased's estate passed prior to such order—Attachment of part of deceased's estate subsequently to above order—Claim of Administrator-General prior to that of attaching creditor.*—On the 16th April, 1898, the plaintiff obtained an *ex parte* decree against the defendant as heir and legal representative of his deceased father. Previously to the date of the decree (*viz.*, on 4th March, 1898), an order had been made by the High Court under ss. 17 and 18 of the Administrator-General's Act (II of 1874), authorizing the Administrator-General to collect the assets of the deceased and ordering him, if necessary, to take out letters of administration to his estate. On the 29th April, 1898, the plaintiff under s. 268 of the Civ. Pro. Code (Act XIV of 1882) attached certain money in the hands of a third party due to the deceased's estate. On the 2nd July, 1898, letters of administration were granted to the Administrator-General.

Held that, as against the Administrator-General, the attachment was void *ab initio*. At the date of the decree obtained by the plaintiff, the Administrator-General was entitled by virtue of the High Court's order to take possession of the estate of the deceased. As soon as that order was made, his right to possession became paramount and excluded that of the defendant (the son of deceased), who was then no longer entitled to recover payment of debts due to his father. A decree, therefore, subsequently obtained against the defendant could not, as against the Administrator-General, confer any rights on the decree-holder, who could not stand in a better position than the defendant, his judgment-debtor. Under ss. 278 and 280 of the Civ. Pro. Code, the Administrator-General had the right to have the attachment removed, because he was exclusively entitled, at first by reason of the order under s. 18 of Act II of 1874 and subsequently by his letters of administration, to recover the debt, and was not subject to any decree which affected his title. BHAIJI BHIMJI v. ADMINISTRATOR-GENERAL OF BOMBAY, 23 B. 428=Chitty's S.C.C.R. 580 ... 284

Admission.

See HUNDI, 24 B. 360.

Adverse Possession.

(1) Limitation—Resumption—Service lands—Mere non-performance of service does not make the holding adverse—See SERVICE LANDS, 23 B. 602.

(2) Limitation Act (XV of 1877), s. 18, and art. 144, sch. II—Survey Settlement Act (Bom. Act I of 1865)—Limitation—Khoti—See LIMITATION, 24 B. 104.

(3) See HINDU LAW (PARTITION), 23 B. 137.

Agreement.

(1) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B. 644.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 394, 502.

(3) See EASEMENT, 24 B. 156.

Agreement—(*Concluded*). PAGE

(4) See LANDLORD AND TENANT, 23 B. 283.
(5) See LEASE, 24 B. 622.
(6) See PARSIS, 23 B. 279.

Agriculturist.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B. 321.

Allocation.

See SHIPPING, 24 B. 55.

Appeal.

1.—GENERAL.
2.—SECOND APPEAL.

——1.—General.

(1) Appeal by defendants—Objections to decree filed by plaintiff—Subsequent withdrawal of appeal—Application by plaintiff for leave to appeal — Sufficient cause—Limitation (Act XV of 1877), s. 5—Civ. Pro. Code (Act XIV of 1882), s. 561—Practice—See PRACTICE, 23 B. 692.

(2) Death of appellant pending appeal—Abatement—Guardians and Wards Act (VIII of 1890), ss. 7 (3), 8 (*a*) and 13—Claim to guardianship based on a will does not survive to claimant's representative—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 23 B. 719.

(3) Decree—Civ. Pro. Code (Act XIV of 1882), s. 231—Application for execution by one of several joint decree-holders—Appeal—Practice—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 623.

(4) Decree for account—Further directions—Time for appeal—Letters Patent, s. 15—Civ. Pro. Code (Act XIV of 1882), s. 591—See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 302.

(5) Limitation Act (XV of 1877), s. 12, sch. II, art. 152—Civ. Pro. Code (Act XIV of 1882), s. 205—Date of judgment— Date of decree—Bill of costs signed subsequently — Time requisite for obtaining copy of the decree—Time between pronouncement of judgment and signing of the decree—Practice — Limitation—See LIMITATION, 23 B. 442.

(6) *Practice—Appeal from a decree in the nature of an award—Case referred to the decision of a Court, both parties agreeing to abide by such decision.*—Where both parties to a suit referred the matters in dispute between them to the Court, and agreed to abide by its decision, and the Court passed a decree awarding a certain sum to the plaintiff.

Held, that no appeal lay from the decree, the decision of Court being in the nature of an arbitrator's award. SAYAD ZAIN v. KALABHAI, 23 B. 752=1 Bom. L.R. 366 ... 503

(7) Practice—Valuation—Court Fees Act (VII of 1870), s. 7, cl. 10 (*a*), cl. 4 (*c*). (*d*) ; s. 12—Class to which a suit belongs—Decision as to such class—See VALUATION, 23 B. 486.

(8) Reference—Civ. Pro. Code (Act XIV of 1882), ss. 622, 646-A—Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), ss. 27 and 33—Decree passed by a Subordinate Judge invested with the jurisdiction of a Small Cause Court—Finality of such decree—See SMALL CAUSE COURT, 24 B. 310.

(9) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B. 321.

(10) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 382 ; 24 B. 314.
(11) See EVIDENCE, 23 B. 296 ; 24 B. 591.
(12) See GUARDIAN, 24 B. 95.
(13) See RECEIVER, 24 B. 38.

——2.—Second Appeal.

See LIMITATION ACT (XV OF 1877), 23 B. 513.

Apportionment.

See LANDLORD AND TENANT, 23 B. 15.

Approver. PAGE

Trial of approver for non-fulfilment of the condition on which pardon was offered—Practice—Crim. Pro. Code (Act V of 1898). s. 337—Pardon tendered to one of the accused—See CRIM. PRO. CODE (ACT V OF 1898), 23 B. 493.

Arbitration.

Order of reference to arbitration—Civ. Pro. Code (Act XIV of 1882), s. 506—Jurisdiction—Absence of the written authority to refer—Practice—See PRACTICE, 23 B. 629.

Assessment.

See REGISTRATION, 24 B. 615.

Assignee.

See LIMITATION ACT (XV OF 1877), 23 B. 246.

Assignment.

(1) See INSURANCE, 23 B. 191.
(2) See REGISTRATION, 24 B. 615.
(3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 B. 502.

Attachment.

(1) See ADMINISTRATOR-GENERAL, 23 B. 428.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 237, 266.
(3) See VENDOR AND PURCHASER, 24 B. 400.

Award.

See APPEAL (GENERAL), 23 B. 752.

Bail.

See SHIPPING, 24 B. 55.

Bank of Bombay.

Bank—Shares—Registration and transfer of shares—Rights of surviving co-parceners—Necessity of probate or letters of administration—Presidency Banks Act (XI *of* 1876), *ss.* 20, 22 *and* 23.—Thirteen shares of the Bank of Bombay stood in the name of one Sarabhai, who died in March, 1895. The plaintiff, who was the minor son of Sarabhai and joint and undivided with him, applied to the Bank to have the shares transferred to his name as the sole surviving co-parcener of Sarabhai. The Bank contended they were not bound to do so without production of the probate of the will of Sarabhai or letters of administration to his estate.

Held, (reversing RUSSELL, J.) that having regard to the terms of the Presidency Banks Act (XI of 1876) the Bank were right in their contention. For a share in the Bank, for the purposes of devolution or survivorship, must be deemed, as far as the Bank was concerned, the exclusive property of its registered holder, and that, therefore, the sole surviving co-parcener of a deceased Hindu cannot demand that the Bank of Bombay should, by reason of his survivorship, register him as a shareholder in respect of shares in the Bank which stand in the name of his deceased co-parcener. BANK OF BOMBAY v. AMBALAL SARABHAI, 24 B. 350 = 2 Bom. L. R. 467 ... 767

Benami Transaction.

(1) See MINOR, 23 B. 146.
(2) See MORTGAGE (GENERAL), 23 B. 119.

Bequest.

(1) See WILL, 23 B. 1.
(2) See HINDU LAW (WILL), 23 B. 725.

Bhagdar.

Bhagdari estate—Alienation by a bhagdar of his share—Bombay Act V *of* 1862, *s.* 3—*Collector setting aside sale of share—Subsequent suit to recover share—Limitation.*—In the year 1871 the plaintiff, a co-sharer in a bhag, alienated his share to a stranger. In the year 1882 the Collector declared the alienation to be illegal, and in the

Bhagdar—(*Concluded*). PAGE

year 1883 ordered that the plaintiff should be reinstated in the possession of his share. At plaintiff's request his share was given into the possession of the defendant, who was the plaintiff's brother and khatedar of the entire bhag. In the year 1892 the plaintiff brought this suit against the defendant to recover possession of his share. The defendant contended that the suit was time-barred, the plaintiff not having been in possession since the year 1871.

Held, that the suit was not barred, the possession of plaintiff's alienee being the possession of the plaintiff himself, and the defendant not being entitled to tack to the period of his own possession that of the plaintiff's alienee. MAHAMAD DASU v. AMANJI, 23 B. 710= 1 Bom. L.R. 203 ... 475

Bhagdari Estate.

See BHAGDAR, 23 B. 710.

Bill of Lading.

See SHIPPING, 23 B. 551.

Bombay.

Town of Bombay, limits of—Mortgage—Transfer of Property Act (IV of 1882), s. 69—See MORTGAGE (SALE), 23 B. 348.

Botkhat.

(1) See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 24 B. 489.
(2) See LANDLORD AND TENANT, 24 B. 426.

Boundary.

See EVIDENCE, 23 B. 63.

Breach.

See LEASE, 24 B. 622.

Brokerage.

See WAGER, 24 B. 227.

Burden of Proof.

(1) Adoption—Validity of adoption depending on whether natural son alive or dead—Deed or will conferring estate on a person described as adopted son—Evidence—Evidence Act (I of 1872), ss. 107, 108—Person not heard of for seven years—Presumption of death—See EVIDENCE, 23 B. 296.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 237.
(3) See DEFAMATION, 24 B. 13.
(4) See HINDU LAW (JOINT FAMILY), 24 B. 135.
(5) See JURISDICTION, 23 B. 122.
(6) See MINOR, 23 B. 146.

Burial.

Right of—Easement—Customary rights—Custom of burial—Local custom—Right claimed by a certain section of Mahomedans to bury their dead in a certain locality—See EASEMENT, 23 B. 666.

Caste Question.

(1) Excommunication—Court's power to inquire into the validity of the order of excommunication—Burden of proof—Jurisdiction—Jurisdiction of Civil Courts—See JURISDICTION, 23 B. 122.

(2) Jurisdiction of Civil Court—Defamation—Privileged communication—Excommunication—See DEFAMATION, 24 B. 13.

Cause of Action.

(1) See HUSBAND AND WIFE, 23 B. 307.
(2) See LIMITATION ACT (XV OF 1877), 24 B. 435.

Caveator.

See PRACTICE, 23 B. 626.

Certificate. PAGE

(1) See ACT XXIII OF 1871 (PENSIONS), 23 B. 676.
(2) See PENAL CODE (ACT XLV OF 1860), 24 B. 287.

Charge.

(1) See ACT XV OF 1865 (PARSI MARRIAGE AND DIVORCE), 24 B. 465.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 181.

Charity.

(1) *Charitable Trust—Decree, form of—Account to be taken first—Matters to be considered in framing scheme.*—The plaintiffs sued as persons interested in the maintenance of a religious and charitable institution and prayed that the defendants, as recipients of the offerings at the idol's shrine, should be made accountable as trustees for the right disposal of the property thus acquired. They also prayed for an account, a receiver, for the removal of the shevaks, the defendants, from their office, and for the settlement of a scheme for future management. The High Court directed the District Judge (1) to take steps either by appointing a receiver, or otherwise, in his discretion, for guarding the property of the temple; (2) to take an account of the property and of the receipts and disbursements of the temple; (3) to make the requisite orders for recovering property appropriated by the shevaks, and (4) to draw up a scheme for the future management of the temple and its funds, regard being had to the established practice of the institution and to the position of the shevaks and of other persons connected with it.

Held, that the decree was right, no further direction being necessary, and the first thing to be done being to take an account of the trust property. CHOTALAL v. MANOHAR, 24 B. 50 (P.C.) = 2 Bom. L.R. 516 = 4 C.W.N. 23 = 26 I. A. 199 = 7 Sar. P.C.J. 559 ... 570

(2) Hindu temple, with a dharmashala and sadavart attached to it—Public, religious and charitable trust—Civ. Pro. Code (Act XIV of 1882), s. 539—Trustee—Constructive trustee—His liability—Right to sue—Limitation—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 659.

(3) *Temple—Scheme of management—Failure of trustees to carry out—Mode of enforcing proper management—Removal of trustees—Practice—Civ. Pro. Code (Act XIV of 1882), ss. 539 and 260—Decree—Execution.*—A decree was passed in a suit under s. 539 of the Civ. Pro. Code (Act XIV of 1882) settling a scheme of management of a certain temple. The scheme provided that the defendants and their heirs were, during their good conduct, to be retained as trustees and managers of the temple, and as such to maintain a proper system of worship, and to keep regular accounts, &c., &c. Subsequently plaintiffs applied for execution of the decree specifically setting forth various clauses of the scheme which had been infringed by the defendants. The plaintiffs prayed that the defendants should be removed from their office and that the decree be enforced by their imprisonment and the attachment of their property. The Judge dismissed the application on the ground that the defendants could not be removed from the managership in execution proceedings, the plaintiff's remedy lying in a regular suit.

Held, that, in order to obtain the removal of the trustees, the procedure would be to amend the scheme of management so as to include a provision for the removal of the trustees if necessary, and not to file a separate suit.

Held, also, that in so far as the decree ordered particular acts to be performed by the defendants in the management of the temple it might be enforced by the imprisonment of the defendants or by the attachment of their property or by both. DAMODARBHAT v. BHOGILAL, 24 B. 45 = 1 Bom L.R. 509 ... 567

Charter-Party.

Bill of lading—Freight—Rate of freight in charter-party—Contract by sub-charterer with shipper for freight at lower rate—Refusal by captain to sign bills of lading at lower rate than rate in charter-party—Payment by shipper of difference under protest—Ship—See SHIPPING, 23 B. 551.

Chavrat Lands. PAGE

See SERVICE LANDS, 23 B. 602.

Civil Court.

(1) See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 24 B. 489.
(2) See JURISDICTION, 23 B. 122.
(3) See MUNICIPALITY, 24 B. 600, 607.

Civ. Pro. Code (Act X of 1877).

S. 211—Mesne Profits—Decree for mesne profits—Decree silent as to the time down to which mesne profits were given—Construction of such decree—Limitation—Limitation Act (XV of 1877), arts. 178, 179—Decree—Construction—Suit for land—See MESNE PROFITS, 24 B. 149.

Civ. Pro. Code (Act XIV of 1882).

(1) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B. 321.

(2) See EVIDENCE, 23 B. 296.

(3) *S.* 13—Res judicata—*Court of competent jurisdiction.*—*A* brought a suit against *B* for Rs. 3,152, that is, for one instalment due under a bond. The suit was heard and decided by a Subordinate Judge of the Second Class, who had been deputed to assist a Subordinate Judge of the First Class. *A* obtained a decree for the amount claimed.

A then brought a second suit against *B* in the Court of a Subordinate Judge of the First Class to recover Rs. 6,526 being the amount of two instalments due under the bond. In this suit B raised the same contentions as in the former suit.

Held, that the decision in the first suit did not operate as *res judicata* in the second suit, as the Court that tried the first suit had no jurisdiction to try the second suit. RAMDAYAL v. JANKIDAS, 24 B. 456=2 Bom. L R. 415 ... 836

(4) Ss. 13 and 14—Consent decree—Partners—Joint contract—Liability of partners—Joint liability—Judgment recovered against one partner—Judgment of a foreign Court—Res judicata—See PARTNERS, 24 B. 77.

(5) Ss. 13 and 43—Practice—Partition—Two suits for partition—First suit for partition of family property—Second suit for partition of property held jointly by family and others—Vritti—See HINDU LAW (PARTITION), 23 B. 597.

(6) S. 14 as amended by Act VII of 1888—Foreign judgment—Suit on a foreign judgment—See FOREIGN JUDGMENT, 24 B. 86.

(7) S. 15—See LIMITATION ACT (XV OF 1877), 24 B. 435.
(8) Ss. 16 and 17—See JURISDICTION, 23 B. 22; 24 B. 407.

(9) *S.* 16, *Proviso and* 57—*Relief to be obtained by personal obedience of defendants—Property situate outside the jurisdiction of the Court in which the suit is filed—Practice—Procedure—Jurisdiction.*—The proviso to s. 16 of the Civ. Pro. Code (Act XIV of 1882) requires not only that the relief sought should be entirely obtainable through the personal obedience of the defendant, but also that the defendant should reside within the jurisdiction of the Court in which the suit is filed.

Held, therefore, that a suit for the determination of an interest in immoveable property, filed in a Court within the jurisdiction of which the property was not situate, did not lie in that Court, as all the defendants did not reside within the jurisdiction of that Court, even though the relief sought could have been obtained through their personal obedience.

Held, also, that in such a case the Judge ought not to dismiss the suit, but return the plaint to be presented to the proper Court under s. 57 of the Civ. Pro. Code. ISAK v. KHATIJA, 23 B. 756 = 1Bom. L.R. 370 ... 505

Civ. Pro. Code (Act XIV of 1882)—(*Continued*). PAGE

(10) *S.* 25—"*Court of Small Causes*"—*Meaning of the expression—A Court invested with Small Cause Court powers not a Small Cause Court within the section—Appeal.*—The expression "Court of Small Causes" in the last clause of s. 25 of the Code of Civil Procedure (Act XIV of 1882) means a Court properly and strictly so called, and does not include a Court invested with the jurisdiction of a Court of Small Causes. RAMCHANDRA v. GANESH, 23 B. 382 ... 254

(11) *Ss.* 28, 278, 283—*Attachment of same property in execution of decrees obtained by different creditors—Claim made in one suit to attached property under s.* 278—*Order made under s.* 281—*Suit by claimant to establish right—All attaching creditors made defendants to suit—Parties—Practice—Small Cause Court—Jurisdiction—Declaratory decree.*—The first and second defendants obtained a decree in suit No. 1548 of 1897 against Runchordas, described as the owner of the Wahalan Mills, and attach property on the mill premises. Twelve other creditors also brought twelve other similar suits and obtained decrees against other persons who were also described as owners of the Wahalan Mills, and attached the same property. In suit No. 1548 of 1897, Ragbunath Mukund (the present plaintiff) under s. 278 of the Civ. Pro. Code (Act XIV 1882) claimed the property. His claim was disallowed, and he was ordered to bring a suit under s. 283. No claim or order was made in the case of the other twelve suits. Raghunath now sued in pursuance of the above order to recover his property, and he included as defendants not merely those (defendants Nos. 1 and 2) who had been plaintiffs in suit No. 1548 of 1897, but also those who had been plaintiffs in the twelve other suits, and who had attached the property in execution of their decrees. It was objected that no suit would lie against the latter, as in their suits no claim had been made to the goods which they had attached and no order made under s. 281 of the Civ. Pro. Code (Act XIV of 1882).

Held (1) that the suit lay against the defendants (other than Nos. 1 and 2), although no claim had been made or order passed under s. 281 of the Civ. Pro. Code. The summary remedy given by s. 278 of the Civ. Pro. Code (Act XIV of 1882) is alternative to the remedy by way of suit. The object of s. 278 is not to deprive a claimant of his remedy by suit, but to give him, if he is diligent, a more speedy and summary remedy.

(2) That the Court of Small Causes had jurisdiction to try the suit. In substance the suit was a suit for goods, though as a matter of form the decree might contain a declaration. A suit for the release of goods wrongfully seized is not a declaratory suit under s. 42 of the Specific Relief Act (I of 1877).

(3) That although the value of the property claimed by the plaintiff was admittedly over Rs. 2,000, the Court of Small Causes had jurisdiction. The plaintiff was entitled to abandon part of his claim.

(4) That the plaintiff might join in one suit as defendants persons who had decrees against different persons. The right to relief was in respect of the same matter and, therefore fulfilled the requirements of s. 28 of the Civ. Pro. Code, 1882. RAGHUNATH MUKUND v. SAKOSH K. R. KAMA, 23 B. 266 ... 176

(12) *Ss.* 36, 37, 100, 102, 103—*Decree*—Ex-parte *decree—Appearance of party—Appearance by pleader or recognized agent—Appearance only for purpose of applying for adjournment—Presidency Small Cause Courts Act* (XIV *of* 1882), *s.* 38—*Dismissal for default—Remedy of plaintiff—Practice—Procedure.*—A suit and cross-suit between the same parties were on the board for hearing on the 23rd April, 1898. On that day A, the counsel who was instructed for the defendants in the first suit and for the plaintiffs in the second, was unable to attend, and B, another counsel, held his brief and appeared on his behalf and applied for two months adjournment of both suits. The munim of his clients was then in Court. B was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused and B said he withdrew from the case. Both suits were then and there disposed of, the

Civ. Pro. Code (Act XIV of 1882)—(*Continued*). PAGE:

claim of the plaintiffs in the first suit being decreed, the second suit being dismissed for non-appearance. On the 7th May following an application was made for a re-hearing of both suits. The Court, regarding the decrees, as *ex parte* decrees, granted a rule for a new trial which was made absolute. On appeal to the Full Court the matter was referred to the High Court.

Held, that under the circumstances the suits were to be considered as having been disposed of under ss. 100 and 102 of the Civ. Pro. Code (Act XIV of 1882) respectively, and that whether or not they, or either of them, fell within the category of contested suits as defined by s. 38 of the Presidency Small Cause Courts Act (XV of 1882), the remedy under s. 103 of the Civ. Pro. Code was open to the plaintiffs in the cross-suit.

Where, on the day fixed for hearing, a party is present in person merely for the purpose of applying for an adjournment which is refused, he must be taken to have "appeared" within the meaning of chap. VII of the Civ. Pro. Code. The party has appeared in person. The purpose for which he appeared, or the action which he took on appearance, are immaterial.

But where the party is absent and an application for adjournment is made on his behalf by a pleader who has no other instructions and whose functions are at an end when the adjournment is refused, in that case the party has not appeared within the meaning of the chapter.

Where the pleader who applies for an adjournment is accompanied by a recognized agent of the party, but the latter neither makes any application, nor does any act, the question is whether he *intends* to appear and in fact does appear for the party in the exercise of his powers under s. 36 of the Civ. Pro. Code. That section is merely permissive and enabling. If the recognized agent although able to do so does not think proper to conduct the case on behalf of his principal, his mere presence in Court is not an "appearance" in the suit. An appearance may be made by a pleader or a recognized agent: but the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented.

Section 38 of the Presidency Small Cause Courts Act (XV of 1882), does not preclude a plaintiff whose suit has been dismissed for default from applying under s. 103 of the Civ. Pro. Code (Act XIV of 1882), to have the order of dismissal set aside. There is no inconsistency between the two sections. A plaintiff whose suit has been dismissed for default has two separate remedies under different enactments. If he chooses to apply for a new trial under s. 38, he must do so within eight days. If he prefers to apply for an order setting aside the dismissal under s. 103 of the Civ. Pro. Code, he can do so within thirty days (Limitation Act XV of 1877, sch. II, art. 163). SOONDERLAL v. GOORPRASAD, 23 B. 414 = Chitty's S.C.C.R. 561... 275

(13) S. 57—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B. 679.

(14) S. 98—See PLEADER AND CLIENT, 23 B. 657.

(15) *S.* 108—*Small Cause Court*—Ex parte *decree*—*Satisfaction of the decree*—*Application by defendant to set aside decree.*—The fact that an *ex parte* decree had been satisfied, does not disentitle a defendant from applying to the Court to set it aside under s. 108 of the Civ. Pro. Code (Act XIV of 1882). ZENDOOLAL v. KISHORILAL, 23 B. 716 = 1 Bom. L.R. 213 ... 479

(16) *S.* 120—*Refusal of a plaintiff to attend as a witness.*—A plaintiff who was represented by a pleader was summoned at the instance of a defendant to attend the Court and to give evidence on his behalf on the day fixed for final hearing. The plaintiff refused to attend, on the ground that he was a person of rank and was exempted from personal appearance in the Courts of a Native State. The first Court, considering the personal appearance of the plaintiff necessary, issued an order under s. 120 of the Civ. Pro. Code (Act XIV of 1882) that he should attend, and, on his failure to do so, passed

a decree against him. On appeal, the Judge reversed the decree and remanded the case for trial.

Held, confirming the order of remand, that the order and decree of the first Court were alike illegal, as the plaintiff having appeared by a pleader, the Court had no power to issue an order under s. 120, unless the pleader had refused or was unable to answer a material question. SATU v. HANMANTRAO, 23 B. 318 ... 211

(17) S. 203—See SMALL CAUSE COURT, 23 B. 334.

(18) S. 205—See LIMITATION, 23 B. 442.

(19) *Ss.* 211 *and* 331--*Limitation Act* (XV *of* 1877), *sch.* II, *art.* 178—*—Decree for possession with mesne profits till delivery of possession — Darkhast for execution—Obstruction—Application for removal of obstruction—Application registered as a suit—Disposal of the darkhast —Decree in the suit—Execution—Limitation—Mesne profits for three years subsequent to the suit.*—The plaintiffs having obtained a decree for possession of certain lands with mesne profits till delivery of possession applied for execution. An obstruction having been caused to the execution, plaintiffs applied for the removal of the obstruction, and their application was registered as a suit under s. 331 of the Civ. Pro. Code (Act XIV of 1882), and their darkhast for execution was disposed of by the Court. The suit was decided in plaintiffs' favour, and they having applied for execution it was contended that the application was time-barred, as it was presented after the expiration of three years from the time of the disposal of the original darkhast, and it was wrong to grant mesne profits for more than three years from the date of the decree though possession was not delivered during that period.

Held, that when litigation under s. 331 of the Civ. Pro. Code (Act XIV of 1882) is pending, the proceedings in execution are suspended during that litigation.

Where a decree directed that plaintiffs should get mesne profits from a certain date till delivery of possession, the amount to be fixed in execution—

Held, that the decree was necessarily subject to the limitation laid down in s. 211 of the Civ. Pro. Code (Act XIV of 1882), and that mesne profits for more than three years from the date of the decree should not be awarded even though possession was not delivered during that period. NARAYAN v. SONU, 24 B. 345=1 Bom. L. R. 846 ... 764

(20) *S.* 231—*Application for execution by one of several joint decree-holders —Order refusing to allow execution by one of several joint decree-holders—Appeal—Practice.*—No appeal lies against an order under s. 231 of the Code of Civil Procedure (Act XIV of 1882), refusing to allow one of several joint decree-holders to execute a joint decree. RATANLAL v. BAI GULAB, 23 B. 623=1 Bom. L. R. 87 ... 416

(21) S. 232 —Transfer of Property Act (IV of 1832), s. 131—Debt—Decree not a debt—Transfer of debt—Assignment of decree—Notice of assignment—See TRANSFER OF PROPERTY ACT (IV of 1882), 24 B. 502.

(22) *S.* 244—Res judicata—*Suit by C for mesne profits as devisee of land under will of A—Will held valid and C's claim allowed—Application by C as legal representative of A for execution of decree obtained by A—Question of validity of will again raised.*—A obtained a decree against B for possession of certain land, and then died. Thereupon C applied for execution of the decree as A's legal representative, relying upon a will made by A in his favour. At the same time, C filed a suit to recover Rs. 140 as mesne profits of the land. The execution proceedings were stayed till after the disposal of the suit for mesne profits. In this suit, B contended that the will in question was not executed by A, and that A was not of sound disposing mind at the time of the alleged execution of the will. The Subordinate Judge found on both these points against B and passed a decree for mesne profits. This decree was upheld, on appeal, by the District Judge.

After the decision of the suit, the Subordinate Judge took up C's application for execution of the original decree obtained by A. This application was resisted by B on the same grounds on which he had defended the suit for mesne profits. He impeached the validity of the will on the grounds of non-execution by, and unsoundness of mind of, the testator. The Subordinate Judge held that the matter was *res judicata*; he, therefore, overruled this objection, and ordered execution to issue. The District Judge held that as the suit for mesne profits was in the nature of a Small Cause suit, in which there was no second appeal, the decision passed in that suit did not operate as *res judicata* in the present execution proceedings. He, therefore, reversed the Subordinate Judge's order and remanded the case for a fresh decision.

Held, reversing the remand order, that the question whether C was entitled to execute the decree as A's representative fell within the last clause of s. 244 of the Code of Civil Procedure (Act XIV of 1882). The Subordinate Judge, who had raised an issue as to the validity of the will relied upon by C in the suit for mesne profits, was entitled to act upon his determination of that issue in the execution proceedings. BHAVANISHANKAR v. NARANSHANKAR, 23 B. 536=1 Bom. L. R. 36 ... 357

(23) *Ss.* 244, 258—*Agreement not to execute decree—Execution—Breach of contract—Suit to recover damages.*—The provisions of s. 244 of the Civ. Pro. Code (Act XIV of 1882) are no bar to a suit to recover damages for breach of a contract not to execute a decree. HANMANT v. SUBBABHAT, 23 B. 394 ... 262

(24) *Ss.* 244, 278 *to* 283—*Questions arising between the decree-holder and the representatives of the judgment-debtor—Claims to attached property where representative judgment-debtor claims to hold the attached property as trustee of third party—Execution of decree.*—The plaintiffs sued for a declaration that certain property was liable to be attached in execution of a decree obtained by them in suit No. 591 of 1888 against the estate of one Gulaya, deceased, who had been the head of a *math* situate in the Dharwar District. The property had been attached in execution, but the defendant, who was Gulaya's successor in office, had obtained the removal of the attachment on the ground that the property belonged to the *math* and not to Gulaya personally, and was not, therefore, liable to satisfy the decree. The plaintiffs thereupon brought this suit. The lower appellate Court passed a decree for the plaintiff's and granted the declaration. On second appeal it was contended that under s. 244 of the Civ. Pro. Code (Act XIV of 1882), the question ought to have been decided in execution of the decree in suit No. 591 of 1888, and that a separate suit would not lie.

Held, on the merits, that the decree of the lower appeal Court should be reversed and the suit dismissed.

Per RANADE, J.—Where the representatives of a judgment-debtor puts forward a personal claim to property which is attached as assets of the judgment-debtor in his hands, the investigation of the claim must be made in execution under the provisions of s. 244 of the Code of Civil Procedure (Act XIV of 1882). But where he asserts that he holds the property in trust for, or on behalf of, or as manager of some third person or body of persons, or of a religious charity or institution, the claim must be investigated under the provisions of ss. 278 to 283, and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit.

Per PARSONS, J.—Ss. 278 to 283 of the Code of Civil Procedure have no reference to any claim preferred or objection made by any person who is on the record as a party to the suit. Whenever a question arises between the representative of a judgment-debtor on the record (whether originally sued as such or added before or after decree) and the decree-holder as to whether property in the hands of the representative was of the assets of the deceased or not, that question

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must be determined by order of the Court executing the decree under the provisions of s. 244. MURIGEYA v. HAYAT SAHEB, 23 B. 237 ... 157

(25) *Ss.* 244, 310-A, 311 *and* 320—*Limitation—Limitation Act* (XV *of* 1877), *s.* 14—*Decree— Execution by Collector — Application to Collector to set aside sale.*—A decree passed against the applicant Narayan was transferred for execution to the Collector under s. 320 of the Civ. Pro. Code (Act XIV of 1882). On the 8th May 1897, the Collector in execution sold certain property, belonging to the applicant, which was purchased by the respondents. On the 17th May 1897, the applicant applied to the Collector to set aside the sale on the ground of alleged irregularities, and the Collector having referred the matter to the Mamlatdar for report, forwarded the record to the Court on 30th July 1897. On the 6th August 1897, the applicant, fearing that he had not applied to the proper Court, applied to the Subordinate Judge to set aside the sale, framing his application both under s. 310 A and s. 311 of the Civ. Pro. Code. He contended that, under s. 14 of the Limitation Act his application was not barred.

Held, that the application was barred by limitation. Under the rules made by the Government of Bombay under s. 320 of the Civ. Pro. Code, the Collector had no jurisdiction. There was, therefore, no *bona-fide* mistake of jurisdiction such as would justify the Court in excluding the time occupied in applying to the Collector from the period of limitation.

Under the rules made by the Local Government of the Bombay Presidency, a Collector has not the power of the Court, under s. 311 of the Civ. Pro. Code, to set aside a sale.

No second appeal lies from an order made under s. 311 of the Civ. Pro. Code. NARAYAN v. RASULKHAN, 23 B. 531 = 1 Bom. L. R. 33 ... 354

(26) *Ss.* 244, 549 and 647, *explanation—Execution—Appeal by defendant against the order granting execution—Appellant required to give security for the costs of the appeal and of the original suit.*—The Court can require an appellant from an order made under s. 244 of the Civ. Pro. Code (Act XIV of 1882) in execution of a decree to give security for the costs of the appeal and of the original suit. DAGDU v. CHANDRABHAN, 24 B. 314 = 1 Bom. L.R. 837 ... 744

(27) S. 248—See LIMITATION ACT (XV OF 1877), 23 B. 35.

(28) *S.* 257-A—*Execution of decree—Agreement between a judgment-creditor and a person other than the judgment-debtor—Postponement of execution.*—The provisions of s. 257-A of the Civ. Pro. Code (Act XIV of 1882) do not include within their scope an agreement between a judgment-creditor and a person other than the judgment-debtor, whereby such person, in consideration of the postponement of the execution of the decree against the judgment-debtor, undertakes to pay to the judgment-creditor a certain sum of money. Such agreements are, therefore, enforceable although made without the sanction of the Court. KESU v. GENU, 23 B. 502 ... 334

(29) S. 266—See HINDU LAW (GIFT), 23 B. 131.

(30) S. 268—See ADMINISTRATOR-GENERAL, 23 B. 428.

(31) S. 274—Attachment of interest under will—Will—Construction—Bequest to wife with obligation of maintaining and educating children—Interest taken under such bequest—Decree against wife—Fraudulent conveyance—Transfer of Property Act (IV of 1882), s. 53—See WILL, 23 B. 1.

(32) S. 287—Execution—Sale in execution subject to mortgage—Suit to set aside sale and for re-sale of property free from mortgage—Practice—Procedure—See EXECUTION OF DECREE, 23 B. 759.

(33) S. 305—Sanction under s. 305—Guardians and Wards Act (VIII of 1890), ss. 29 and 30—Act XX of 1864—Guardian—Certificated guardian—Mortgage by such guardian without Court's permission—Validity of such mortgage—See GUARDIAN, 23 B. 287.

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(34) *S.* 310-A—*Act V of* 1894—*Execution sale*—"*Person whose immoveable property has been sold*"—*Prior private purchaser of property sold in execution not within the section.*—A person who has purchased property which is afterwards sold in execution of a decree obtained against his vendor, is not entitled under s. 310-A of the Civ. Pro. Code (Act XIV of 1882) to have the execution sale set aside. RAMCHANDRA v. RAKHMABAI, 23 B. 450 ... 298

(35) *S.* 310 *A as amended by Act V of* 1894—*Actual receipt of sale-proceeds by decree-holder necessary to set aside a sale*—*Sale in execution of a decree.*—The words in cl. (*b*) of s. 310 A of the Code of Civil Procedure as amended by Act V of 1894—" less any amount which may, since the date of such proclamation of sale, have been *received* by the decree-holder "—contemplate an actual receipt of the amount by the decree-holder. A mere payment of the sale-proceeds into Court does not satisfy the requirements of the section.

A proclamation of sale ordered that for the recovery of Rs. 843-9-9 certain immoveable property belonging to the judgment-debtor should be sold in two lots, A and B. Lot A was sold for Rs. 420, and on the next day lot B was sold for Rs. 584. The judgment-debtor afterwards paid into Court Rs. 452-13-0, and applied to have the sale of lot B set aside, alleging that he had purchased lot A through a third party, and that the sale-proceeds had been paid into Court.

Held, that the mere payment of the sale-proceeds into Court was not a sufficient compliance with the requirements of s. 310 A of the Code of Civil Procedure, and as it had not been shown that the sale proceeds had been received by the decree-holder, the sale could not be set aside. TRIMBAK v. RAMCHANDRA, 23 B. 723=1 Bom. L.R. 215 ... 483

(36) *S.* 310 *A*—*Right to apply under the section*—*Ownership of land*—*Vendor and purchaser*—*Effect of contract of sale*—*Transfer of Property Act* (*IV of* 1882), *s.* 54.—A person who has contracted to purchase land, or an interest in land, does not by such contract become the owner, in equity, of such land or such interest (s. 54 of the Transfer of Property Act, IV of 1882). He has a personal right against his vendor or the assignee with notice of his vendor to compel the latter by a suit for specific performance to perform his contract: but he has no direct right over the land.

Held, accordingly, that a person who had contracted to purchase certain land which was subject to mortgage, and was sold in execution by the mortgagee, was not the owner of the land and was, therefore, not entitled to apply to set aside the sale under s. 310 A of the Civ. Pro. Code (Act XIV of 1882). MAHADEV v. VASUDEV J. KIRTIKAR, 23 B. 181 ... 119

(37) *S.* 316—*Execution*—*Sale*—*Sale absolute*—*Purchaser*—*Certificate of sale granted to the representative of deceased purchaser.*—When a sale in execution has become absolute, the Court can, under s. 316 of the Civ. Pro. Code (Act XIV of 1882), grant the certificate prescribed therein to the representatives of a deceased purchaser. *Re* VINAYAK NARAYAN, 24 B. 120=1 Bom. L.R. 645 ... 618

(38) S. 380—See PRACTICE, 23 B. 100.

(39) Chap. XXV—See PRACTICE, 23 B. 626.

(39-*a*) S. 392—See EVIDENCE, 24 B. 43.

(40) S. 440—Guardian—Right to sue—Lunatic—Guardian of the person of a lunatic not competent to sue in respect of the lunatic's estate—See LUNATIC, 23 B. 403.

(41) S. 462—See LUNATIC, 23 B. 653.

(42) S. 462—Decree—Suit on behalf of minor—Compromise of decree by next friend—Application to set aside compromise—Modes of impeaching the decree—Practice—Procedure—Minor—See MINOR, 23 B. 620.

(43) Ss. 503 and 505—See RECEIVER, 24 B. 38.

(44) S. 506—Arbitration—Order of reference to arbitration—Jurisdiction—Absence of written authority to refer—Practice—See PRACTICE, 23 B. 629.

Civ. Pro. Code (Act XIV of 1882)—(*Continued*). PAGE

(44-*a*) Ch. XXXVIII—See APPEAL (GENERAL), 23 B. 752.

(45) S. 539—Mahomedan law—Wakf—Mutawalli—Alienation of wakf property—Suit to set aside such alienation—Right to sue—See MAHOMEDAN LAW (WAKF), 24 B. 170.

(46) *S.* 539—*Public, religious and charitable trust—Charity—Hindu temple, with a* dharmshala *and* sadavart *attached to it—Trustee—Constructive trustee—His liability—Right to sue—Limitation.*—A Hindu built a temple in honour of the deity Shri Pandurang, to which were attached a *dharmshala* and a *sadavart* for feeding travellers and giving alms to the poor. For the maintenance of the temple and the charities connected with it, he dedicated certain property by a deed of gift, under which he constituted himself a trustee for life and appointed a *panch* to act as his successors in the trust. During his life-time he managed the temple as provided in the deed. On his death in 1867, the *panch* did not take charge, but his son (the defendant) assumed the management. The temple was open to the Hindu community.

In 1894 the *pujari* of the temple and five other worshippers of the idol filed this suit under s. 539 of the Code of Civil Procedure (Act XIV of 1882) with the sanction of the Advocate General, for removing the defendant from the management of the temple on the ground of his misconduct and mismanagement of the trust property.

The defendant pleaded (*inter alia*) that the property was not a public, religious and charitable trust: that he was not a trustee that the plaintiffs had no right to sue, and that the suit was time-barred.

Held, (1) that having regard to the fact that a certain number of the public had always used the temple, that there was attached to it a *dharmshala* and that the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadavart*, the intention of the founder was to devote the property to public, religious and charitable purposes;

(2) that although the defendant was not appointed a trustee, yet by taking charge of the endowment, and purporting to manage it as temple property, he made himself a constructive trustee, and was liable, as such, to the beneficiaries;

(3) that the plaintiffs were entitled to maintain the suit under s. 539 of the Code of Civil Procedure (Act XIV of 1882);

(4) that the suit was not time-barred, as with every fresh breach of the constructive trust, or whenever the direction of the Court was deemed necessary, a fresh cause of action arose. JUGALKISHORE v. LAKSHMANDAS, 23 B. 659=1 Bom. L.R. 118 ... 440

(47) Ss. 539 and 260—Decree—Execution—Charity—Temple—Scheme of management—Failure of trustees to carry out—Mode of enforcing proper management—Removal of trustees—Practice—See CHARITY 24 B. 45.

(48) S. 552—See MAHOMEDAN LAW (PRE-EMPTION), 24 B. 414.

(49) S. 561—See PRACTICE, 23 B. 692.

(50) S. 584—See LIMITATION ACT (XV OF 1877), 23 B. 513.

(51) *S.* 591—*Appeal—Decree for account—Further directions—Time for appeal—Letters Patent, s.* 15.—A decree was passed in a partnership suit directing (*inter alia*) the taking of an account. The Commissioner having taken the account and made his report, an order was made, on further directions, varying it in certain respects. Subsequently a final decree was passed, founded in part on the order on further directions. An appeal was filed against the final decree, in which objection was taken to the order on further directions. It was contended that no appeal having been filed against the order on further directions, as might have been done under s. 15 of the Letters Patent, so much of the appeal as arose out of that order had been barred by lapse of time.

Held, that the order passed on further directions was not appealable under Chap. XLI of the Civ. Pro. Code (Act XIV of 1882) and that it fell, therefore, under the concluding portion of s. 591 of the Civ. Pro. Code, any error in it might subsequently be set forth as a ground of appeal against the final decree.

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Per JENKINS, C. J.—Assuming that the order on further directions was a judgment within the meaning of s. 15 of the Letters Patent, and as such appealable, the contention of the respondent cannot prevail ; as that would not deprive the appellants of their right to appeal under the Code. JAMSETJI v. DADABHOY, 24 B. 302 =1 Bom. L. R. 649 ... 736

(52) S. 622—See LIMITATION, 23 B. 177.

(53) Ss. 622 and 646-A—Reference—Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), ss. 27 and 33—Decree passed by a Subordinate Judge invested with the jurisdiction of a Small Cause Court—Finality of such decree—Appeal — See SMALL CAUSE COURT, 24 B. 310.

(54) S. 647—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 23 B. 698.

Civ. Pro. Code Amendment Act (VII of 1888).

(1) See FOREIGN JUDGMENT, 24 B. 86.
(2) See PRACTICE, 23 B. 100.
(3) See REGISTRATION, 24 B. 609.

Civ. Pro. Code, Amendment Act (V of 1894).

See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 450, 723.

Claim.

(1) ACT VIII OF 1890 (GUARDIAN AND WARDS), 23 B. 719.
(2) See ADMINISTRATOR GENERAL, 23 B. 428.
(3) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 237, 266.

Collector.

(1) See ACT XXIII OF 1871 (PENSIONS), 23 B. 576.
(2) See BHAGDAR, 23 B. 710.
(3) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 531.

Commission.

Application by a defendant (caveator to examine witnesses on commission —Civ. Pro. Code (Act XIV of 1882), Chap. XXV—Practice—See PRACTICE, 23 B. 626.

Commissioner.

See EVIDENCE, 24 B. 43.

Companies Act (X of 1866).

Ss. 22, 29—See BANK OF BOMBAY, 24 B. 350.

Company.

(1) Registration and transfer of shares—Rights of surviving co-parceners—Necessity of probate or letters of administration—Presidency Banks Act (XI of 1876), ss. 20, 22 and 23—Bank of Bombay—Shares —See BANK OF BOMBAY, 24 B. 350.

(2) *Transfer of shares—Approval of transfer by directors—Such power of approval a fiduciary power—Resolution of directors to approve of future transfers* ultra vires.—By the articles of association of the New Great Eastern Spinning and Weaving Company transfers of shares in the Company were subject to the approval of the directors. On the 18th October, 1898, the directors passed a resolution "that up to the time of the next ordinary general meeting the board approve of all transfers of shares made by Dwarkadas Shamji and Ramdas Kessowji (two of the shareholders) or either of them, and . . . . . will transfer shares standing in the name of Dwarkadas Shamji and in the name of Ramdas Kessowji to their or his transferees without claiming any lien or raising any objection."

Held, that the above resolution was *ultra vires* and not binding on the company. The power conferred on the directors by the articles of association was a fiduciary power to be exercised for the benefit of the company, and could not be exercised until the question of each transfer together with the names of the transferor and the transferee

was before them and they had an opportunity of considering each case. *In re* NEW GREAT EASTERN SPINNING AND WEAVING COMPANY, 23 B. 685=1 Bom. L.R. 269 ... 458

Compromise.

Of decree by next friend—Application to set aside compromise—Modes of impeaching the decree—Practice—Procedure—Civ. Pro. Code (Act XIV of 1882), s. 462—Minor—Suit on behalf of minor—Decree—See MINOR, 23 B. 620.

Condition.

(1) See HINDU LAW (WILL), 23 B. 271.
(2) See LEASE, 24 B. 622.

Confession.

(1) Confession not signed by the accused—Admissibility of such confession—Evidence—Parol evidence admissible to prove the terms of the confession—Crim. Pro. Code (Act X of 1882), s. 533—See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 221.

(2) Retracted confessions—Admissibility of such confessions without corroborative evidence—Evidence—Criminal Procedure—See CRIMINAL PROCEDURE, 22 B. 316.

Consent decree.

See PARTNERS, 24 B. 77.

Consideration.

See HUNDI, 24 B. 360.

Construction.

(1) See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 24 B. 240.
(2) See HINDU LAW (WILL), 23 B. 271; 24 B. 420.
(3) See INJUNCTION, 23 B. 103.
(4) See MESNE PROFITS, 24 B. 149.
(5) See TREES, 23 B. 518.
(6) See UNIVERSITY, 23 B. 465.
(7) See WILL, 23 B. 80.

Constructive trustee.

See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 659.

Continuing offer.

See CONTRACT, 24 B. 97.

Contract.

(1) *Continuing offer—Successive contracts—Reasonable notice—Offer.*—The plaintiffs were the agents of two mills in Bombay. The defendants were a coal company carrying on business in Bombay by their agents, the Bombay Company Limited.

The defendants on the 19th of August 1897, signed a memorandum in the form of a letter addressed to the plaintiffs, of which the first two clauses were as follows:—

"The undersigned have this day made a contract with Messrs. Homee Wadia and Company for a period of twelve months, *viz.*, from 1st September, 1897, to 31st August, 1898.

"Sellers to supply them with Bengal Coal Company's Desburghur from time to time as required by purchasers; reasonable notice to be given of such requirements. The total quantity indented for during the year shall not exceed, without seller's consent, the maximum average of 350 tons per month."

Up to the 16th July, 1898, the plaintiffs had indented for 1,752 tons, of which 1,552 tons had been delivered. On that date they indented for 500 tons more. On the 18th July, the plaintiffs further indented for an additional 1,500 tons. The defendants replied offering to deliver 500 tons in August, but declining to deliver 1,500 tons. The plaintiffs on the 22nd July gave notice to the defendants that they

Contract—(*Continued*). PAGE

would require delivery of the balance, *viz.*, 2,648 tons (that is, 4,300 *minus* 1,552 tons already delivered), on or before the 31st August, 1898.

The defendants subsequently delivered 200 and 500 tons, leaving 1,948 tons undelivered. The plaintiffs claimed Rs. 6,600-13-5 as damages for non-delivery.

Held, that the memorandum of the 19th August, 1897, was not a contract, but simply a continuing offer, and that each successive order given by the plaintiffs was an acceptance of the offer as to the quantity ordered. The offer of the defendants and each successive order of the plaintiffs constituted a series of contracts. The failure alleged was one to comply with orders given after the defendant's offer was cancelled and withdrawn.

Held, further, that the plaintiffs were not entitled to obtain more than 350 tons in any one month without the defendants' consent.

Held, further, that the notice given by the plaintiffs on the 22nd July, 1898, to supply 2,648 tons was not a reasonable notice within the meaning of the memorandum of the 19th August, 1897. BENGAL COAL Co. v. HOMEE WADIA AND CO., 24 B. 97 ... 602

(2) Illegal Contract—Contract Act (IX of 1872), s. 23—Tolls Act (Bom. Act III of 1875), s. 13—Amending Act (Bom. Act V of 1881), s. 2—Lease—Condition—Breach of condition—See LEASE, 24 B. 622.

(3) *Offer—Acceptance in different terms—Contract Act* (IX *of* 1872), *ss.* 7 *and* 207—*Evidence of previous dealings between parties when admissible—Evidence Act* (I *of* 1872), s. 92, *Pro.* 5—*Interest on price and charges not legally demandable in absence of special contract.*—The defendant made an offer in writing to the plaintiffs for the purchase of 200 bales of pepperill drill at 9 *s.* 2*d.* A few days later, the plaintiffs' salesman tendered for signature to the defendant an indent containing certain terms not contained in the original offer, and in particular containing the words "Free Bombay Harbour and interest." This the defendant refused to sign. The plaintiffs, however, sent the offer by cable to their home firm, and on receipt of a favourable reply communicated this acceptance to the defendant. This acceptance, the defendant said, he had returned. The plaintiff denied that he had done so.

Held, *per* SIR L. JENKINS, C.J.—"The law on this point is thus formulated in the most authoritative mode by the contract Act (IX of 1872), s. 7: 'In order to convert a proposal into a promise the acceptance must be absolute and unqualified.' That is to say, until there is such an acceptance the stage of negotiations has not been passed, and no legal obligation is imposed. Similarly, any departure from the terms of the offer or any qualification vitiates the acceptance it accompanies unless it is agreed to by the person from whom the offer comes. In other words, an acceptance with a variation is no acceptance; it is simply a counter-proposal, which must be accepted by the original promisor before a contract is made".

Held, further, that because the acceptance was not shown to have been returned, no inference could be drawn that the defendant must have assented to the terms in which it failed to correspond to his offer. It is clear that a person making a proposal cannot impose on the party to whom it is addressed the obligation to refuse it under the penalty of imputed assent, or attach to his silence the legal result that he must be deemed to have accepted it.

Held, further, that evidence of previous dealings is admissible only for the purpose of explaining the terms used in a contract and not to impose on a party an obligation as to which the contract is silent, or to read into it a liability which would otherwise not exist. It was impossible to find, in dealings carried out on the basis of signed indents, any clue to the intention of the parties when not only was no indent signed, but the defendant refused to sign one.

Held, further, that in the absence of any contract to that effect, interest could not be legally demanded on the contract price, and still less could it be demanded on the incidental charges on the invoice. HAJI MAHOMED HAJI JIVA v. E. SPINNER, 24 B. 510=2 Bom. L. R. 691 ... 871

Contract—(*Concluded*). PAGE.

(4) Of sale—Delivery of possession—Payment of the whole of the purchase-money — Registered conveyance not executed—Transfer—Attachment—Vendor having no attachable interest—Transfer of Property Act (IV of 1882), ss. 40, 54, 56 (6) (*b*)—Trusts Act (II of 1882), s. 91—See VENDOR AND PURCHASER, 24 B. 400.

(5) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 181, 394.

(6) See INJUNCTION, 23 B. 103.

(7) See MINOR, 23 B. 146.

(8) See SHIPPING, 23 B. 551.

(9) See VENDOR AND PURCHASER, 23 B. 525.

Contract Act (IX of 1872).

(1) Ss. 2, 10, 11, 247 and 248—See MINOR, 23 B. 146.

(2) Ss. 7 and 207—See CONTRACT, 24 B. 510

(3) Ss. 10 and 11—See WILL, 23 B. 1.

(4) Ss. 2—See LEASE, 24 B. 622.

(5) S. 27—See INJUNCTION, 23 B. 103.

(6) S. 30—See INSURANCE, 23 B. 191.

(7) S. 30—Wagering contracts—Satta transactions—Suit to recover brokerage in respect of satta transactions—Bom. Act III of 1865—Wager—See WAGER, 24 B. 227.

(8) S. 50—See LIMITATION ACT (XV OF 1877), 24 B. 619.

(9) S. 63—See MORTGAGE (SALE), 23 B. 348.

(10) S. 65—See LANDLORD AND TENANT, 23 B. 15.

(11) S. 178—Pledge—Husband and wife—Possession required for valid pledge—See PLEDGE, 24 B. 458.

(12) Ss. 201 to 203—See PRINCIPAL AND AGENT, 24 B. 403.

(13) S. 235—Guardian's liability—Warranty—Breach of warranty—Suit on warranty—Principal and agent — Guardian — Minor—Loan obtained by guardian as such—Liability for such loan—Warranty by guardian of authority to borrow—Misrepresentation on a point of law—See WARRANTY, 24 B. 166.

(14) S. 251—See PARTNERS, 24 B. 77.

Converts.

See RELIGION, 23 B. 539.

Conveyance.

See VENDOR AND PURCHASER, 24 B. 400.

Co-parceners.

Rights of surviving co-parceners—Shares—Registration and transfer of shares — Necessity of probate or letters of administration — Presidency Banks Act (XI of 1876), ss. 20, 22 and 23—Bank of Bombay—See BANK OF BOMBAY, 24 B. 350.

Copy.

See LIMITATION ACT (XV OF 1877), 23 B. 311.

Co-sharer.

(1) Hindu law—Joint family—Bond in favour of one co-sharer—Payment of such bond made to another co-sharer when a discharge—Right to sue—See HINDU LAW (JOINT FAMILY), 24 B. 123.

(2) Hindu law—Partition—Suit by a purchaser of a co-sharer's interest for partition of a specific part of joint property—Right of defendant co-sharers to require a general partition—Rules as to partition, general and partial—See HINDU LAW (PARTITION), 24 B. 128.

(3) Mortgage by co-sharer of undivided share—Partition suit subsequently brought by other co-sharer to which mortgagee not a party—Mortgaged property allotted to a sharer other than mortgagor—Rights of such co-sharer—Partition re-opened—Fraud of mortgagor and mortgagee—Partition—See HINDU LAW (PARTITION), 23 B. 385.

(4) See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 24 B. 539.

(5) See KHOT, 24 B. 533.

Costs. PAGE

(1) Security for—Civ. Pro. Code (Act XIV of 1882), ss. 244, 549 and 647, explanation—Execution—Appeal by defendant against the order granting execution—Appellant required to give security for the costs of the appeal and of the original suit—See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 314.

(2) Security for costs—Infant female plaintiff—Civ. Pro. Code (Act XIV of 1882), s. 380—Practice—See PRACTICE, 23 B. 100.

(3) See LIMITATION, 23 B. 442.

(4) See SHIPPING, 24 B. 55.

Counter-claim.

Agent—Revocation of authority—Interest of agent in property—Exercise of authority so as to bind principal—Contract Act (IX of 1872), ss. 201, 202, 203—Principal and agent — See PRINCIPAL AND AGENT, 24 B. 403.

Court Fees.

See MAHOMEDAN LAW (PARTITION), 23 B. 188.

Court Fees Act (VII of 1870).

Ss. 7, cl. (*a*), 4 (*c*) and (*d*) and 12—See VALUATION, 23 B. 486.

Covering Note.

See INSURANCE, 23 B. 737.

Criminal Procedure.

Judge's charge—Misdirection — Confessions — Retracted confessions — Admissibility of such confessions without corroborative evidence—Evidence —The accused were tried for murder. The Sessions Judge in his charge to the jury discussed the evidence generally, describing it as very poor evidence which, standing alone, amounted to nothing. He also told the jury that, as regards retracted confessions, "the law is that you are to look for corroboration in independent evidence. If that supplies such corroboration that you can confidently say, 'the confessions must be absolutely true,' you can act upon them, otherwise not."

Held, that the charge was defective. The Sessions Judge ought to have summed up the evidence to the jury calling their attention to the material parts of it, and leaving them to form their own opinion on it, instead of treating it generally.

Held, also, that the Judge had misdirected the jury, as there is no rule of law that a retracted confession cannot be treated as evidence unless it is corroborated in material particulars by independent reliable evidence. QUEEN-EMPRESS v. GANGIA, 23 B. 316 ... 210

Crim. Pro. Code (Act X of 1872).

S. 246—See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 221.

Crim. Pro. Code (Act X of 1882).

(1) *Ss.* 107, 167 *and* 344—*Remand of prisoners in police custody—Security to keep the peace—Magistrate's power to demand such security from persons residing beyond his local jurisdiction.*—Under s. 167 of the Code of Criminal Procedure (Act X of 1882) the period for which a Magistrate can authorize the detention of the accused in police custody is fifteen days on the whole, including one or more remands. A Magistrate cannot call upon a person residing beyond his local jurisdiction to give security against a breach of the peace within that jurisdiction. *In re* KRISHNAJI P. JOGLEKAR, 23 B. 32 ... 21

(2) *Ss.* 195, 369—*Sanction to prosecute—Revision—Session Judge's power to review his order in proceedings taken to revoke sanction.*—A Sessions Judge, having once refused to revoke a sanction granted by a Subordinate Court under s. 195 of the Crim. Pro. Code (Act X of 1882), has no jurisdiction afterwards to review his order and set aside the sanction.

Crim. Pro. Code (Act X of 1882)—(*Continued*). PAGE

An application to a Sessions Judge for revocation of a sanction granted under s. 195 of the Code is a criminal proceeding in revision. Any order passed in such a proceeding is final, and cannot be reviewed or revised by him. QUEEN-EMPRESS v. GANESH, 23 B. 50 ... 33

(3) *S.* 423—*Appellate Court—Powers of appellate Court to enhance sentence—Sentence—Alteration of sentence.*—The accused was convicted of criminal breach of trust and sentenced to nine months' rigorous imprisonment. On appeal, the conviction was upheld, but the sentence was altered to one of six months' further rigorous imprisonment and a fine of Rs. 1,000, or, in default of payment, three months' further rigorous imprisonment. The accused applied to the High Court in revision, contending that the alteration of the sentence amounted to an enhancement of the sentence beyond the powers of the appellate Court under s. 423 of the Code of Criminal Procedure (Act X of 1882).

Held, that there was no enhancement of the sentence. QUEEN-EMPRESS v. CHAGAN JAGANNATH, 23 B. 439 ... 291

(4) S. 488—Maintenance—Husband and wife—Maintenance order obtained by a wife against husband—Subsequent decree for restitution of conjugal rights obtained by husband—Effect of such decree on previous order of maintenance—See HINDU LAW (MAINTENANCE), 23 B. 484.

(5) *Ss.* 522, 523, 524—*Order to restore possession of immoveable property.*—An order made under s. 522 of the Crim. Pro. Code (Act X of 1882) restoring possession of immoveable property to a person who has been dispossessed of it by criminal force, is an independent order and may be made subsequently to the date of the conviction of the offender. It need not be made at the same time as the conviction.

The case contemplated by s. 522 is that of a person in possession (the complainant) being dispossessed by force by another person (the accused) and the latter being in possession at the date of conviction. In such a case the section gives the Magistrate power to order possession to be restored to the complainant. In the case of a proper order, third persons could not be affected; if they are, the order is not thereby necessarily invalid. Clause 2 of the section gives them a remedy by civil suit.

On 27th September, 1897, complainant charged one Ravlo with criminal trespass under s. 447 of the Indian Penal Code (Act XLV of 1860). He alleged that in the previous July Ravlo had entered into possession of the land and sowed rice upon it, and that when in the month of September, 1897, he (the complainant) went to the field, Ravlo had turned him out by force and refused to vacate the land. On the 17th November, 1897, the case was heard by the Third Class Magistrate, who convicted Ravlo of the offence charged.

On the following day (18th November 1897) the complainant applied to the Magistrate under s. 522 of the Code of Criminal Procedure (Act X of 1882) to be restored to possession of the land and of the standing crops. The Magistrate ordered possession of the land to be restored to the complainant, but attached the crops under chap. XLIII of the Crim. Pro. Code.

Thereupon one Visaji intervened and claimed the crops as having been sown by himself. His claim was disallowed, and the crops were ordered to be sold and the proceeds credited to Government under ss. 523 and 524 of the Code.

Held, that the order made by the Magistrate under s. 522 restoring possession of the land to the complainant was bad, because it did not appear that the offence of which the accused was convicted was attended with criminal force, and that the dispossession was due to the use of such force. The illegal entry complained of had taken place in July, 1897. The accused then took possession, and in September, being then still in possession, forcibly resisted the complainant when he attempted to enter upon the land. The complainant, however, did not charge the accused with this assault,

Crim. Pro. Code (Act X of 1882)—(*Concluded*). PAGE

but with the trespass which had taken place in July. It is only when the actual use of criminal force leads to dispossession that an order under s. 522 can be made.

Held, also, that the order passed under ss. 523 and 524 with reference to the crops were illegal. The crops were not property in respect of which the offence was committed, nor were they used in the commission of the offence. They were not such property as is referred to in ss. 517, 523 or 524 of the Crim. Pro. Code.

Held, also, that the Third Class Magistrate, as such, had no authority to make an order under s. 524. NARAYAN v. VISAJI, 23 B. 494 ... 329

(6) *S.* 533—*Confession—Confession not signed by the accused—Admissibility of such confession—Parol evidence admissible to prove the terms of the confession.*—S. 533 of the Code of Criminal Procedure (Act X of 1882) is intended to apply to all cases in which the directions of the law have not been fully complied with. It applies to omissions to comply with the law as well as to infractions of the law.

The accused was charged with murder. At the trial a confession made by him before the committing Magistrate was tendered in evidence against him. The Sessions Judge rejected the confession as inadmissible, as it did not bear the mark or signature of the accused, and, as there was no other reliable evidence to bring home the charge to the accused, he was acquitted.

Held, reversing the order of acquittal, that though the record of the confession was inadmissible, parol evidence could be given of the terms of the confession, and those terms, when proved, might be admitted and used as evidence against the accused under s. 533 of the Code of Criminal Procedure (Act X of 1882).

The accused was, therefore, ordered to be retried. QUEEN-EMPRESS v. RAGHU, 23 B. 221 ... 146

Crim. Pro. Code (Act V of 1898).

(1) *S.* 35—*Conviction of several offences at one trial—One sentence only to be passed in such cases—Sentence—Indian Penal Code (Act XLV of 1860), s. 71.*—Where a person commits house-breaking in order to commit theft, and theft, he may be charged with, and convicted of, each of these offences. In awarding punishment under the provisions of s. 71 of the Indian Penal Code (Act XLV of 1860) the Court should pass one sentence for either of the offences in question and not a separate one for each offence.

If in such a case two sentences are passed, and the aggregate of these does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, that would be an irregularity, and not an illegality, calling for the interference of a Court, Appeal or Revision. QUEEN-EMPRESS v. MALU and QUEEN-EMPRESS v. MAGU, 23 B. 706 (F.B.)=1 Bom. L.R. 142 ... 472

(2) *Ss.* 144, 145, 435 *and* 439—*Dispute about right to perform service in a public temple—Notice—High Court—High Court's criminal revisional jurisdiction.*—A Magistrate professing to act under s. 145 of the Crim. Pro. Code (Act V of 1898) is bound to follow the proper procedure. He must set forth the grounds on which he is satisfied that there is a dispute likely to cause a breach of the peace. He is bound to issue notices to all parties concerned so as to give them an opportunity to put in their respective claims. And his order should not interfere with the rights of the parties as determined by previous decisions of the Civil Court.

A dispute relating to the right of performing religious service in a public temple, when it is likely to cause a breach of the public peace, falls under s. 145 of the Crim. Pro. Code (Act V of 1898).

The High Court ordinarily has no jurisdiction to interfere with an order under chap. XII of the Crim. Pro. Code (Act V of 1898), which is not a proceeding within the meaning of s. 435 of the Code; but when the Magistrate exceeds his jurisdiction under s. 144 or 145, the High Court has power to interfere under its revisional jurisdiction (s. 439).

Crim. Pro. Code (Act V of 1898)—(*Concluded*). PAGE

A dispute arose between certain classes of priests attached to a Hindu temple about the right of performing a certain religious service. On the complaint of one of the parties, the Magistrate of the district, purporting to act under s. 145 of the Code of Criminal Procedure (Act V of 1898), passed an *ex-parte* order prohibiting the other party from taking any part in the said service, although both parties had been previously declared by the Civil Court to be entitled to officiate at the service.

Held, that the order was illegal, and opposed to the provision of s. 145 of the Code. *In re* PANDURANG GOVIND, 24 B. 527 2 Bom. L.R. 84 ... 882

(3) S. 145, cl. 6, s. 147—See ACT III OF 1876 (BOMBAY MAMLATDAS COURTS), 24 B. 251.

(4) S. 188—Indian Penal Code (Act XLV of 1860), ss. 108-A, 372—Disposing of a minor for immoral purposes—Abetment—Offence committed out of British India—Jurisdiction—Offence not triable except with the certificate of Political Agent or sanction of Government—See PENAL CODE (ACT XLV OF 1860), 24 B. 287.

(5) *Ss.* 269, *cl.* 3, *and* 307—*Jury—Trial by jury of an offence triable with the aid of assessors - Practice.*—The accused was tried by a jury on four charges: (1) forgery, (2) using a forged document, (3) criminal misappropriation, and (4) attempting to use a forged document as genuine. The jury returned a unanimous verdict of "not guilty" on all the charges. The Sessions Judge agreed with the jury in their verdict on the 1st, 2nd and 4th charges, but he differed from them on the 3rd charge, which was criminal misappropriation. This offence was not triable by a jury and ought, therefore, under cl. 3 of s. 269 of the Crim. Pro. Code (Act V of 1898), to have been tried by the Sessions Judge with the aid of the jurors as assessors. Nevertheless the Judge took the verdict of the jury upon this charge, and differing from it, referred the case to the High Court under s. 307 of the Code.

eld, that although the procedure of the Sessions Judge was irregular, the trial by jury must be accepted as legal, and the case as one that could be referred to the High Court under s. 307 of the Crim. Pro. Code. QUEEN-EMPRESS v. JEYRAM HARIBHAI, 23 B. 696 = 1 Bom. L.R. 114 ... 465

(6) *S.* 237—*Pardon tendered to one of the accused—Approver—Trial of approver for non-fulfilment of the condition on which pardon was offered—Practice.*—No action can be taken against a person who has accepted a pardon for breach of the condition on which the pardon was tendered until after the case in the Court of Session has been finished, and then his trial should be commenced *de novo*. QUEEN-EMPRESS v. BHAU, 23 B. 493 ... 328

(7) S. 342, cl. 4—Evidence Act (I of 1872), s. 132—Practice—Procedure—Witness—Accused person calling as witnesses other accused persons charged with him and awaiting a separate trial for same offence—See PRACTICE, 23 B. 213.

(8) S. 429—See ACT IX OF 1890 (RAILWAYS), 24 B. 293.

(9) S. 435—See MUSCAT, 24 B. 471.

(10) *S.* 557—*Pleader—Appointment of a pleader to act as Presidency Magistrate—Appointment not forbidden by the Code.*—The appointment of a pleader to act as a Magistrate is not forbidden by s. 557 or any other provision of the Code of Criminal Procedure (Act V of 1898).

After the Crim. Pro. Code of 1898 had come into force, a practising pleader was appointed to act as a Presidency Magistrate. On his appointment he gave up practising and was not practising at the time the accused was tried and convicted by him of theft. The accused applied to the High Court, in revision, to quash the conviction, on the ground that the appointment of the Magistrate contravened the provisions of s. 557 of the Code of Criminal Procedure.

Held, that s. 557 of the Code does not deal with appointments, and had no application to the present case, as the Magistrate was not practising at the time the accused was tried and convicted. *In re* JIVANJI ADAMJI, 23 B. 490 ... 326

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Custom.

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Damages.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 394.
(2) See DEFAMATION, 24 B. 13.
(3) See INJUNCTION, 23 B. 786.

Damdupat.

(1) Bond purporting to be executed in adjustment of a past debt—Principal for the purpose of damdupat is the amount of the bond—Hindu law—Interest—See HINDU LAW (GENERAL), 24 B. 305.

(2) *Interest—Mortgage—Redemption—Mortgage with possession—Mortgagee to take rent in part-payment of interest — Remaining interest to be paid by mortgagor every year—Hindu law.*—The *damdupat* rule applies in all cases as between Hindu debtors and creditors both in respect of simple as also of mortgage debts. (2) It does not, however, apply where the mortgagee has been placed in possession, and is accountable for profits received by him as against the interest due. (3) But where these profits are by the terms of the bond received for only a portion of the interest on the mortgage debt, the general rule of *damdupat* will govern such mortgage accounts. SUNDARBAI v. JAYAVANT BHIKAJI, 24 B. 114 = 1 Bom. L.R. 551... 614

(3) See REGISTRATION, 24 B. 609.

Darkhast.

See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 345.

Dassa Porwad Caste.

See HINDU LAW (SUCCESSION), 23 B. 257.

Datta Homa.

Hindu law—Adoption—Adoption of brother's son—Omission of datta homa ceremony—Adoption valid—See HINDU LAW (ADOPTION), 24 B. 218.

Debentures.

See FORGERY, 24 B. 65.

Declaration.

Hindu law—Adoption—Adoption by widow—Suit for a declaration that adoption was invalid and for recovery of possession—Reversioner—Bar of limitation to claim for declaration—Limitation Act (XV of 1877), sch. II, arts. 118, 119 and 141—Act IX of 1871, sch. II, art. 129—Act XIV of 1859, s. 1, cls. 6 and 12—Specific Relief Act (I of 1877), s. 42—See HINDU LAW (ADOPTION), 24 B. 260.

Declaratory Decree.

See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 266.

Declaratory Suit.

See KHOT, 24 B. 533.

Decree.

(1) Civ. Pro. Code (Act XIV of 1882), s. 203—Decree not according to law—Substantial failure of justice—Interference under extraordinary jurisdiction—See SMALL CAUSE COURT, 23 B. 334.

(2) Construction—Suit for land—Mesne profits—Decree for mesne profits—Decree silent as to the time down to which mesne profits were given — Construction of such decree—Civ. Pro. Code (Act X of 1877), s. 211—Limitation—Limitation Act (XV of 1877), arts. 178, 179—See MESNE PROFITS, 24 B. 149.

(3) *Ex-parte* decree— Appearance of party — Appearance by pleader or recognzied agent—Appearance only for purpose of applying for

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adjournment—Civ. Pro. Code (Act XIV of 1882), ss. 36, 37, 100, 102, 103—Presidency Small Cause Court Act (XV of 1882), s. 38—Dismissal for default—Remedy of plaintiff—Practice—Procedure—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 414.

(4) *Ex-parte* decree—Civ. Pro. Code (Act XIV of 1882), s. 108—Small Cause Court—Satisfaction of the decree—Application by defendant to set aside decree—See CIV. PRO CODE (ACT XIV OF 1882), 23 B. 716.

(5) Form of—Accounts to be taken first—Matters to be considered in framing scheme—Charitable trust—See CHARITY, 24 B. 50.

(6) Partition—Decree for partition—Decree awarding plaintiff's share, but postponing possession thereof till plaintiff attained majority—Effect of such decree—Hindu law—See HINDU LAW (PARTITION), 24 B. 182.

(7) Transfer of Property Act (IV of 1882), ss. 87, 88, 89 and 93—Mortgage—Decree for sale of mortgaged property—Default in payment on the date fixed in the decree—Redemption—Power to enlarge the time—See TRANSFER OF PROPERTY ACT (IV OF 1882), 24 B.300.

(8) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B. 644.

(9) See MINOR, 23 B. 620.

(10) See SMALL CAUSE COURT, 24 B. 310.

(11) See TRANSFER OF PROPERTY ACT (IV OF 1882), 24 B. 502.

Deed.

See EVIDENCE, 23 B. 63.

Defamation.

Privileged communication—Excommunication—Caste question—Jurisdiction of Civil Court.—Plaintiff was a Hindu widow of the Modh Wania caste. Defendant was the head of the caste. He received anonymous letters imputing bad conduct to the plaintiff. He was requested to call a caste meeting to consider the matter; he did so, and placed the letters before the meeting, and it was then resolved to warn the plaintiff. The warning was, however, unheeded So a second meeting was called by the defendant. Plaintiff sent her brother and sister's husband to the meeting in order that they might defend her. But they offered no explanation on her behalf. Witnesses were then heard and ten persons selected to decide what should be done. Defendant was one of those ten, and he communicated to the general meeting the decision they had come to—namely, that the plaintiff should be excommunicated. The meeting unanimously adopted this decision, and the defendant announced the decision of the caste to the *gor* for him to promulgate. The plaintiff thereupon sued to recover from the defendant Rs. 5,249 as damages for defamation.

Held, that the defendant was not guilty of defamation. He acted in the matter honestly, and as he was bound to act in the interests of the caste, and in the discharge of his duties as leader of the caste.

Per RANADE, J.—The defendant's act was privileged. Defendant was the head of the caste, and the caste men assembled were interested in the matter along with the defendant. Anonymous letters were received and the defendant had a duty to perform. The matter was discussed at a properly convened meeting, where the plaintiff's near relations were duly summoned and were in fact present. The occasion was lawful and properly exercised to protect mutual interests. The privilege was, therefore, complete, and good faith was to be presumed, unless express malice could be shown.

The caste having presumably acted in good faith, and proceeded regularly according to the custom, the Civil Court could not interfere with its action, or examine the question on its merits. KESHAVLAL v. BAI GIRJA, 24 B. 13=1 Bom. L.R. 478 ... 545

Deposit.

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See INSOLVENCY, 23 B. 474.

Disclaimer.

See LANDLORD AND TENANT, 24 B. 426.

Discretion.

(1) See LIMITATION ACT (XV OF 1877), 23 B. 513.
(2) See MUNICIPALITY, 23 B. 528.

Dishonour.

See HUNDI, 24 B. 360.

Distributive Share.

See ACT XV OF 1865 (PARSI MARRIAGE AND DIVORCE), 24 B. 465.

Divorce.

(1) Charge on husband's immoveable property—Widow—Distributive share—Parsi Marriage and Divorce Act (XV of 1865)—Alimony—See ACT XV OF 1865 (PARSI MARRIAGE AND DIVORCE), 24 B. 465.

(2) *Husband and wife—Indian Divorce Act* (IV *of* 1869), *ss.* 17 *and* 20—*Decree for nullity of marriage—Confirmation by the High Court—Time of confirmation—Practice—Procedure.*—Under the Indian Divorce Act (IV of 1869) a decree for nullity of marriage made by a District Court cannot be confirmed by the High Court before the expiration of six months from the pronouncing thereof. A. v. B, 23 B. 460 ... 305

Divorce Act (IV of 1869).

(1) Ss. 17 and 20—See DIVORCE, 23 B. 460.
(2) S. 33—See PARSIS, 23 B. 279.
(3) S. 37—See ACT XV OF 1865 (PARSI MARRIAGE AND DIVORCE), 24 B. 465.

Dunlop's Proclamation.

See TREES, 23 B. 518.

Dwelling House.

See ACT IV OF 1893 (PARTITION), 23 B. 77.

Easement.

(1) *Customary rights—Custom of burial—Local custom—Right claimed by a certain section of Mahomedans to bury their dead in a certain locality—Right of burial.*—Where a certain section of the Mahomedan community had been for many years in the habit of burying their dead near a darga in plaintiff's land, and the plaintiff sued for an injunction restraining them from exercising this right in future.
Held, that the right of burial claimed by the defendants was not an easement, but a customary right, which being confined to a limited class of persons and a limited area of land, was sufficiently certain and reasonable to be recognized as a valid local custom. MOHIDIN v. SHIVLINGAPPA, 23 B. 666=1 Bom. L.R. 170 ... 445

(2) Easement Act (V of 1882), ss. 4 and 52—Right of growing rice plants in another's land to be afterwards transplanted to his own—License—See LICENSE, 23 B. 397.

(3) *Easement Act* (V *of* 1882), *s.* 15, expl. 1.—*Access of light and air to windows—Agreement preventing the acquirement of an easement.*—A promise was made regarding the access of light and air, by the plaintiff's predecessor in title, to windows placed by him in the upper part of his house, which was separated by a narrow space

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from a building opposite belonging then to the defendant's predecessor. This promise was that the owner of the house would make no objection to the blocking up of the windows in question when the owner of the building opposite should rebuild it and raise it to a higher elevation.

The owner of the windows accepted this promise.

After the lapse of twenty years the defendant, having given notice that he would act on the agreement, proceeded to re-build; and he raised his bulding higher than the old one, causing the obstruction of which the plaintiff now complained.

Held, that there having been a continuing agreement between the parties within the meaning of Explanation 1 of the Indian Easements Act, 1882, the acquirement by the plaintiff of an easement by prescription had been prevented.

From the agreement it was apparent that the employment of light and air had not been granted as an easement. SULTAN NAWAZ v. RUSTOMJI N. BYRAMJI JIJIBHOY, 24 B. 156 (P.C.)=2 Bom. L.R. 518=26 I.A. 184=1 Sar. P.C.J. 609 ... 641

(4) *Right of way—Change of use—Indian Easements Act* (V *of* 1882), *s.* 23—*Increase of servitude.*—Under s. 23 of the Indian Easements Act (V of 1882) a right of way enjoyed for agricultural purposes may be used for the purpose of a factory, provided no additional burden is thereby imposed on the servient heritage. JESANG v. A. T. WHITTLE, 23 B. 595=1 Bom. L.R. 37 ... 397

(5) *Right of way—Right of way enjoyed for agricultural purposes—Change of use—Increase of servitude—Injunction*—The defendants had a right of way to their field through an adjoining field of the plaintiff. Until shortly before suit the defendants' field had only been used for agriculture, and the way through the plaintiff's field was used by them for ordinary agricultural purposes. The defendants, however, converted their field into a timber depot and began to use the way across the plaintiff's field for purposes connected with the timber trade. The plaintiff sued for an injunction.

Held, that plaintiff was entitled to an injunction restraining the defendants from using the way otherwise than for agricultural purposes. DESAI BHAOORAI *v.* DESAI CHUNILAL, 24 B. 188=1 Bom. L.R. 658 ... 663

(6) See INJUNCTION, 23 B. 786.

(7) See MAHOMEDAN LAW (PRE-EMPTION), 24 B. 414.

Easement Act (V of 1882).

(1) See EASEMENT, 24 B. 188.

(2) Ss. 4 and 52—See LICENSE, 23 B. 397.

(3) S. 7, ill. (*h*)—See WATER, 23 B. 506.

(4) S. 15, Explanation 1—See EASEMENT, 24 B. 156.

(5) S. 23—See EASEMENT, 23 B. 595.

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Disclaimer of title—Notice to quit—Landlord and tenant—See LANDLORD AND TENANT, 24 B. 426.

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Entry.

(1) See KHOT, 24 B. 533.

(2) See LIMITATION ACT (XV OF 1877), 24 B. 435.

Estoppel.

(1) See MINOR, 23 B. 146.

(2) See PLEDGE, 24 B. 458.

Evidence.

(1) *Commissioner appointed to prepare a map—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 392—*Statements of village officers made to such commissioner and recorded by him—Practice.*—In a suit as to a right of

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way a commissioner was appointed under s. 392 of the Civ. Pro. Code to prepare a map of the locality in question.

Held, that the statement of the village officers made to him with regard to the right of way were inadmissible in evidence. SHITAWA v. BHIMAPPA, 24 B. 43=1 Bom. L.R. 493 ... 565

(2) Confession—Confession not signed by the accused—Admissibility of such confession—Parol evidence admissible to prove the terms of the confession—Crim. Pro. Code (Act X of 1882), s. 533—See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 221.

(3) Confessions—Retracted confessions—Admissibility of such confessions without corroborative evidence—Criminal Procedure—See CRIMINAL PROCEDURE, 23 B. 316.

(4) *Evidence Act* (I *of* 1872), *ss.* 13 *and* 43—*Judgments—Judgments not* inter partes—*Admissibility of such judgments—Documents not objected to in first Court—Appeal—Practice.*—Judgments not *inter partes*, though not conclusive as *res judicata*, are admissible in evidence under s. 13 of the Evidence Act (I of 1872) to show the conduct of the parties, or particular instances of the exercise of a right, or admissions made by the parties or their predecessors in title, or to identify property, or to show how it has been previously dealt with.

Where parties to a suit, in order to save delay or expense or for any other reason, have agreed or not objected to the admission of certain evidence given in some former proceedings, although it is not strictly admissible, and the first Court has allowed this to be done, it is not open to the appellate Court to take objection to such a procedure and exclude the evidence.

A, B and C were members of a joint Hindu family, each having a third share in the family estate. A assigned his interest in the joint estate to the plaintiffs, who in 1897 filed this suit to recover by partition their one-third share in the property. B and C pleaded (*inter alia*) that A had already relinquished his share in their favour by a release dated 7th August, 1885.

The plaintiffs relied upon the judgments in a former suit brought by certain creditors of A to establish A's title to a third share in the property. In that suit it had been decided that the release relied upon by B and C was a fraudulent and colourable transaction.

Held, that the judgments in the former litigation, though not *inter partes*, were admissible under s. 13 of the Evidence Act (I of 1872). LAKSHMAN v. AMRIT, 24 B. 591=2 Bom. L. R. 386 ... 924

(5) *Evidence Act* (I *of* 1872), *s.* 32, *cls.* (2) *and* (3)—*Deed—Recitals in deed—Description of boundary—Statement against pecuniary or proprietary interest.*—The plaintiff sued in 1893 to recover possession of certain land. The defendants denied the plaintiff's title. The plaintiff tendered in evidence a registered mortgage-deed of adjacent land executed in 1877, which set forth the boundaries of the land comprised in the mortgage, and as one of such boundaries referred to the land in question as then belonging to the plaintiff. At the date of the deed there was no litigation existing between the present litigants, and at the date of the present suit the mortgagor was dead.

Held, that the statement in the deed was admissible under cl. 3 of s. 32 of the Evidence Act (I of 1872) as a statement against the pecuniary or proprietary interest of the mortgagor. NINGAWA v. BHARMAPPA, 23 B. 63 ... 42

(6) Evidence Act (I of 1872), s. 92, proviso 5—Evidence of previous dealings when admissible—Contract—Interest on price and charges not demandable in absence of special contract—See CONTRACT, 24 B. 510.

(7) *Evidence Act* (I *of* 1872), *ss.* 107 *and* 108—*Person not heard of for seven years—Presumption of death—Adoption—Validity of adoption depending on whether natural son alive or dead—Onus of proof—Deed or will conferring estate on a person described as adopted son—*

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Res judicata—*Former decree in favour of plaintiff, but issue as to adoption found against him—No appeal open to plaintiff against that finding.*—Death is to be presumed after a certain interval (seven years); but there is no presumption as to time of death. If, therefore, any one has to establish the precise period during these seven years at which a person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the continuance of life. There is no presumption of law that because a person was alive in 1877, therefore he was alive in 1878.

One Shankar died in September, 1878, leaving a widow Bhagubai. The year before his death his only son (Bala), a child of eight years old, had left his home and was never heard of again. A few days before his death, Shankar adopted the plaintiff (his nephew) and executed a deed of adoption, which stated that he had no hope that his son Bala was alive, and that he had, therefore, adopted the plaintiff. The deed further declared the plaintiff to be the owner of all Shankar's property with all the rights of a natural son, but provided that, in the event of the lost son returning, he should have half. In 1892 the plaintiff as Shankar's adopted son brought this suit to recover some of Shankar's property, which was in the hands of the defendants, who claimed it as Shankar's heirs. They (*inter alia*) impeached the plaintiff's adoption.

Held that, in order to recover the property as the adopted son of Shankar, it lay on the plaintiff to prove a valid adoption. It was a condition precedent to prove that, at the date of the adoption, Shankar was without a son. It was, therefore, for the plaintiff to prove that Bala was then dead. There was at that time, no presumption that Bala was dead, and there being no evidence on the point it was impossible to say when he died, or consequently that the adoption was valid.

Held, however, that plaintiff was entitled to succeed as donee under the deed of adoption (Ex. A). It was clearly Shankar's intention to give the estate to the plaintiff as being his adopted son. But if the adoption was invalid, the gift had no effect. The *onus* here was on the defendants. It was for them to show that Bala was at that date alive and the adoption, therefore, invalid. That burden they had not discharged, and the plaintiff, therefore, was entitled to a decree.

Per FARRAN, C.J.—Where a deed of gift or will confers an estate upon a named person, because he fills or by reason of his filling a certain character, he is entitled to recover the estate without affirmatively proving that he fills such character. The *onus* of proving that he does not fill the character, which is the reason of the gift, lies upon those who dispute his claim. The whole question is one of *onus* of proof.

The plaintiff had previously sued one Krishnaji, the father of the defendants, in another suit (No. 804 of 1885) to recover certain other lands. In that suit it had been held that the plaintiff was not the adopted son of Shankar, but that nevertheless he was entitled to recover the lands sued for, on the strength of the above-stated deed (Ex. A), and a decree was passed for the plaintiff.

Held, that the issue as to adoption in that suit was not *res judicata* in the present suit. In the former suit the plaintiff recovered upon the deed. He could not have appealed from the decree which was in his favour, nor could he under the Civ. Pro. Code (Act XIV of 1882) appeal from the finding upon the adoption issue which was against him. Upon that issue there had not been a final decision.
RANGO BALAJI v. MUDIYEPPA, 23 B. 296 ... 197

(8) Hundi—Inadmissible in evidence for want of stamp—Independent admission of loan—Suit on the original consideration—Admission by pleader erroneous in law—Binding effect—Dishonour—Notice—See HUNDI, 24 B. 360.

(9) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 23 B. 698.

(10) See LIMITATION, 23 B. 177.

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(1) Ss. 13 and 43—See EVIDENCE, 24 B. 591.
(2) S. 23—See LIMITATION, 23 B. 177.
(3) S. 32, cls. 2 and 3—See EVIDENCE, 23 B. 63.
(4) S. 33—See MINOR, 23 B. 146.
(5) S. 91—See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 221.
(6) S. 92, cl. 4—See REGISTRATION, 24 B. 609.
(7) S. 92, Proviso 4—Mortgage—Power of sale—Suit to set aside sale under power of sale—Promise by mortgagee to postpone sale—Evidence of such promise admissible—See MORTGAGE (SALE), 23 B. 348.
(8) S. 92, Proviso 5—See CONTRACT, 24 B. 510.
(9) Ss. 107 and 108—See EVIDENCE, 23 B. 296.
(10) S. 115—See SHIPPING, 23 B. 551.
(11) S. 132—See PRACTICE, 23 B. 213.

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(1) See DEFAMATION, 24 B. 13.
(2) See JURISDICTION, 23 B. 122.

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(1) Administrator-General—Administrator-General's Act (II of 1874), ss. 17 and 18—Order to collect assets—Decree against deceased's estate passed prior to such order—Attachment of part of deceased's estate subsequently to above order—Claim of Administrator-General prior to that of attaching creditor—See ADMINISTRATOR-GENERAL, 23 B. 428.
(2) Agreement between a judgment-creditor and a person other than judgment-debtor—Postponement of execution—Civ. Pro. Code (Act (XIV of 1882), s. 257-A—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 502.
(3) Agreement not to execute decree—Breach of contract—Suit to recover damages—Civ. Pro. Code (Act XIV of 1882), ss. 244, 258—Decree—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 394.
(4) Charity—Temple—Scheme of management—Failure of trustees to carry out—Mode of enforcing proper management—Removal of trustees—Practice—Civ. Pro. Code (Act XIV of 1882), ss. 539 and See CHARITY, 24 B. 45.
(5) Civ. Pro. Code (Act XIV of 1882), s. 231—Application for execution by one of several joint decree-holders—Order refusing to allow execution by one of several joint decree-holders—Appeal—Practice—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 623.
(6) Civ. Pro. Code (Act XIV of 1882), ss. 278—283, 28—Attachment of same property in execution of decrees obtained by different creditors—Claim made in one suit to attached property under s. 278—Order made under s. 281—Suit by claimant to establish right—All attaching creditors made defendants to suit—Parties—Small Cause Court—Declaratory decree—Jurisdiction—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 266.
(7) Civ. Pro. Code (Act XIV of 1882), s. 310-A—Act V of 1894—Execution sale—"Person whose immoveable property has been sold"—Prior private purchaser of property sold in execution not within the section—See CIV. PRO. CODE (Act XIV OF 1882), 23 B. 450.
(8) Execution by Collector—Application to Collector to set aside sale—Civ. Pro. Code (Act XIV of 1882), ss. 244, 310-A, 311 and 320—Limitation—Limitation Act (XV of 1877), s. 14--Decree — See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 531.
(9) For maintenance—Suit for altering rate of maintenance fixed by a decree—Hindu law—Widow—Maintenance—Practice—Procedure—See HINDU LAW (WIDOW), 24 B. 386.
(10) Limitation—Mesne profits for three years subsequent to the suit—Civ. Pro. Code (Act XIV of 1882), ss. 211 and 331—Limitation Act (XV of 1877), sch II, art. 178—Decree for possession with mesne

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profits till delivery of possession—Darkhast for execution—Obstruction—Application for removal of obstruction—Application registered as a suit—Disposal of the darkhast—Decree in the suit—See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 345.

(11) *Sale in execution subject to mortgage—Suit to set aside sale and for re-sale of property free from mortgage—Practice—Procedure—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 287.—The plaintiff, having sold property in execution of a decree subject to a certain mortgage lien which had been duly investigated and allowed, brought this suit to have the sale set aside and praying for a re-sale of the property free from the mortgage lien.

Held, that he was not entitled to the relief sought. His proper remedy was to have brought a suit for a declaration that the alleged mortgage was null and void, and to have stayed the sale till the determination of that suit. PARSHOTAM v. GANESH, 23 B. 759=1 Bom. L.R. 220 ... 508

(12) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 237, 536, 723; 24 B. 120, 314.

(13) See HINDU LAW (DEBTS), 24 B. 343.

(14) See HINDU LAW (JOINT FAMILY), 23 B. 372; 24 B. 135.

(15) See LIMITATION, 23 B. 442.

(16) See LIMITATION ACT (XV OF 1877), 23 B. 35.

(17) See MAMLATDAR'S COURT, 24 B. 397.

(18) See MORTGAGE (GENERAL), 23 B. 119.

(19) See MORTGAGE (REDEMPTION), 23 B. 592.

(20) See SURETY, 23 B. 478.

(21) See WILL, 23 B. 1.

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(1) Minor—Guardian—*Ex parte* decree against minor—Minor's right to sue to set aside *ex parte* decree—Proof of negligence or fraud on the part of the guardian—Practice—See MINOR, 24 B. 547.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 414, 716.

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(1) Limitation—Hindu Law—Partition—Son born after partition—Right of such son to partition—Share of such son—Family arrangement—Limitation—See HINDU LAW (PARTITION), 23 B. 636.

(2) See MINOR, 23 B. 146.

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(1) Partners—Joint contract—Liability of partners—Joint liability—Judgment recovered against one partner—Judgment of a foreign Court—*Res judicata*—Civ. Pro. Code (Act XIV of 1882), ss. 13 and 14—Consent decree—See PARTNERS, 24 B. 77.

(2) *Suit on a foreign judgment—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 14, *as amended by Act* VII of 1888.—A suit will lie on a judgment of a Court in a Native State. MAYARAM v. RAVJI, 24 B. 86=1 Bom. L.R. 539 ... 594

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No title through forgery—Shares, debentures, Government promissory notes having a forged indorsement—Holder has no title—Government promissory notes surrendered for renewal—Title to renewal notes—

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English Bills of Exchange Act (*Stat.* 45 *and* 46 *Vict.*, *c.* 61)—*Negotiable Instruments Act* XXVI *of* 1881—*Holder in due course.*—The plaintiff as administrator of Purmanand Cooverji, a deceased Hindu, sued to recover from the defendants (thirty-one in all, certain shares, debentures and Government promissory notes which he alleged belonged to the estate of the deceased, but which the first four defendants had stolen, and by means of forged indorsements sold to the other defendants and received the purchase-money. Those of the defendants who had purchased the Government promissory notes contended that as innocent purchasers for value they were entitled to retain them.

Held, that the plaintiff was entitled to recover all the shares, debentures and Government promissory notes from the defendants.

Some of the Government promissory notes on which the forged indorsements had been made had been surrendered for renewal and fresh promissory notes issued in their place.

Held, that the plaintiff was entitled to recover the renewed notes from the holders. HUNSRAJ v. RUTTONJI, 24 B. 65=1 Bom. L.R. 734 ... 581

Fraud.

(1) *Fraudulent conveyance—Conveyance by plaintiff to defeat creditors—Subsequent suit by plaintiff to recover possession.*—When property has been conveyed by the owner to another person with the object of defrauding his (the owner's) creditors, and the fraud has been carried out, the owner cannot succeed in a suit to recover possession. HONAPA v. NARSAPA, 23 B. 406 ... 271

(2) See HINDU LAW (PARTITION), 23 B. 385.

(3) See MINOR, 24 B. 547.

Fraudulent Conveyances.

(1) Conveyance by plaintiff to defeat creditors—Subsequent suit by plaintiff to recover possession—See FRAUD, 23 B. 406.

(2) Transfer of Property Act (IV of 1982), s. 53—Will—Construction—Bequest to wife with obligation of maintaining and educating children—Interest taken under such bequest—Decree against wife—Attachment of interest under will—Civ. Pro. Code (Act XIV of 1882), s. 274—See WILL, 23 B. 1.

(3) See MINOR, 23 B. 146.

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Time for appeal—Letters Patent, s. 15—Civ. Pro. Code (Act XIV of 1882), s. 591—Appeal—Decree for accounts—See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 302.

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(1) See LANDLORD AND TENANT, 24 B. 34.

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Guardian. PAGE

(1) *Certificated guardian—Mortgage by such guardian without Court's permission—Validity of such mortgage—Sanction under Civ. Pro. Code (Act* XIV *of* 1882), *s.* 305—*Guardian and Wards Act* (VIII *of* 1890), *ss.* 29 *and* 30—*Act* XX *of* 1864.—Anant was the owner of the property in dispute. He mortgaged it with possession to defendant No. 1 in 1884. Anant died leaving an adopted son Vithal, a minor. Thereupon one Vasudev was appointed by the District Court to be guardian of the person and property of the minor under Act XX of 1864. In September, 1890, Vasudev mortgaged the same property to plaintiff with the sanction of the Subordinate Judge's Court obtained under s. 305 of the Code of Civil Procedure (Act XIV of 1882). In 1895 the plaintiff as second mortgagee brought this suit to redeem the earlier mortgage of 1884.

Held, that Vasudev, as certificated guardian, had no power to mortgage the minor's property without the previous permission of the Court which had appointed him to act as guardian, and that the sanction of another Court given under s. 305 of the Code of Civil Procedure (Act XIV of 1882) was not sufficient to legalise the mortgage.

Held, also, that such mortgage would have been absolutely void under Act XX of 1864, but was only voidable under s. 30 of Act VIII of 1890 at the instance of any other person affected thereby.

Held, further, that defendant No. 1 the original mortgagee, was not affected by the plaintiff's mortgage, and that the only person really affected by that mortgage was Vithal, the owner of the equity of redemption, who was a necessary party to the suit. DATTARAM v. GANGARAM, 23 B. 287 ... 191

(2) *Ex parte* decree against minor—Minor's right to sue to set aside *ex parte* decree—Proof of negligence or fraud on the part of the guardian—Practice—Minor—See MINOR, 24 B. 547.

(3) Minor—Loan obtained by guardian as such—Liability for such loan—Warranty by guardian of authority to borrow—Misrepresentation on a point of law—Contract Act (IX of 1872), s. 235—Guardian's liability— Warranty— Breach of warranty—Suit on warranty—Principal and Agent—See WARRANTY, 24 B. 166.

(4) *Minor—Remuneration of guardian—Order refusing remuneration not appealable—Guardian and Wards Act* (VIII *of* 1890), *ss.* 22, 45 *and* 47.—A Nazir of the District Court was appointed guardian of the property of certain minors, but no provision as to his remuneration was made at the time of his appointment. Subsequently he applied for remuneration on his transfer to another appointment. The Judge passed an order refusing to allow any remuneration, on the grounds that his accounts had been badly kept and the estates had been mismanaged. The Nazir appealed against the order.

Held, that the order was not appealable. GANGADHAR v. SHIVLINGRAO, 24 B. 95=1 Bom. L.R. 547 ... 600

(5) Right to sue—Practice—Procedure—Lunatic—Guardian of the person of a lunatic not competent to sue in respect of the lunatic's estate—Civ. Pro. Code (Act XIV of 1882), s. 440—See LUNATIC, 23 B. 403.

(6) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 23 B. 698.

(7) See MINOR, 24 B. 238.

Gujarat.

Adoption of an only son—Validity of such adoption in Gujarat—Hindu Law—Adoption—See HINDU LAW (ADOPTION), 24 B. 367.

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(1) See CRIM. PRO. CODE (ACT V OF 1898), 24 B. 527.

(2) See MUSCAT, 24 B. 471.

Hindu Law.

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——1.—General.

(1) Damdupat—Mortgage—Redemption—Mortgage with possession—Mortgage to take rent in part payment of interest—Remaining interest to be paid by mortgagor every year—See DAMDUPAT, 24 B. 114.

(2) *Interest*—Damdupat—*Bond purporting to be executed in adjustment of a past debt—Principal for the purpose of* damdupat *is the amount of the bond.*—In the case of a bond purporting to be executed in adjustment of a past debt, the principal for the purpose of the rule of *damdupat* is the amount of such bond, and not the balance of the unpaid principal actually advanced on an earlier bond.

Per JENKINS, C.J.—Neither the texts, the commentaries, usages or the cases forbid the conversion by subsequent agreement of interest into capital, nor is there any such prohibition involved in the rule of *damdupat* as it has been formulated. SUKALAL v. BAPU, 24 B. 305=2 Bom. L.R. 18. ... 738

——2.—Adoption.

(1) *Adoption by daughter-in-law of A after the estate has vested in A's widow—Permission by A to adopt—Non-consent of widow—Divesting of estate once vested—Widow's authority to adopt in Bombay—Daughter-in-law must have permission—Co-widows—Adoption by one co-widow—Adoption of a son older than adoptive mother.*—An adoption cannot divest a person of an estate which has once vested in him, unless such adoption is made with his consent. An exception to this rule is where a co-widow adopts. Such an adoption will divest the younger widow of her estate. Another exception is where a daughter-in-law adopts with the authority of her father-in-law, who is head of the family, as in 15 B. 110.

Unless prohibited expressly or by implication, a widow in the Presidency of Bombay has authority to adopt, but a daughter-in-law, *i.e.*, the widow of a pre-deceased son, must be specially authorized by her father-in-law in order that she may make a valid adoption binding as against the heirs of her father-in-law.

Sakulbai was the widow of Balkrishna, who died in 1877 in the lifetime of his father Raghunath. Fourteen years later, *viz.*, in 1891, Raghu died, leaving a widow Saibai, who succeeded to his estate as his heir. In March, 1892, Sakubai adopted the plaintiff Gopal, who was older than herself, as son to her husband, alleging that she had Raghu's permission to do so. The plaintiff sued for a declaration that as adopted son of Balkrishna he was entitled to succeed as heir to the property of Raghu, as against the defendant Vishnu, who claimed to have been adopted by Saibai as son to Raghu. The lower appellate Court disallowed the plaintiff's adoption on the grounds (1) that Saibai had not consented to it, and (2) that the plaintiff was older than his adoptive mother Sakubai.

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Held, (confirming the decree of the lower Court), that as the adoption of the plaintiff Gopal was made by Sakubai without proper authority and without Saibai's consent, it was inoperative and invalid. As Saibai did not give her consent to the plaintiff's adoption, that adoption did not divest her of her exclusive right to succeed as heir of Raghu.

Semble.—The fact that an adopted son is older than the adopting mother does not make his adoption invalid. The rule prescribing a difference of age in favour of the adopting mother is only directory and not mandatory. GOPAL v. VISHNU, 23 B. 250 ... 166

(2) *Adoption by senior widow—Widow's capacity to adopt—Implied prohibition.*—In the absence of express prohibition the husband's consent to an adoption by his widow is always to be implied.

The question of implied prohibition is one of legal inference from the facts found, and it is open to the Court to inquire into its correctness in second appeal.

Semble.—In the Bombay Presidency the widow's right to adopt is inherent and not merely delegated.

Semble.—In the absence of express prohibition by the husband, the widow's power to give or take in adoption is co-extensive with that of the husband. LAKSHMIBAI v. SARASVATIBAI, 23 B. 789=1 Bom. L.R. 420 ... 528

(3) *Adoption by widow of a predeceased son—Consent of mother-in-law—Adoption must be by widow of the last full owner—Exceptions to the rule.*—By Hindu law as settled by judicial decisions, it is only the widow of the last full owner who has the right to take a son in adoption, to such owner, and a person in whom the estate does not vest, cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights.

To this rule there are four exceptions :—

1. In the case of co-widows. Though, on the death of the husband without male issue, the estate vests in all his widows, it has been held that the elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows, of their vested rights. The consent of such younger widows has not been held to be essential.
2. In the case of a mother who succeeds as heir to an unmarried son, legitimate or adopted, who dies after his father. In such a case the right of the widow to take a son in adoption to her husband has been conceded to her, though such a son cannot properly be described as being the heir of the last full owner.
3. When an adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent.
4. Where there has been ratification by conduct or acquiescence.

Per PARSONS, J.—The mere fact that the adopting widow is not the widow of the last male holder would not make an adoption by her spiritually invalid, while any difficulty as to the inheritance and the estate is cured by the assent to the adoption given by the person in whom that inheritance or estate is vested.

One Bhimappa died in 1878, leaving a widow Umava and a daughter-in-law Sarasvati him surviving. His only son Darigavda, the husband of Sarasvati, had predeceased him. On Bhimappa's death his estate vested in his widow Umava. In 1879 Sarasvati with Umava's consent adopted a son Shentapa (defendant No. 3). The plaintiff in this suit sued to recover certain land which formed part of Bhimappa's estate, alleging that it had been given to him by Umava. The first defendant alleged and proved that he had bought the land from the third defendant (Shentapa), who was the adopted son of Sarasvati.

Held, (dismissing the suit), that the adoption was valid, and that the first defendant was entitled to the land. PAYAPA v. APPANNA, 23 B. 327 ... 227

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(4) *Adoption by widow—Suit for a declaration that adoption was invalid and for recovery of possession—Reversioner—Bar of limitation to claim for declaration—Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 118, 119 *and* 141—*Limitation Act* (IX *of* 1877), *sch.* II, *art.* 129—*Limitation Act* (XIV *of* 1859), *s.* 1, *cls.* 6 *and* 12—*Specific Relief Act* (I *of* 1877), *s.* 42.—Shrinivasrao and Konherrao were two divided brothers. They were members of a vatandar family. Konherrao died leaving two sons, Swamirao and Timaji. Swamirao was given in adoption to Shrinivasrao. Timaji died leaving a widow and three daughters. In 1872 Timaji's widow, Gangabai, adopted defendant No. 1 and she died in the year 1890. In 1894 Shrinivasrao's grandson by adoption, the present plaintiff, a minor represented by his adoptive mother, sued for a declaration that the adoption of defendant No. 1 was invalid, for a declaration of ownership and possession of property with mesne profits, and for an injunction.

Held, that the suit for a declaration that the adoption was invalid was governed by art. 118, sch. II of the Limitation Act (XV of 1877), and being barred under that article, the whole claim was time-barred.

Per JENKINS, C.J.—A combination of several claims would not in general deprive each claim of its specific character and description.

Per CANDY, J.—Primarily the case is governed by art. 141, but if the defendant in possession can plead "I am to your knowledge or to the knowledge of your predecessor in title in possession as a son alleged to have been validly adopted by the widow, on whose death you claim possession," then the case is governed by art. 118.

Per TYABJI, J.—(1) Art. 118 of sch. II of the Limitation Act (XV of 1877) applies to every suit where the validity of the defendant's adoption is the substantial question in dispute, whether such question is raised by the plaintiff in the first instance or arises in consequence of defendant setting up his own adoption as a bar to the plaintiff's success.

(2) Art. 141 applies to the ordinary simple case of a reversioner where the validity of the adoption is not the substantial point in dispute, or where the plaintiff can succeed without impugning the validity of the defendant's adoption. SHRINIVAS v. HANMANT, 24 B. 260 (F.B.)=1 Bom. L.R. 799 ... 709

(5) *Adoption of an only son—Validity of such adoption in Gujarat.*—The adoption of an only son is valid in Gujarat, where the Mayukha is the paramount authority on Hindu law. VYAS CHIMANLAL v. VYAS RAMCHANDRA, 24 B. 367 (F.B.)=2 Bom. L.R. 163 ... 778

(6) *Adoption of brother's son*—Datta homa—*Omission of* datta homa *ceremony—Adoption valid—Hindu law.*—Among Brahmans in the Presidency of Bombay the performance of the *datta homa* ceremony is not essential to the validity of the adoption of a brother's son. VALUBAI v. GOVIND KASHINATH, 24 B. 218=1 Bom. L.R. 770 ... 682

(7) *Gift and acceptance—Ceremonies of adoption*—Sapinda *relationship, limitation of.*—In the case of an adoption under the Hindu law, if there is evidence of gift and acceptance, and it is further shown that the adoptee has been recognised for a number of years and placed in possession of property, the Court may dispense with the formal proof of the performance of the ceremonies of adoption.

Where the natural mother of an adopted son was seven degrees removed from the common ancestor and the adoptive father five degrees removed *ex parte paterna*.

Held, that the adoption was valid.

Quære—Whether, when the relationship is more than six degrees removed, *sapinda* relationship between the natural mother and the adopter does not cease. VYAS CHIMANLAL v. VYAS RAMCHANDRA, 24 B. 473=2 Bom. L.R. 163 ... 847

(8) *Gift of a son in adoption by a widow after re-marriage—Widow Re-marriage Act* (XV *of* 1856), *ss.* 2 *and* 3.—A Hindu widow has

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no power, after her re-marriage, to give in adoption her son by her first husband, unless he has expressly authorized her to do so. PANCHAPPA v. SANGABASWA, 24 B. 89=1 Bom. L. R. 543 ... 596

(9) Validity of adoption depending on whether natural son alive or dead—Onus of proof—Deed or will conferring estate on a person described as adopted son—Evidence—Indian Evidence Act (I of 1872), ss. 107, 108—Person not heard of for seven years—Presumption of death—See EVIDENCE, 23 B. 296.

(10) Vatan—Succession to a vatan—Bombay Act V of 1886, s. 2—Widow—Right of succession of a widow other than the widow of the last holder—Adoption by such widow—Collateral male member—See VATAN, 24 B. 484.

(11) Will—Construction—Gift conditional on adoption—Condition precedent—Direction to adopt given to the widow of the testator's deceased son, not carried out—Bequest of residuary property—Condition precedent not fulfilled—See HINDU LAW (WILL), 23 B. 271.

——3.—Alienation.

(1) See HINDU LAW (GIFT), 23 B. 131.
(2) See HINDU LAW (PARTITION), 23 B. 137.

——4.—Caste.

(1) See DEFAMATION, 24 B. 13.
(2) See HINDU LAW (SUCCESSION), 23 B. 257.

——5.—Custom.

(1) See HINDU LAW (GENERAL), 24 B. 305.
(2) See HINDU LAW (GIFT), 23 B. 131.

——6.—Debts.

(1) Joint family—Father's debt—Liability of family property—Decree against widow for husband's debt—Execution sale—Minor sons bound though not parties to suit—Hindu Law—See HINDU LAW (JOINT FAMILY), 24 B. 135.

(2) Joint Family—Manager—Debt contracted by a manager for family purposes—Decree against the managing member alone—Sale in execution of such decree—Effect of such sale—See HINDU LAW (JOINT FAMILY), 23 B. 372.

(3) *Son's liability for father's debt—Decree against father—Execution sale—Son's interests when not affected by such sale.*—When ancestral property is sold in execution of a decree against a Hindu father, there are only two cases in which the son's interests do not pass under the sale: *first*, when they are not sold; *second*, when the debt is not binding upon the sons by reason of its having been contracted for an illegal or immoral purpose. JOHARMAL v. EKNATH, 24 B. 343=1 Bom. L. R. 839 ... 763

(4) Surety—Father's liability as surety—Liability of his son for the debt for which he was surety—Hindu law—See HINDU LAW (JOINT FAMILY), 23 B. 454.

(5) See HINDU LAW (GENERAL), 24 B. 305.
(6) See HINDU LAW (JOINT FAMILY), 24 B. 123.

——7.—Gift.

(1) Adoption—Gift and acceptance—Ceremonies of adoption—*Sapinda* relationship, limitation of—See HINDU LAW (ADOPTION), 24 B. 473.

(2) Gift of a son in adoption by a widow after re-marriage—Widow Re-marriage Act (XV of 1856), ss. 2 and 3—See HINDU LAW (ADOPTION), 24 B. 89.

(3) *Gift of moveable property—Delivery of possession not necessary if deed of gift be registered—Transfer of Property Act* (IV of 1882), *ss.* 123, 129—*Registration—Hindu Law.*—The rule of Hindu law, that delivery of possession is essential to complete a gift, is abrogated by s. 123 of the Transfer of Property Act (IV of 1882). BAI RAMBAI v. BAI MANI, 23 B. 234 ... 155

Hindu Law—7.—Gift—(*Concluded*). PAGE

(4) *Revocation of gift*—Vritti—*Gift of* vritti—*Validity of such gift—Compulsory alienation of* vritti *invalid—Private alienation not absolutely prohibited.*—When a gift is made, the donor taking all the steps in his power to give effect to it, it is complete, and he cannot revoke it by a subsequent will.

A *vritti* cannot be sold in execution of a decree. Such a compulsory alienation is not only opposed to the Hindu law and public policy, but is also against the provisions of s. 266 of the Code of Civil Procedure (Act XIV of 1882). But private alienations are not absolutely prohibited. No general rule can be pleaded in such matters. The rules of succession depend upon each particular foundation or office, and in respect of it, custom and practice must govern and prevail over the text law which prohibits both partition and alienation. RAJARAM v. GANESH, 23 B. 131 ... 87

(5) Will—Construction—Gift conditional on adoption—Condition precedent—Direction to adopt given to the widow of the testator's deceased son not carried out—Bequest of residuary property—Condition precedent not fulfilled—Hindu law—See HINDU LAW (WILL), 23 B. 271.

(6) See MINOR, 24 B. 547.

———8.—Guardianship.

Gift—Minor—Guardian—*Ex-parte* decree against minor—Minor's right to sue to set aside *ex-parte* decree—Proof of negligence or fraud on the part of the guardian—Genuine gift by father-in-law to his widowed daughter-in-law—Gift by way of affection of a small share of moveable property acquired by the donor while living in union with his sons and grandson—Gift valid—See MINOR, 24 B. 547.

———9.—Inheritance.

(1) *Daughters—Succession among daughters—The poorest daughter entitled to inherit the whole estate—Comparative poverty.*—In the Presidency of Bombay, the principle of law which governs the succession of daughters *inter se* as heirs to their father's estate is, that though the Courts ought not to go minutely into the question of comparative poverty, yet where the difference in wealth is marked, the whole property passes to the poorest daughter. TOTAWA v. BASAWA, 23 B. 229 ... 152

(2) *Deceased brother's son—Sister—Daughter of a predeceased son.*—A brother's son succeeds as heir in preference to a sister or a granddaughter (daughter of a predeceased son).

In the Island of Bombay the sister's place as heir is to be determined by the text of Mayukha.

Both under the Mayukha and the *Mitakshara*, the sister comes in as a *gotraja sapinda*, and as such must be postponed to the brother's son who is a *sapinda*. MULJI v. CURSANDAS, 24 B. 563 =2 Bom. L. R. 721 ... 906

(3) *Paternal grand-mother inheriting property from maiden grand-daughter—Estate taken by grand-mother—Power to dispose by will.*—A paternal grand-mother in Gujarat, inheriting moveable and immoveable property from her maiden grand daughter, takes an absolute interest in such property, and on her death the property goes to her heir and not to the heir of the grand-daughter, and the grand-mother can dispose of such property by will. GANDHI MAGANLAL v. BAI JADAB, 24 B. 192 (F.B.) =1 Bom. L. R. 574... 666

(4) *Uncles of whole blood and half-blood—Preference—Manu—*Mitakshara *—Mayukha—Viramitrodaya—Smriti Chandrika—Madanparijat—Vyavahar—Hindu law—Deceased nephew.*—For the purpose of inheritance, an uncle of the whole-blood is not entitled to preference over one of the half-blood.

One Bhagwantrao, a minor, died leaving him surviving two paternal uncles, one of whom was an uncle of the whole-blood and the other of the half-blood. The nephew and the uncles were found to be divided from each other.

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Held, that the two uncles were entitled to inherit the property of their deceased nephew in equal shares. VITHALRAO v. RAMRAO, 24 B. 317 = 2 Bom. L.R. 139 ... 746

(5) See HINDU LAW (SUCCESSION), 23 B. 257.

——10—Joint Family.

(1) *Bond in favour of one co-sharer—Payment of such bond made to another co-sharer when a discharge—Right to sue.*—Where a debt due to one member of a joint family has been paid by the debtor to another member of the family, the question whether such payment operates as a discharge depends on the circumstances under which it was made.

A and B were members of a joint Hindu family. Both managed the joint property for the common benefit. Each used to recover debts due on bonds taken in the other's name. In 1890 defendant passed a bond to A. In 1892 he passed a mortgage-bond to B, the consideration for which was stated to be the balance due on the former bond. Subsequently A sued defendant on the bond of 1890.

Held, that under the circumstances the mortgage-bond passed to B operated as a valid discharge of A's claim under the previous bond. GURUSHANTAPPA v. CHANMALLAPPA, 24 B. 123 = 1 Bom L.R. 556. 620

(2) Civ. Pro. Code (Act XIV of 1882), s. 43—Practice—Partition—Two suits for partition—First suit for partition of family property—Second suit for partition of property held jointly by family and others—Vritti—See HINDU LAW (PARTITION), 23 B. 597.

(3) Debt—Son's liability for father's debt—Decree against father—Execution sale—Son's interests when not affected by such sale—Hindu law—See HINDU LAW (DEBTS), 24 B. 343.

(4) *Family property—Family firm—Partnership—Partnership suit between members of joint family—Suit by a co-parcener for an account of the profits of a joint family firm—Injunction—Exclusion of partner.*—A member of a joint Hindu family cannot maintain a suit for an account of the profits of a partnership which is alleged to be joint family property, and an award of his share in such profits when ascertained.

This rule of Hindu law does not prevent an injunction being granted in cases in which one member of the family is prevented from taking part in the business of the firm. GANPAT v. ANNAJI, 23 B. 144 ... 95

(5) *Father's debt—Liability of family property—Decree against widow for husband's debt—Execution sale—Minor sons bound, though not parties to suit.*—One Ghanu died leaving him surviving a widow and two minor sons. The widow mortgaged some lands and a house to pay off a debt due by her husband. Subsequently a money decree was passed against her for another debt due by her husband, and the greater part of the mortgaged property was sold in execution, and the equity of redemption thereof was purchased by the mortgagee (the defendant). The sons were not parties to the suit in execution proceedings.

The sons afterwards brought this suit, claiming that not having been parties to the suit their interests were not affected by the sale, and praying for redemption. The lower Courts allowed the claim and passed a decree for the plaintiffs. On second appeal,

Held (reversing the decree and remanding the case), that the Courts in determining the effect of an execution sale must look to the substance of the transaction. The question was whether the debt for which the property was sold was a joint family debt, and whether it was the equity of redemption in the entirety of the mortgaged property that was offered for sale, bargained for, and intended to be bought. It was obvious that, if the sons had been parties to the suit in which the decree had been passed, they would have appeared by their mother and guardian, and there was no reason to suppose that anything would have been differently done in the suit if she had been described as their guardian instead of being treated as the representative of the estate. Under these circumstances the sons were substantially represented in the suit, and the sale and proceedings

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therein should be treated as valid, unless the sons were able to show either that their father's debt, which was the foundation of the decree, was of such a nature that no liability arising from it could attach to the family property, or, if they failed in that, they might show that the entirety of the family property was, in fact, not sold. DEVJI v. SAMBHU, 24 B. 135 = 1 Bom. L.R. 627 ... 628

(6) *Manager—Debt contracted by a manager for family purposes—Decree against the managing member alone—Sale in execution of such decree—Effect of such sale.*—When a debt is incurred by a Hindu as manager of the family for family purposes, the other members of the family, though not parties to the suit, will be bound by the decree passed against him in respect of the debt; and if in execution of the decree any joint property is sold, the interest of the whole family in such property will pass by the sale. SAKHARAM v. DEVJI, 23 B. 372 247

(7) *Surety—Father's liability as surety—Liability of his sons for the debt for which he was surety.*—Ancestral property in the hands of sons is liable for a father's debt incurred as a surety. TUKARAMBHAT v. GANGARAM, 23 B. 454 ... 301

(8) See ACT IV OF 1893 (PARTITION), 23 B. 73.
(9) See BANK OF BOMBAY, 24 B. 350.
(10) See EVIDENCE, 24 B. 591.
(11) See HINDU LAW (PARTITION), 23 B. 137, 184, 385.
(12) See MINOR, 23 B. 146.

——11.—Maintenance.

(1) Decree for maintenance—Suit for altering the rate of maintenance fixed by a decree—Hindu law—Widow—Practice—Procedure—See HINDU LAW (WIDOW), 24 B. 386.

(2) *Husband and wife—Maintenance order obtained by a wife against husband—Subsequent decree for restitution of conjugal rights obtained by husband—Effect of such decree on previous order of maintenance—Crim. Pro. Code (Act X of 1882), s. 488.*—A decree of a Civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance, if the wife should persist in refusing to live with her husband. A Magistrate ought to cancel a previous order of maintenance made by him, or rather treat it as determined if the wife failing to comply with the decree for restitution refuses to live with her husband. *In re* BULAKIDAS, 23 B. 484 ... 322

(3) *Maintenance of daughter-in law—Claim of daughter-in-law against self-acquired property of her father-in-law in hands of his heirs.*—The widow of a predeceased son, who lived in union with his father, has a legal right to maintenance from her mother-in-law out of the self-acquired property of the father-in-law to which his widow has succeeded as his heir. A son's widow has no legal claim for maintenance against self-acquired property in the hands of her father-in-law, but when such property devolves upon his heirs, the daughter-in-law has a claim against it in their hands for maintenance if her husband had lived in union with his father. YAMUNABAI v. MANUBAI, 23 B. 608 = 1 Bom. L.R. 95 ... 406

(4) *Widowed daughters—Their right of maintenance out of their father's estate—Hindu law—Daughters.*—According to Hindu law, it is only the unmarried daughters who have a legal claim for maintenance out of their father's estate. The married daughters must seek their maintenance from the husband's family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs. BAI MANGAL v. BAI RUKHMINI, 23 B. 291 ... 193

(5) Widow's maintenance—Right of maintenance charged on property left by testator—Sale of such property in fraud of widow's right of maintenance—Right of widow as against purchaser—Transfer of Property Act (IV of 1882), s. 39—Hindu law—Widow—See HINDU LAW (WIDOW), 23 B. 342.

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(1) See HINDU LAW (JOINT FAMILY), 24 B. 135.
(2) See MINOR, 23 B. 146.

——13.—Partition.

(1) *Alienation by co parceners—Possession by alienee—Adverse possession—Limitation—Limitation Act (XV of 1877), sch. II, arts. 127 and 144.*—Where co-parceners have alienated their shares in the joint property by sale and mortgage, and the alienees have been in possession for more than twelve years, a claim for partition is, as against such alienees, barred by limitation under art. 144 of the Limitation Act (XV of 1877).

Art. 127 of sch. II of the Limitation Act (XV of 1877) does not apply except in cases between members of a joint family. It does not apply to the case of a stranger to the family holding property which originally belonged to the family. As to him the ordinary rule of limitation (art. 144) applies. BHAVRAO v. RAKHMIN, 23 B. 137 (F.B.) ... 91

(2) *Co-sharer—Mortgage by co-sharer of undivided share—Partition suit subsequently brought by other co-sharer to which mortgagee not a party—Mortgaged property allotted to a sharer other than mortgagor—Rights of such co-sharer—Partition re-opened—Fraud of mortgagor and mortgagee.*—Four brothers, *viz.*, Damodar, Lakshman, Balvant and Parashram, were joint owners of certain land. For purposes of convenience each was in possession of a certain portion, but there was no formal partition. The particular land in question in this suit (Plot. Nos 1 and 2 of Survey No. 174) was a part of the land in possession of Balvant. In 1867, without the knowledge of his brothers, Balvant mortgaged these plots of land to the first defendant for Rs. 2,800. In 1886 Damodar sued for partition of the whole property, and in 1891 Lakshman brought a similar suit. By the decrees in these suits, Plot No. 1 was allotted to Damodar and Plot No. 2 was awarded to Lakshman. The mortgagee was not a party to either suit, the plaintiffs in these suits (as found by the High Court) having had no notice of the mortgage. Damodar and Lakshman, on attempting to get possession of the lands allotted to them respectively by the partition decrees, were obstructed by the mortgagee, and now brought these suits against him and the heirs of Balvant (defendants Nos. 2—9), claiming possession of the lands allotted to them free of the mortgage-debt, or that the partition should be re-opened, and that unencumbered land should be allotted to them and the mortgaged land given to Balvant's branch of the family (defendants Nos. 2—9).

Held, that the partition should be re-opened and the mortgaged land assigned to the (defendants Nos. 2—9).

Where a co-sharer of joint property has mortgaged his share without the knowledge of his co-sharers, and there has subsequently been a partition suit to which, through the fraud of the mortgagor and the mortgagee, the latter has not been made a party, he (the mortgagee) will only be allowed to proceed for the recovery of his mortgage-debt against that portion of the property which has been allotted to his mortgagor. LAKSHMAN v. GOPAL, 23 B. 385 ... 256

(3) *Decree for partition—Decree awarding plaintiff's share, but postponing possession thereof till plaintiff attained majority—Effect of such decree.*—On the 21st February, 1894, a decree in a partition suit provided as follows:—

"Plaintiff is a minor twelve years old; until he attains twenty-one years, Narayan (defendant) should, for the next nine years annually deliver to him twenty maunds of paddy, and for this year ten maunds; after that plaintiff should be given one-sixth of the family lands; until then defendant is not to alienate the lands."

The minor died and in 1897 his widow, Sundari, as his heir, applied for execution of the decree, claiming seventy maunds of paddy, being the amount due at the rate specified in the decree. It was objected that she was not entitled to execute, inasmuch as the decree

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had not effected a partition, and that the property at his death still remained joint family property, which passed to the male survivors of the family, and that she was only entitled to maintenance.

Held, that the effect of the decree was to make the applicant's husband a divided member of his family. It awarded him a one-sixth share of the family estate and assigned to him a separate allowance. The mere fact that it postponed the actual possession of the share until he had attained the age of twenty-one years made no difference. The share vested in him from the date of the decree and descended to his heirs.

Held, also, that in execution of the decree she was only entitled to recover the arrears of the allowance up to the date of her husband's death. When he died he was still a minor, and the allowance ceased, and the share went to his heirs by right of inheritance, and was recoverable only by a separate suit and not in execution. LAKSHMAN v. NARAYAN, 24 B. 182=1 Bom. L. R. 777 ... 658

(4) *Son born after partition—Right of such son to partition—Share of such son—Family arrangement—Limitation—Hindu law.*—In the year 1875, one Venkatrav having at that time three sons, *viz.*, defendants Nos. 1, 2 and 3, divided his property, allotting one-third to the first defendant and retaining the remaining two-thirds in his own possession in the interest of his other two sons (defendants Nos. 2 and 3) who were then minors. The latter continued to live with him, and he managed the property. The first defendant was the son of Venkatrav's elder wife and the second and third defendants were the sons of his younger wife. In 1880 the plaintiff was born and in 1894 he brought this suit by his mother (the younger wife) as next friend for a partition of the whole of Venkatrav's property, including that which in 1875 had been allotted to the first defendant. The plaintiff claimed a fourth share.

Held, that the plaintiff was not entitled to any part of the property which had been given to the first defendant in 1875. The family arrangement then made had been acquiesced in for more than twelve years and could not be disturbed. The plaintiff could only claim against defendants Nos. 2 and 3, who lived with their father in union and with whom the plaintiff himself had lived as member of a joint family. GANPAT v. GOPALRAO, 23 B. 636=1 Bom. L. R. 123 ... 425

(5) *Suit by a purchaser of a co-sharer's interest for partition of a specific part of joint property—Right of defendant co-sharers to require a general partition—Rules as to partition, general and partial.*—Where a co-parcener or a purchaser of the rights of a co-parcener sues for partition, the partition must be general; a suit for a partial partition of a single property will not lie. SHIVMURTEPPA v. VIRAPPA, 24 B. 128=1 Bom. L. R. 620 ... 623

(6) *Suit for partition by a purchaser from a co-sharer—Decree in such suit need not be for a general partition of the entire estate—Practice.*—When a purchaser from a co-sharer in a joint family estate sues to have his share severed and given to him, the Court is not bound to force the members of the family into a partition of the whole estate. It is, no doubt, open for each and every co-sharer to ask to have his share divided off and allotted to him (in which case he would have to pay Court-fees according to his share). But, in the absence of such a request, the Court is not bound to determine what is the share of each of the co-sharers, and to compel him to take that share by making a general partition.

In such a case the High Court refused in second appeal to accede to the prayer of some of the co-sharers, who had not appeared in the Court of first instance to have their shares divided off and allotted to them. MURARRAO v. SITARAM, 23 B. 184 ... 121

(7) *Two suits for partition—First suit for partition of family property—Second suit for partition of property held jointly by family and others—Vritti—Civ. Pro. Code (Act XIV of 1882), ss. 13 and 43—Practice.*—A suit brought by some members of a family against the other members of the same family for partition of the joint family

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property does not preclude a second suit by the same plaintiffs for partition of other property belonging jointly to their family and strangers. PURUSHOTTAM v. ATMARAM, 23 B. 597=1 Bom. L. R. 76 ... 399

(8) See ACT IV OF 1893 (PARTITION), 23 B. 73.

(9) See HINDU LAW (GIFT), 23 B. 131.

——14.—Reversioner.

(1) Bar of limitation to claim for declaration—Limitation Act (XV of 1877), sch. II, arts. 118, 119 and 141—Limitation Act (IX of 1877), sch. II, art. 129—Limitation Act (XIV of 1859), s. 1, cls. 6 and 12—Specific Relief Act (I of 1877), s. 42—Adoption by widow—Suit for a declaration that adoption was invalid and for recovery of property—See HINDU LAW (ADOPTION), 24 B. 260.

(2) Limitation—Limitation Act (XV of 1877), ss. 10 and 28, arts. 120, 141 and 144—Will—Hindu Law—Dharam—Bequest for Dharam—See HINDU LAW (WILL), 23 B. 725.

——15.—Self-acquisition.

(1) Maintenance of daughter-in-law—Claim of daughter-in-law against self-acquired property of her father-in-law in hands of his heirs—See HINDU LAW (MAINTENANCE), 23 B. 608.

(2) See HINDU LAW (INHERITANCE), 24 B. 563.

——16.—Succession.

(1) Inheritance—Daughters—Succession among daughters—The poorest daughter entitled to inherit the whole estate—Comparative poverty—See HINDU LAW (INHERITANCE), 23 B. 229.

(2) Inheritance—Deceased brother's son—Sister—Daughter of a predeceased son—Hindu Law—See HINDU LAW (INHERITANCE), 24 B. 563.

(3) *Jains—Gujarati Jains settled in Belgaum—Succession among Jains—Rights of illegitimate sons of a Jain—Division into four castes—Inheritance—Illegetimate sons—Ordinary Hindu law, that of Brahmins, Kshatriyas and Vaishyas—Jains mostly Vaishyas—Four divisions of Jains—Dassa Porwad caste of Jains.*—The Courts in India have always recognized the existence of four castes, *viz.*, Brahmins, Kshatriyas, Vaishyas and Shudras.

Jains are dissenters and are mostly of Vaishya origin. A Jain converted into orthodox Hindu faith returns to the caste from which he traces his first descent.

The four main divisions of Jains are: Pramar, Oswal, Agarwal and Khandewal.

Unless a special custom to the contrary be established, the ordinary Hindu law governs succession among the Jains. Ordinary Hindu law is that of the three superior castes.

Under the ordinary Hindu law, illegitimate sons do not inherit, but are only entitled to maintenance.

Held, that a Jain of the Dassa Porwad caste was governed by the general Hindu law applicable to the three regenerate castes, being, though not a Brahmin, certainly not a Shudra, but a Vaishya by origin, and having as such carried this law with him from Gujarat to the Belgaum District.

Held, therefore, that his widow was his sole heir, and that his illegitimate sons were only entitled to maintenance.

Quære—Whether even among Shudras the widow is altogether excluded from inheritance by illegitimate sons? AMBABHAI v. GOVIND, 23 B. 257 ... 171

(4) To a vatan—Bombay Act V of 1896, s. 2—Widow—Rights of succession of a widow other than the widow of the last holder—Adoption by such widow—Collateral male member—Vatan—See VATAN, 24 B. 484.

(5) See HINDU LAW (GIFT), 23 B. 131.

——17.—Widow.

(1) Adoption—Adoption by a daughter-in-law of A after the estate has vested in A's widow—Permission by A to adopt—Non-consent of

Hindu Law—17.—Widow—(*Concluded*). PAGE

widow—Divesting of estate once vested—Widow's authority to adopt in Bombay—Daughter-in-law must have permission—Co-widows—Adoption by one co-widow—Adoption of a son older than adoptive mother—See HINDU LAW (ADOPTION), 23 B. 250.

(2) Adoption by senior widow—Widow's capacity to adopt—Implied prohibition—See HINDU LAW (ADOPTION), 23 B. 789.

(3) Adoption by widow of a predeceased son—Consent of mother-in-law—Adoption must be by widow of the last full owner—Exceptions to this rule—Hindu law—See HINDU LAW (ADOPTION), 23 B. 327.

(4) Daughters—Maintenance—Widowed daughters—Their right of maintenance out of their father's estate—See HINDU LAW (MAINTENANCE), 23 B. 291.

(5) Gift—Gift conditional on adoption—Condition precedent—Direction to adopt given to the widow of the testator's deceased son not carried out—Bequest of residuary property—Condition precedent not fulfilled—Hindu Law—Will—Construction — See HINDU LAW (WILL), 23 B. 271.

(6) *Maintenance—Decree for maintenance—Suit for altering the rate of maintenance fixed by a decree—Practice—Procedure.*—A suit will lie to obtain a reduction in the amount of maintenance decreed to a Hindu widow on a change of circumstances, such as a permanent deterioration in the value of the family property.

But where such deterioration is due to the plaintiff's own default in not keeping the property in a proper state of repair, he has no right to ask for a reduction.

Per PARSONS, J —Courts should insert words which would enable them on application to set aside or modify their orders as circumstances might require, and in such cases the remedy would be the more appropriate one by application under the leave reserved. GOPIKABAI v. DATTATRAYA, 24 B. 386 = 2 Bom L.R. 191 ... 790

(7) *Maintenance—Right of maintenance charged on property left by testator—Sale of such property in fraud of widow's right of maintenance—Right of widow as against purchaser—Transfer of Property Act* (IV *of* 1882), *s.* 39—*Executor, power of sale of—Probate and Administration Act* (V *of* 1881), *s.* 90, *as amended by Act* VI *of* 1889, *s.* 14.—A testator, by his will, gave his widow's maintenance out of the income of his immoveable estate subject to a limited power of sale or mortgage conferred upon his executrix for a special purpose. It was found by the lower Courts that a large part of the property was sold by the executrix with the object of defeating the claim of the plaintiff, who was one of the testator's widows, and that the purchaser was aware of the fraud.

Held, that the plaintiff was entitled to recover her maintenance out of the property in the hands of the purchaser. The purchaser having been aware of the fraud, the plaintiff's right to maintenance against the property in his hands remained unaffected whether under s. 39 of the Transfer of Property Act (IV of 1882) or the law previously in force and irrespective of the possibility of her claim being satisfied from other property.

S. 90 of the Probate and Administration Act V of 1881 as amended by Act VI of 1889, s. 14, gives an executor merely the ordinary powers of sale that an owner would have in so far as they are not limited by the will, and as such, those powers are subject to the usual rules of equity. SHRI BEHARILALJI v. BAI RAJBAI, 23 B. 342 ... 227

(8) See DEFAMATION, 24 B. 13.
(9) See HINDU LAW (ADOPTION), 24 B. 89, 260.
(10) See HINDU LAW (SUCCESSION), 23 B. 257.
(11) See MINOR, 24 B. 547.
(12) See VATAN, 24 B. 484.

——18.—Will.

(1) *Dharam—Bequest for "dharam"—Reversioner—Limitation—Limitation Act* (XV *of* 1877), *ss.* 10, 28 ; *arts.* 120, 141, 144.—A bequest by a Hindu testator of moveable and immoveable property to trustees

Act (XV of 1877). Act (XV of 1877). Act (XV of 1877).

Hindu Law – 18.—Will—*(Concluded)*. PAGE

There is no real difference in the meaning of the words "*waras*" (heirs) and "*malak*" (owner). CHUNILAL v. BAI MULI, 24 B. 420.

(4) Inheritance—Paternal grandmother inheriting property from maiden granddaughter—Estate taken by grandmother—Power to dispose by will—See HINDU LAW (INHERITANCE), 24 B. 192.

(5) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 536.

(6) See EVIDENCE, 23 B. 296.

(7) See HINDU LAW (GIFT), 23 B. 131.

Holder.

See FORGERY, 24 B. 65.

Holding Over.

See LIMITATION ACT (XV OF 1877), 24 B. 504.

House-tax.

(1) House valuation—Valuation made by Municipality—Magistrate's power to revise the valuation—Bombay District Municipal Act (Bom. Act VI of 1873), s. 84, as amended by Bombay Act II of 1884—Municipality—See MUNICIPALITY, 23 B. 446.

(2) See MUNICIPALITY, 24 B. 607.

Hundi.

Inadmissible in evidence for want of stamp—Independent admission of loan—Suit on the original consideration—Admission by pleader erroneous in law—Binding effect—Dishonour—Notice.—Where there is an independent admission of a loan, the holder of a hundi, bill or note, which is defective and inadmissible in evidence for want of a stamp, may still sue on the consideration the person to whom he gave it, though he cannot use the bill in support of his suit.

An admission by a pleader, if it is erroneous in law, is not binding on his client.

In a suit based on the consideration independently of a hundi, it is not necessary to prove notice of dishonour. KRISHNAJI v. RAJMAL, 24 B. 360=2 Bom. L.R. 25 ... 773

Husband and Wife.

(1) Distributive share—Parsi Marriage and Divorce Act (XV of 1865)—Alimony—Charge on husband's immoveable property—See ACT XV OF 1865 (PARSI MARRIAGE AND DIVORCE), 24 B. 465.

(2) Indian Divorce Act (IV of 1869), ss. 17 and 20—Decree for nullity of marriage—Confirmation by the High Court—Time of confirmation—Practice—Procedure—Divorce—See DIVORCE, 23 B. 460.

(3) Maintenance order obtained by a wife against husband—Subsequent decree for restitution of conjugal rights obtained by husband—Effect of such decree on previous order of maintenance—Crim. Pro. Code (Act X of 1882), s. 488—Maintenance—See HINDU LAW (MAINTENANCE), 23 B. 484.

(4) Possession required for valid charge—Contract Act (IX of 1872), s. 178—Pledge—See PLEDGE, 24 B. 458.

(5) Suit by husband for restitution of conjugal rights—Defence to such suit—Agreement for separation a good defence—Parsi Marriage and Divorce Act (XV of 1865), s. 36—Parsis—Marriage—See PARSIS, 23 B. 279.

(6) *Suit for possession of wife—Wife herself defendant—Limitation—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 35—*Restitution of conjugal rights—Demand and refusal—Continuing cause of action—Limitation Act* (XV *of* 1877), *s.* 23.—Where a husband sued to recover possession of his wife, making the wife herself the defendant to the suit.

Held, it was in substance a suit for the restitution of conjugal rights, and art. 35 of the Limitation Act (XV of 1877) applied.

Husband and Wife—(*Concluded*). PAGE

The demand and refusal, which form the starting point for limitation under art. 35, are a demand by the husband and refusal by the wife (or *vice versa*) being of full age.

A positive refusal on the part of the wife to return to her husband is not essential to the husband's cause of action.

Quære—Whether in case of a refusal by a wife of full age to a demand made by her husband, that she should return to him, a suit by him for her recovery is barred under art. 35 of sch. II of the Limitation Act (XV of 1877), or falls within the purview of s. 23 as based on a continuing cause of action. FAKIRGAUDA v. GANDI, 23 B. 307 ... 204

(7) See LUNATIC, 23 B. 653.

Immoveable Property.

(1) Order to restore possession of—Crim. Pro. Code (Act X of 1882), ss. 522, 523, 524—See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 494.

(2) See JURISDICTION, 23 B. 22.

(3) See SPECIFIC RELIEF ACT (I OF 1877), 23 B. 673.

Inam Village.

See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 24 B. 539.

Income.

See JURISDICTION, 24 B. 407.

Infant.

See PRACTICE, 23 B. 100.

Inheritance.

See RELIGION, 23 B. 539.

Injunction.

(1) *Contract in Zanzibar—Contract for personal service—Contract not to practise as physician—Construction—Restraint of trade—Contract Act* (IX *of* 1872), *s.* 27.—A agreed on certain terms to become assistant for three years to B, who was a physician and surgeon practising at Zanzibar. The letter (Ex. B), which stated the terms which B offered and which (as the Court found) A accepted, contained the words "the ordinary clause against practising must be drawn up." At the end of a year a disagreement took place and A ceased to act as B's assistant and began to practise in Zanzibar on his own account. B sued for an injunction to restrain him.

Held, that B was entitled to an injunction restraining A from practising in Zanzibar on his own account during the period of three years. CHARLESWORTH v. MACDONALD, 23 B. 103 ... 68

(2) Joint family—Family property—Family firm—Partnership—Partnership suit between members of joint family—Suit by a co-parcener for an account of the profits of a joint family firm—Injunction—Exclusion of partner—Hindu Law—See HINDU LAW (JOINT FAMILY), 23 B. 144.

(3) *Light and air—Easement—Damages—Practice where amount of injury does not justify injunction.*—The plaintiff sued for an injunction restraining the defendant from erecting a building which interfered with the light and air coming to the plaintiff's house. The lower appeal Court found that, though the light and air of the plaintiff's house was sensibly diminished by the defendant's building, there was not such substantial damage done as would justify an injunction, and it dismissed the suit with costs, being of opinion that the plaintiff's remedy, if any, was a suit for damages.

Held, that the lower Court was right in not granting an injunction, but instead of dismissing the suit, and referring the plaintiff to another suit for damages, it ought itself to have directed an inquiry as to the damages sustained by the plaintiff by reason of the diminution of the supply of light and air to his house. KALLIANDAS v. TULSIDAS, 23 B. 786=1 Bom. L.R. 459 ... 526

Injunction—(*Concluded*). PAGE.

(4) See EASEMENT, 24 B. 188.
(5) See JURISDICTION, 23 B. 122.
(6) See MUNICIPALITY, 24 B. 600.

Insolvency.

Order of personal discharge—Finality of order—Indian Insolvent Act (*Stat.* 11 *and* 12 *Vict.*, *Cap.* 21), *ss.* 47, 56—*Practice—Procedure.*—An order under s. 47 of the Indian Insolvent Act (Stat. 11 and 12 Vict., Cap. 21) for the final discharge of an insolvent once granted cannot be set aside except upon the grounds specified in s. 56 of that Act. The only course open to an opposing creditor is to appeal against the order under s. 73. *In re* DAYABHAI SARUPCHAND, 23 B. 474... 315

Insurance.

(1) *Covering note—Slip—Policy—Concealment of material fact.*—On the 15th March 1897, the plaintiff, who was a shipper of salt, applied for and obtained from the defendants' company in Bombay a preliminary "covering note" for Rs. 51,000 for salt to be shipped by him from Bombay to Calcutta. The note stated that a stamped policy in completion thereof would be issued on receipt of particulars. The plaintiff's practice was to bring salt from his salt-works at Uran in native prows and to put it on board steamers in Bombay harbour. On the 14th April, 1897, the plaintiff put 594 bags of salt on board a prow for shipment in the British India steamer "Nairung." The transhipment commenced on the 27th April. Forty-nine bags had been transhipped when a storm arose and the prow shipped water and sank with the remaining 545 bags on board, which were thus wholly lost. Their value was Rs. 4,360. On the 29th April, 1897, the plaintiff applied to the defendants' company for a policy and paid the premium, and on the 30th April, a policy of insurance was issued to him. It was "an insurance (lost or not lost) at and from Bombay to Calcutta upon any kind of goods and merchandise and freight of or on the ship or vessel called the 'Nairung,' including all risk of craft and boat to or from the ship or vessel." Upon this policy the plaintiff sued to recover the value of the lost salt, *viz.*, Rs. 4,360. The defendants pleaded that the covering note of 15th March, 1897, did not constitute a completed agreement for the insurance of the salt; and as to the policy they pleaded that it was void, inasmuch as the loss had already occurred at the time of issue and that the plaintiff had concealed the fact from them. The plaintiff alleged that information of the loss was given on the 27th April when the policy was applied for, and he further contended that in any event, the defendants were liable, inasmuch as the covering note of 15th March, 1897, was a complete and final contract binding upon the defendants, whatever events might subsequently have happened.

Held, affirming Candy, J., that the plaintiff was not entitled to recover. KASAM HAJI MITHA v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY, 23 B. 737=1 Bom. L.R. 725 ... 493

(2) *Life insurance—Insurance effected by one person on the life of another in whose life he has no interest—Wager—Contract Act* (IX *of* 1872), *s.* 30—*Stat.* 14 *Geo.* III, *c.* 48—*Stat.* 8 *and* 9 *Vict.*, *c.* 106—*Assignment of life policy to a stranger without interest in the life insured.*—The defendant company issued a policy for a term of ten years for Rs. 25,000 on the 23rd August, 1894, on the life of Mehbub Bi, the wife of one Abdul Samad, who was a clerk in the employment of one Nasarwanji F. Bhandara, a barrister practising at Hyderabad. On the 1st September, 1894, Mehbub Bi assigned the policy to the plaintiff Alamai, who was the wife of Nasarwanji F. Bhandara. On the 2nd October, 1894, Mehbub Bi died. The plaintiff as assignee of the policy, brought this suit to recover Rs. 25,000 from the defendants. The defendants (*inter alia*) contended the policy had really been effected, not by Mehbub Bi or for use or benefit or even her account, but by the said Nasarwanji F. Bhandara for his own use and benefit, and that he had no interest in the life of Mehbub Bi, and that, therefore, the policy was void.

Insurance—(*Concluded*). PAGE

Held (1) on the evidence that the policy had not been effected by Mehbub Bi, or for her use and benefit, but had been effected by Nasarwanji F. Bhandara for his own use and benefit, and that he had no interest in the life of Mehbub Bi.

(2) That in India an insurance for a term of years on the life of a person in which the insurer has no interest, is void as a wagering contract under s. 30 of the Contract Act (IX of 1872), and that, therefore, the policy sued on was void.

Quœre—Whether an assignment of a life policy to a stranger having no interest in the life of the insured is void? ALAMAI v. POSITIVE GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LIMITED, 23 B. 191 ... 126

Interest.

(1) Damdupat—Bond purporting to be executed in adjustment of a past debt—Principal for the purpose of damdupat—The amount of the bond—Hindu law—See HINDU LAW (GENERAL), 24 B. 305.

(2) Hindu law—Mortgage—Redemption—Mortgage with possession—Mortgage to take rent in part payment of interest—Remaining interest to be paid by mortgagor every year—Damdupat—See DAMDUPAT, 24 B. 114.

(3) See CONTRACT, 24 B. 510.

(4) See LIMITATION ACT (XV OF 1887), 24 B. 493.

Intestacy.

See WILL, 23 B. 80.

Jains.

(1) Gujarati Jains settled in Belgaum—Succession among Jains—Rights of illegitimate sons of a Jain—Division into four castes—Inheritance—Illegitimate sons—Ordinary Hindu law, that of Brahmins, Kshatriyas and Vaishyas—Jains mostly Vaishyas—Four divisions of Jains—Dassa Porwad caste of Jains—Hindu law—See HINDU LAW (SUCCESSION), 23 B. 257.

(2) See JURISDICTION, 23 B. 122.

Joint Contract.

Liability of partners—Joint liability—Judgment of a foreign Court—Judgment recovered against one partner—*Res judicata*—Civ. Pro. Code (Act XIV of 1882), ss. 13 and 14—Consent decree—Partners—See PARTNERS, 24 B. 77.

Joint Liability.

See PARTNERS, 24 B. 77.

Judgment.

See EVIDENCE, 24 B. 591.

Jurisdiction.

(1) Civ. Pro. Code (Act XIV of 1882), s. 16, proviso, and s. 57—Relief to be obtained by personal obedience of defendants—Property situate outside the jurisdiction of the Court in which the suit is filed—Practice—Procedure—See CIV. PRO CODE (ACT XIV OF 1882), 23 B. 756.

(2) Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 3 (*z*), 53 and 73—Agriculturist—Plaintiff proved or admitted to be an agriculturist—Appeal—Special Judge—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B. 321.

(3) High Court—High Court's criminal revisional jurisdiction—Crim. Pro. Code (Act V of 1898), ss. 144, 145, 435 and 439—Dispute about right to perform service in a public temple—Notice—See CRIM. PRO. CODE (ACT V OF 1898), 24 B. 527.

(4) *Immoveable property—Civ. Pro. Code (Act XIV of 1882), s. 16—Varshasans charged on villages in Nizam's territory and paid in the*

Jurisdiction—(*Continued*). PAGE

same territory—Suit to establish title to a share in such Varshasans—Plea of jurisdiction.—An objection to jurisdiction may be raised at any stage of a suit, even after remand by the High Court in second appeal.

Plaintiffs filed a suit in the Court of the First Class Subordinate Judge at Nasik to establish their right to a certain share in two *Varshasans* (annual allowances). The allowances were charged on the revenues of two villages in the Nizam's territory, and paid to the defendants by the Treasury Office at Aurangabad in the same territory. The plaintiffs alleged that the *Varshasans* were granted to a common ancestor of the parties and enjoyed as joint ancestral property, while the defendants contended that the allowances were granted to their grandfather as his exclusive property to descend to his heirs, and that plaintiffs had no right to share in them.

Held, that the Nasik Court had no jurisdiction to try the suit. The *Varshásans* were immoveable property, and there being a *bona fide* claim of title to them, the claim should be determined according to the law in force in the Nizam's dominions. The suit should, therefore, be brought in the Courts of the Nizam, in whose territory the *Varshasans* were granted and paid.

Plaintiffs could not claim a declaration of title, or ask for a refund of the allowances in a British Court, merely because the defendants happended to be residents in British territory. KESHAV v. VINAYAK, 23 B. 22 ... 15

(5) *Jurisdiction of Civil Courts—Caste question—Excommunication—Court's power to inquire into the validity of the order of excommunication—Burden of proof.*—The plaintiff, who was *pujari* of a Jain temple, sued for an injunction to restrain the defendants from entering the temple and worshipping the idol, on the ground of their excommunication by the Swami for misconduct. Defendants pleaded that they had been guilty of no offence for which a sentence of excommunication could properly be passed, and that the inquiry into their conduct was held by the Swami *ex parte* and without any notice being given to them.

Held, that the Civil Court had jurisdiction to inquire into the validity of the sentence of excommunication, and that it lay on the plaintiff, who sought to enforce the sentence and by virtue of it to deprive the defendants of their civil rights, to prove that it was passed on justifiable grounds and after a fair and proper inquiry. APPAYA v. PADAPPA, 23 B. 122 ... 81

(6) Jurisdiction of Mamalatdar over officers of Government sued in their official capacity—Act XIV of 1869, s. 32—Act X of 1876, s. 15—Bombay Irrigation Act (Bom. Act VII of 1879), s. 48—Leakage water—Rights of riparian proprietors — Water course — See MAMLATDAR, 23 B. 761.

(7) *Mamlatdar—Mamlatdars' Act (Bom. Act III of 1876), s. 6—Disputes between riparian proprietors.*—A Mamlatdar's Court has no jurisdiction to determine questions arising between riparian proprietors as to the amount of water each can take from a stream.

A suit will lie in a Mamlatdar's Court where a person has been dispossessed or deprived of the use, or when he has been disturbed or obstructed, or when attempt has been made to disturb or obstruct him in the use of water of which he is in possession or was in possession within six months before suit. BABAJI RAMJI v. BABAJI DEVJI, 23 B. 47 ... 31

(8) Mamlatdars, Act (Bom. Act III of 1876), s. 4—Water—Water course—Riparian owners, rights of—Mamlatdar—See WATER, 23 B. 506.

(9) Mamlatdar's Court—Decree—Execution—Person ousted in execution no party to the decree—Suit for possession in Mamlatdar's Court by person ousted—See MAMLATDAR'S COURT, 24 B. 397.

(10) Muscat—Court of Her Majesty's Consul at Muscat—High Court's criminal revisional jurisdiction over the Consular Court—Order in Council, dated 4th November, 1867—Crim. Pro. Code (Act V of 1898), s. 435—See MUSCAT, 24 B. 471.

Jurisdiction—(*Concluded*). PAGE

(11) Offence committed out of British India—Offence not triable except with the certificate of Political Agent or sanction of Government—Crim. Pro. Code (Act V of 1898), s. 188—Penal Code (Act XLV of 1860), ss. 108-A, 372—Disposing of a minor for immoral purposes—Abetment—See PENAL CODE (ACT XLV OF 1860), 24 B. 287.

(12) Practice—Procedure when suit filed in wrong Court—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 11—Civ. Pro. Code (Act XIV of 1882), s. 57—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B. 679.

(13) Small Cause Court—Declaratory decree—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 266.

(14) *Suit to establish right to a share in certain income—Property having a foreign origin—Income received within the jurisdiction of the Court—Question of title not involved—Jurisdiction of the Court to entertain the suit—Civ. Pro. Code (Act XIV of 1882), ss. 16 and 17.*—All property having a foreign origin is not outside the jurisdiction of a British Court.

"The Courts of Equity in England are, and always have been, Courts of conscience, operating in *personam* and not in *rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *rations domicilii* within their jurisdiction." The jurisdiction of Courts in India is governed and must be ascertained by the same principles except so far as they may be at variance with legislative enactment.

The plaintiff sued in the Court at Nasik in British India to establish his right to a share in the income derived from certain grants of land situate outside of British India, but received by the defendant within the jurisdiction of the Nasik Court.

Held, that the suit was within the jurisdiction of the Court, there being no dispute as to title. KASHINATH v. ANANT, 24 B. 407 = 2 Bom. L. R. 47 ... 804

(15) See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 456.
(16) See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 32.
(17) See DEFAMATION, 24 B. 13.
(18) See LIMITATION, 23 B. 177.
(19) See MUNICIPALITY, 24 B. 600.
(20) See PRACTICE, 23 B. 329.
(21) See RECEIVER, 24 B. 38.
(22) See SMALL CAUSE COURT, 23 B. 334.

Jury.

(1) Trial by jury of an offence triable with the aid of assessors—Practice—Crim. Pro. Code (Act V of 1898), s. 269, cl. 3 and s. 307—See CRIM. PRO. CODE (ACT V OF 1898), 23 B. 696.

(2) See CRIMINAL PROCEDURE, 23 B. 316.

Khot.

(1) *Khoti khasgi lands—Khasgi lands allotted to a khoti sharer—Sale of khoti—Occupancy rights in khoti khasgi lands.*—One Naro was the owner of a 14 pies takshim (share) in a khoti village. To this takshim were allotted twenty khasgi thikans. In 1876 Naro mortgaged his khoti takshim to the plaintiff.

In 1880 the takshim was sold in execution of a decree against Naro and purchased by Ambardekar. Ambardekar sold the takshim to the plaintiff in 1881.

In 1893 plaintiff obtained a decree against Naro establishing his right to recover thal (or customary rent) in respect of the twenty khasgi thikans.

Naro having died, plaintiff brought this suit against Naro's sons in 1895 to eject them from the khasgi thikans.

Held, that the plaintiff was entitled to recover. The sale of the khoti takshim passed with it the khasgi lands allotted to the takshim. Both as mortgagee and purchaser of the takshim plaintiff acquired a title to the khasgi thikans in dispute.

Khot—(*Concluded*). PAGE

Held, also, that the effect of the decree which plaintiff had obtained against Naro in 1893 in the rent suit was that, in the absence of any agreement, Naro was a mere tenant-at-will of the khasgi thikans, liable to be evicted after due notice.

Held, also, that a khoti sharer has not, with reference to a khoti khasgi thikan allotted to his share, an "occupancy right" against the body of khoti sharers, so that when he parts with his share in the khoti his khoti khasgi lands are changed into khoti nisbat lands. RAGHUNATHRAO v. VASUDEV, 23 B. 769=1 Bom. L.R. 436 514

(2) *Mortgagee of a co-sharer in the khotki—Khoti Act (Bom. Act I of 1880), s. 16—Settlement register—Entry in the register—Survey officer's authority to determine the title of persons claiming as mortgagees only from a co-sharer—Declaratory suit—Limitation.*—The word "khot" as used in the Bombay Khoti Act (Bom. Act I of 1880) does not include a mortgagee of a co-sharer in the khotki.

The Act does not give the survey officer, when preparing the settlement register, any authority to investigate and determine the title of persons who claim as mortgagees only of a share in the khotki, still less to determine whether an alleged mortgage of a share has been redeemed or is still subsisting.

On 28th April 1888, the survey officer, after determining the co-sharers in a khoti village, prepared the settlement register under s. 16 of Bombay Act I of 1880, in which he entered the names of defendants as mortgagees of a certain share in the khotki. In 1891 plaintiffs, who claimed to be entitled to the said share, on becoming aware of the entry, petitioned the Collector for a removal of the names of the defendants from the register on the ground that their mortgage had been redeemed. This petition was opposed on 15th October 1892, by defendants, who denied plaintiff's title, and was finally rejected by the Collector on 25th November 1892.

In 1896 plaintiffs filed the present suit to cancel the entry and the register and for a declaration of their own title.

Held, that the suit was not time-barred. The cause of action accrued on 15th October 1892, when defendants denied plaintiffs' title, and not on 29th April 1888, when defendants' names were entered in the register as mortgagees. DATTATRAYA v. RAMCHANDRA, 24 B. 533=2 Bom. L.R. 354. ... 886

(3) See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 24 B. 489.

(4) See TREES, 23 B. 518.

Khoti.

(1) Trees—Right to cut trees—Khoti khasgi land in the Ratnagiri District—Dunlop's Proclamation — Construction—Crown grant—Right to rescind—See TREES, 23 B. 518.

(2) See LIMITATION, 24 B. 104.

Khoti Estate.

See HINDU LAW (PARTITION), 23 B. 137.

Khoti Khasgi Lands.

(1) See KHOT, 23 B. 769.
(2) See LANDLORD AND TENANT, 24 B. 426.
(3) See TREES, 23 B. 518.

Khoti Sharer.

See KHOT, 23 B. 769.

Khoti Village.

See LIMITATION ACT (XV OF 1877), 24 B. 23.

Kulkarni Vatan.

See VATAN, 24 B. 484.

Land Acquisition Act (X of 1870).

See MUNICIPALITY, 24 B. 600.

Land Acquisition Act (I of 1894). PAGE

S. 4—See MUNICIPALITY, 24 B. 600.

Landlord and Tenant.

(1) *Ejectment—Disclaimer of title—Notice to quit—Limitation—Khoti Act (Bom. Act I of 1880, ss. 20, 21, 22—Decision of survey officer as to nature of tenure—Botkhat—Date of framing botkhat.*—Where a tenant under a plea of ownership has succeeded in obtaining a possessory order in a suit before a Mamlatdar, it is not necessary for the evicted landlord to give notice to quit before suing in ejectment on his title.

It would be otherwise where the possessory order was sought on the ground of a disturbance of an existing tenancy.

The plaintiffs were khots, and defendants were their yearly tenants in occupation of their *khoti khasgi* lands. In 1890 the survey officer purporting to act under s. 20 of the Bombay Khoti Act (Bombay Act I of 1880) decided that defendants were occupancy tenants, but the plaintiffs did not come to know of this decision till 1893, when the *botkhot* was prepared and signed. Shortly afterwards the plaintiffs took forcible possession of the lands. Thereupon the defendants filed a suit in the Mamlatdar's Court to recover possession, alleging that they were owners of the land, and that they had been illegally dispossessed. The Mamlatdar restored them to possession.

In 1896 plaintiffs filed the present suit to eject defendants. Defendants pleaded (*inter alia*) that the suit was bad for want of notice to quit and that the claim was time-barred

Held, that defendants having distinctly repudiated the landlord's title in the possessory suit were not entitled to a notice to quit.

Held, also, that the suit was within time, the cause of action having accrued in 1893, when the *botkhat* was prepared, and not in 1890, when the survey officer passed his decision. MAHIPAT v. LAKSHMAN, 24 B. 426=2 Bom. L.R. 228 ... 817

(2) *Land Revenue Code (Bombay Act V of 1879), ss. 56, 57, 81, 214 (e) and (i)—Lease—Failure to pay Government assessment—Forfeiture—Payment of the arrears by tenant actually in possession—Forfeiture not followed by sale of occupancy—Lease not destroyed by the forfeiture—Tenant's liability for rent subsequent to the forfeiture.*—A registered occupant of land having failed to pay the arrears of Government revenue, his occupancy was forfeited under s. 56 of the Land Revenue Code (Bombay Act V of 1879), but the forfeiture was not followed by sale of the occupancy, the Collector having allowed the registered occupant's tenant under a lease to be registered as occupant on his paying up all arrears of Government revenue due on the land. Afterwards a question having arisen as to the tenant's liability for rent under the lease subsequent to the forfeiture.

Held, that the tenant was liable. When a registered occupant's tenancy is forfeited under s. 56 of the Land Revenue Code, and that forfeiture is not followed by sale of the occupancy (the Collector allowing the person actually in possession to be registered as occupant on his paying up all arrears of Government revenue due on the land), the lease by which the person actually in possession was holding from the former registered occupant is not destroyed by the forfeiture, and the lessee is still under liability to his landlord. GANPARSHIBAI v. TIMMAYA, 24 B. 34=1 Bom. L.R. 505 559

(3) *Lease—Covenant for quiet enjoyment—Covenant implied—Interruption of tenant's enjoyment by order of plague officials—Suit for rent.*—A lessor sued to recover from his lessee rent for fifteen months from 1st August, 1897, to 31st October, 1898; under an agreement for lease for ten years dated 1st September, 1890, *i.e.*, prior to the application of the Transfer of Property Act (IV of 1882), to Bombay. The defendant contended that in the agreement there was an implied covenant for quiet enjoyment, and that as he had been compelled by the plague authorities to vacate the premises from 5th February, 1898, to 1st April, 1898, there had been a

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breach of the covenant. He claimed, therefore, to deduct the rent for that period or to be allowed it as a counter claim as damages for disturbance.

Held (giving judgment for plaintiff), that even assuming that, in the agreement for the lease, a covenant for quiet enjoyment was to be implied, such a covenant could only be one for quiet enjoyment by the defendant so long as it was lawful for him to enjoy the property. No guarantee against the acts of Legislature could be read into the implied covenant for quiet enjoyment. MERWANJI MANCHERJI CAMA v. SYED SIRDAR ALI KHAN, 23 B. 510=1 Bom. L.R. 267 ... 339

(4) *Lease for a year—Whole rent paid in advance—Destruction of premises before expiration of lease—Right of tenant to a refund of rent paid in advance—Apportionment—Transfer of Property Act* (IV *of* 1882), *s.* 108, *cl.* (*e*)—*Contract Act* (IX *of* 1872), *s.* 65.—In April, 1896, the defendant let to the plaintiffs one compartment in a certain godown for storing goods for twelve months for a sum of Rs. 1,459 and a second compartment in the same godown for twelve months for Rs. 1,368. The plaintiffs entered into possession. In August, 1896, in accordance with the practice, the plaintiffs paid the said two sums in advance to the defendant and got a receipt. On the 30th October, 1896, without any default of the plaintiffs, the whole godown including the said two compartments was destroyed by fire and rendered wholly unfit for the purpose of storing goods. The plaintiffs thereupon sued for a refund of a proportionate part of the money paid to the defendant, relying upon s. 108, cl. (*e*), of the Transfer of Property Act (IV of 1882) and s. 65 of the Contract Act (IX of 1872).

Held, that they were entitled to recover. The consideration was for the whole year. The lease, *i.e.*, the whole contract, had become void and, therefore, under s. 65 of the Contract Act (IX of 1872) the defendant, who had received the whole consideration, was bound to make compensation for that portion which had failed. DHURAMSEY v. AHMEDBHAI, 23 B. 15 ... 10

(5) *Limitation—Agreement to occupy for a term—Permissive occupation—Expiration of term—Suit for possession—Limitation Act* (XV *of* 1877), *arts.* 113, 139 *and* 144.—Plaintiffs sued to recover possession of a certain house from the defendants, resting their claim on a certain document, dated the 3rd May, 1880, executed by the defendants' father Mallappa to the plaintiffs' father Krishnappa. In this document Mallappa admitted that the house belonged to Krishnappa and promised to vacate it at the end of two years from the date of execution. The document being presented for registration on the 18th May, 1880, Mallapa denied its execution, but after inquiry the District Registrar ordered it to be registered. The lower Court dismissed the suit as barred by limitation (either by art. 113 or art. 144 of the Limitation Act, XV of 1877).

Held, reversing the decree and remanding the case, that the suit was not barred. By the agreement the tenancy or permissive occupation was to end on 3rd May, 1882. Either under art. 139 or 144 the plaintiff had twelve years from that date within which to sue. SHIVRUDRAPPA v. BALAPPA, 23 B. 283 ... 188

(6) Rent-note—Expiration of the term—Tenant holding over—Tenancy at sufferance—Want of privity between landlord and tenant—Suit to recover possession—Limitation—Limitation Act (XV of 1877), sch. II, arts. 139 and 144—See LIMITATION ACT (XV OF 1877), 24 B. 504.

Land Tenure.

See SERVICE TENURE, 24 B. 482.

Lease.

(1) *Condition—Breach of condition—Illegal contract—Contract Act* (IX *of* 1872), *s.* 23—*Tolls Act* (*Bombay Act* III *of* 1875), *s.* 10—*Amending Act* (*Bombay Act* V *of* 1891), *s.* 2.—Under s. 10 of the Tolls Act (Bombay Act III of 1875) Government leased to plaintiff the levy of tolls on certain conditions. One of the conditions was that

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plaintiff should not sublet the tolls without the permission of the Collector previously obtained. One of the clauses of the lease provided that for a breach of any of the conditions of the lease, the Collector might impose a fine of rupees two hundred. The plaintiff sublet the toll to the defendants without the permission of the Collector and sued to recover a certain amount which the defendants promised to pay for the sub-lease. The defendants contended that the contravention of the condition of the lease was illegal and opposed to public policy; that, therefore, the contract was void under s. 23 of the Contract Act (IX of 1872), and that the plaintiff was not entitled to recover the amount.

Held, that the plaintiff was entitled to succeed. The agreement to sublet was not illegal or opposed to public policy merely because it was forbidden under a pecuniary penalty by conditions in the lease to the paintiff. The penal consequences of the breach were limited to the specific penalty and did not make the contract void. BHIKANBHAI v. HIRALAL, 24 B. 622. ...

(2) Covenant for quiet enjoyment—Covenant implied—Interruption of tenant's enjoyment by order of plague officials—Suit for rent—Landlord and tenant—See LANDLORD AND TENANT, 23 B. 510.

(3) Failure to pay Government assessment—Forfeiture—Payment of the arrears by tenant actually in possession—Forfeiture not followed by sale of occupancy—Lease not destroyed by the forfeiture—Tenant's liability for rent subsequent to the forfeiture—Landlord and tenant—See LANDLORD AND TENANT, 24 B. 34.

(4) Lease for a year—Whole rent paid in advance—Destruction of premises before expiration of lease—Right of tenant to a refund of rent paid in advance—Apportionment—Transfer of Property Act (IV of 1882), s. 108, cl. (*e*)—Contract Act (IX of 1872), s. 65—Landlord and tenant. See LANDLORD AND TENANT, 23 B. 15.

Leave to Appeal.

See PRACTICE, 23 B. 692.

Letters of Administration.

See BANK OF BOMBAY, 24 B. 350.

Letters Patent, 1865.

S. 15—Civ. Pro. Code (Act XIV of 1882), s. 591—Appeal—Decree for account—Time for appeal—Further directions—See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 302.

License.

Easement—Indian Easement Act (V of 1882), ss. 4 and 52—Right of growing rice plants in another's land to be afterwards transplanted to his own.—A 'license' as defined by s. 52 of the Indian Easement Act (V of 1882) is not, as in the case of an 'easement,' connected with the ownership of any land, but creates only a personal right or obligation. License rights are not generally transferable, and the transferee is not bound to continue the license granted by the former owner, while easements once established follow the property.

The plaintiff claimed and proved a prescriptive right of using a certain land belonging to the defendant's mortgagor for a certain part of the year for raising rice plants to be afterwards transplanted to his own land.

Held, that the right was clearly enjoyed by the plaintiff as owner of some land to which the young rice plants were transplanted, and that such a right, so attached to plaintiff's land, was not a license but an easement of the nature of *profits a prendre*. SUNDRABAI v. JAYAWANT, 23 B. 397 ... 264

Lien.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 181.

(2) See VENDOR AND PURCHASER, 23 B. 56.

Life Estate.

See WILL, 23 B. 80.

Life Insurance.

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See INSURANCE, 23 B. 191.

Life Policy.

See INSURANCE, 23 B. 191.

Light and Air.

(1) Access of light and air to windows—Agreement preventing the acquirement of an easement—Indian Easements Act (V of 1882), s. 15, Expl. 1—See EASEMENT, 24 B. 156.

(2) Easement—Damages — Practice where amount of injury does not justify injunction—Injunction—See INJUNCTION, 23 B. 786.

Limitation.

(1) *Acknowledgment—Limitation Act* (XV *of* 1877), *s.* 19—*Extraordinary jurisdiction of High Court—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 622—*Evidence—Question of admissitility of document — Document "without prejudice"—Evidence Act* (I *of* 1872), *s.* 23.—In a suit for Rs. 465 the defendant pleaded limitation. In reply the plaintiff relied on an acknowledgment of the debt given by the defendant. The alleged acknowledgment was written on a post card sent by the defendant to the plaintiff. It was in Gujarati and was as follows :—"I was bound to send Rs. 30 according to my *vaida* (fixed time), but on account of the receipt of the intelligence of the death of my father I have not been able to fulfil my promise. But now, on his obsequies being over, I will positively pay Rs. 30 at Shet Merwanji's. You, Sir, should not entertain any anxiety whatever in respect thereof. As to whatever debts may be due by my old man, I am bound to pay the same so long as there is life in me. This is, indeed, my earnest wish. After this, God's will be done. Therefore I will positively pay Rs. 30." The post card bore on it also the words "without prejudice" in English. The lower Courts held that it was, therefore, inadmissible in evidence and, consequently, that the plaintiff's claim was barred, and they dismissed the suit. The plaintiff thereupon applied to the High Court in its extraordinary jurisdiction (s. 622 of the Civ. Pro. Code, Act XIV of 1882) and obtained a rule *nisi* to set aside the decree of the lower Courts on the ground that the post card had been improperly excluded from evidence.

Held, discharging the rule, that even if the post card were admissible in evidence, it did not amount to an acknowledgment of the debt claimed by the plaintiff, which was, therefore, barred by limitation.

Per Farran, C.J.—I am myself strongly inclined to the view that when Courts in the exercise of their judicial functions decide that a document is inadmissible in evidence, having exercised their judgment upon the question of its admissibility or inadmissibility, we have no jurisdiction to interfere in the matter under s. 622. What the Courts do in such a case, assuming the document tendered to be erroneously rejected, is to make a mistake upon a question of law, and it does not appear to me to be material whether the mistake in law is made during the hearing of the case or in the final decision. A mere error in law, is not, I think, an illegality or a material irregularity within the meaning of s. 622 of the Code.

Per Candy, J.—I doubt whether the post card was inadmissible in evidence. To exclude it from evidence, it would be necessary to hold that the words "without prejudice" amounted to an express condition that the card should not be used in evidence against the writer. In England apparently the card would have been admissible. MADHAVRAV v. GULABBHAI, 23 B. 177 ... 116

(2) *Appeal—Limitation Act* (XIV *of* 1877), *s.* 12, *sch.* II, *art.* 152—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 205—*Date of judgment—Date of decree—Bill of costs signed subsequently—Time requisite for obtaining copy of the decree—Time between pronouncement of judgment and signing of the decree—Practice.* The time for presenting an appeal against a decree or order is thirty days from the date of such decree or order (art. 152 of the Limitation Act, XV of 1877). The date of the decree or order is the date on which judgment is pronounced.

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The time excluded from the period of limitation by s. 12 of the Limitation Act must be taken to commence only when the party appealing does something in order to obtain the copy of the judgment or decree, and to end when he obtains the copy. A party who delays to apply for such copy is not entitled to exclude the period of such delay.

A party is at liberty to apply for a copy of the decree, whether the decree has been signed or not. If he has applied, but the copy cannot be prepared because the decree has not been signed, then this time and the time taken up in preparing the copy will be excluded, but so long as he has made no application, the nonsignature of the decree can have no effect at all upon him.

Judgment was pronounced on the 18th December 1897, rejecting an application made by a plaintiff in execution of a decree but the bill of costs (the order as to costs being a part of the order or decree) was not signed until 18th January, 1898. The plaintiff proposing to appeal against the above order applied for copies of the judgment and order on the 14th January. The copies were furnished to him on the 24th January, 1898. The appeal was presented on the 24th February. The lower Court held the appeal barred by limitation under art. 152 of the Limitation Act, not having been presented within thirty days from the date of judgment. On appeal to the High Court :

Held, that the appeal was barred. The only time allowed by law to be excluded was from the 14th January, 1898, on which date copies of the judgment and order were applied for, to the 24th January, 1898, on which date they were furnished. The judgment was pronounced on the 18th December, 1897. The non-signing of the decree was no cause for or explanation of the delay between that date and the 14th January, 1898, or for the delay between the 24th January, 1898, and the 24th February, 1898. YAMAJI v. ANTAJI, 23 B. 442 ... 293

(3) Declaratory suit—Khoti Act (Bom. Act I of 1880), s. 16—Settlement register—Entry in the register—Survey officers' authority to determine the title of persons claiming as mortgagees only of a co-sharer —See KHOT, 24 B. 533.

(4) Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 72, cl. (*a*)—"Written instrument"—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 24 B. 394.

(5) Khoti Act (Bom. Act I of 1880), ss. 20, 21, 22—Decision of survey officer as to nature of tenure—Date of framing botkhat—See LANDLORD AND TENANT, 24 B. 426.

(6) *Khoti—Adverse possession—Limitation Act* (XV *of* 1877), *s.* 18, *and art.* 144, *sch.* II—*Survey Settlement Act* (*Bom. Act* I *of* 1865).—A mixed khoti village, consisting of khoti and dhara lands, belonged to two co-sharers, Parashram and Dhondo. Each of them passed kabulayats to Government in alternate years till 1862-63, when Parashram on account of his advanced age allowed Dhondo to pass the kabulayat every year. In the year 1867 the survey settlement having been introduced under Bombay Act I of 1865, Dhondo refused to pass the annual kabulayat. Government thereupon put the village under attachment, which was, however, removed in the year 1878 on his passing the required kabulayat. The management of the village was restored to him and certain surplus profits were handed over to him by Government. In the year 1881 Parashram sold his share in the khoti to Sakharam, who brought a suit against Dhondo and his brother to recover a half share of the above-mentioned profits. Dhondo resisted the claim, denying that either Parashram or his assignee had any right to the khoti or to share in the khoti profits. The suit was dismissed on a technical ground. Subsequently in the years 1881 and 1884, Dhondo got decrees against the actual tenants declaring that the lands, the subject-matter of the present suit, were his dhara lands, and in accordance with those decrees the revenue authorities made corresponding entries in the revenue records. In the year 1888-89

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Sakharam passed a kabulayat as a half sharer in the khoti and enjoyed the khoti profits for one year. Afterwards plaintiff No. 1, one of Sakharam's sons who died in the meanwhile, having passed the annual kabulayat in 1892-93 and again in 1894-95 and having failed during both the years to recover khoti profits from the lands in dispute, he filed the present suit in August, 1895, for a declaration that the lands were khoti and that the defendants had fraudulently got them entered in the revenue records as dhara. The plaintiff stated that they learnt of the defendant's fraud in the year 1895, and sought to recover a share of the khoti profits for 1892-93 and 1894-95. The defendants contended (*inter alia*) that the claim was time-barred.

Both the lower Courts allowed the claim for a declaration, holding that it was not time-barred, the first Court holding that the cause of action accrued to the plaintiffs in 1888-89, when Sakharam first entered on the management, and the appeal Court holding that the cause of action accrued in 1881 and 1884, when the dhara entries were made in the revenue records, and that but for s. 18 of the Limitation Act (XV of 1877) the plaintiff's suit would have been time-barred even under art. 144, sch. II of the Act. On appeal to the High Court.

Held, (reversing the decree), that the claim was barred by limitation. The plaintiff's cause of action arose in the year 1881 at the date of Sakharam's purchase. Neither Sakharam nor his sons (the present plaintiffs) having ever been in possession of any share of the profits of the lands in dispute, not even in the year when Sakharam passed the kabulayat and managed the village and their right to such possession being throughout denied by Dhondo, the claim was beyond time.

Held, further, that the provisions of s. 18 of the Limitation Act (XV of 1877) did not apply. DHONDO v. VASUDEO, 24 B. 104 = 1 Bom. L.R. 466 ... 607

(7) Limitation Act (XV of 1877), ss. 10 and 28, arts. 120, 141 and 144—Will—Hindu law—Dharam—Bequest for dharam—See HINDU LAW (WILL), 23 B. 725.

(8) Limitation Act (XV of 1877), s. 14—Decree--Execution by Collector—Application to Collector to set aside sale—Civ. Pro. Code (Act XIV of 1882), ss. 244, 310-A, 311 and 320—See CIV. PRO. CODE ACT (XIV OF 1882), 24 B. 531.

(9) Limitation Act (XV of 1877), sch. II, art. 35—Restitution of conjugal rights—Demand and refusal—Continuing cause of action—Limitation Act (XV of 1877), s. 23—Husband and wife—Suit for possession of wife—Wife herself defendant—See HUSBAND AND WIFE, 23 B. 307.

(10) Limitation Act (XV of 1877), sch. II, art. 47—Vendor and purchaser—Contract of sale—Non-payment of purchase money—Suit for possession by vendee who has not paid the purchase money—Remedy of vendor—See VENDOR AND PURCHASER, 23 B. 525.

(11) Limitation Act (XV of 1877), sch. II, arts. 113, 139 and 144—Landlord and tenant—Agreement to occupy for a term—Permissive occupation—Expiration of term—Suit for possession—See LANDLORD AND TENANT, 23 B. 283.

(12) Limitation Act (XV of 1877), sch, II, arts. 118, 119 and 141—Limitation Act (IX of 1871), sch. II, art. 129—Limitation Act (XIV of of 1859), s. 1, cls. 6 and 12—Specific Relief Act (I of 1877), s. 42—Adoption by widow—Suit for a declaration that adoption was invalid and for recovery of possession—Reversioner—Bar of limitation to claim for declaration—See HINDU LAW (ADOPTION), 24 B. 260.

(13) Limitation Act (XV of 1877), sch. II, art. 134—Mortgage—Purchaser from mortgagee—Necessity of possession in order to validate transaction as against original mortgagor—See MORTGAGE (GENERAL), 23 B. 614.

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(14) Limitation Act (XV of 1877), sch. II, art. 178—Decree for possession with mesne profits till delivery of possession—Darkhast for execution—Obstruction—Application for removal of obstruction—Application registered as a suit—Disposal of the darkhast—Decree in the suit—Execution—Mesne profits for three years subsequent to suit—Civ. Pro. Code (Act XIV of 1882), ss. 211 and 331—See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 345.

(15) Limitation Act (XV of 1877), arts. 178, 179—Decree—Construction—Suit for land—Mesne profits—Decree for mesne profits—Decree silent as to the time down to which mesne profits were given—Construction of such decree—Civ. Pro. Code (Act X of 1877), s. 211.—See MESNE PROFITS, 24 B. 149.

(16) Limitation Act (XV of 1877), sch. II, art. 179—Mortgage—Redemption—Decree for redemption—No time fixed in the decree for payment—Execution—Limitation—See MORTGAGE (REDEMPTION), 23 B. 592.

(17) Mortgage—Suit for sale of mortgaged property—Reg. V of 1827, s. 15 cl. 3—Special agreement—See MORTGAGE (SALE), 23 B. 781.

(18) See BHAGDAR, 23 B. 710.

(19) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 659.

(20) See HINDU LAW (PARTITION), 23 B. 137, 636.

(21) See LIMITATION ACT (XV OF 1877), 23 B. 246; 24 B. 435, 504.

(22) See SERVICE LANDS, 23 B. 602.

(23) See SPECIFIC RELIEF ACT (I OF 1877), 23 B. 375.

(24) See WILL, 23 B. 80.

Limitation Act (XIV of 1859).

(1) S. 1 (Cls. 6 and 12)—See HINDU LAW (ADOPTION), 24 B. 260.

(2) S. 15—See SPECIFIC RELIEF ACT (I OF 1877), 23 B. 673.

Limitation (Act IX of 1871).

(1) Sch. II, art. 16—See LIMITATION ACT (XV OF 1877), 24 B. 435.

(2) Art. 129—See HINDU LAW (ADOPTION), 24 B. 260.

Limitation Act (XV of 1877).

(1) *S.* 5—*Appeal not presented in time — Sufficient cause for delay — Discretion of Judge — Second appeal—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 584—*Exercise of discretion not to be interfered with.*—Where an appeal has been dismissed as barred by limitation, the lower Court holding that there was no sufficient cause for not presenting it within the prescribed time, the High Court can only interfere in second appeal if that decision is contrary to law, that is, if the lower Court has exercised its discretion capriciously or arbitrarily or without proper legal material to support its decision. PARVŒTI v. GANPATI, 23 B. 513 ... 342

(2) S. 5—Civ. Pro. Code (Act XIV of 1882.) s. 561—Practice—Appeal by defendants—Objections to decree filed by plaintiff—Subsequent withdrawal of appeal—Application by plaintiff for leave to appeal—Sufficient cause—See PRACTICE, 23 B. 692.

(3) S. 7 and 17—Partnership—Death of partner—Subsequent recovery of assets by surviving partner—Suit by administrator of deceased partner against surviving partner for recovered assets—Suit for partnership account—See PARTNERSHIP, 23 B. 544.

(4) S. 10 — *Suit against Secretary of State to recover possession of a khoti village and mesne profits.*—In the year 1892 plaintiffs brought this suit against the Secretary of State to recover possession of khoti village with mesne profits. It was found as a fact that Government had been in possession of the rights to which the suit related for upwards of fifty years, and during that time no acknowledgment of their title to khotship had been made either to plaintiffs or their predecessors.

Held, that the claim was time-barred; Government not being in possession or control of the village as stake-holder, s. 10 of the

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Limitation Act (XV of 1877) was not applicable. SECRETARY OF STATE FOR INDIA v. SAKHARAM, 24 B. 23=1 Bom.L.R. 472 ... 552

(5) S. 10, 28, arts. 120, 141, and 144—See HINDU LAW (WILL), 23 B. 725.

(6) S. 12, sch. II, art. 152—See LIMITATION, 23 B. 442.

(7) S. 14—See CIV. PRO CODE (ACT XIV OF 1882), 23 B. 531.

(8) S. 18, Sch. II, art. 144—See LIMITATION, 24 B. 104.

(9) S. 19—See LIMITATION, 23 B. 177.

(10) *S.* 20—*Part-payment of principal—Payment in kind.*—A payment may be made not only in the current coin of the realm, but in any other medium that the creditor may choose to accept.

Where goods are delivered by the debtor and taken by the creditor in payment either of principal or interest as such, such delivery would be a good payment of principal or interest, as the case may be, so as to extend the period of limitation under s. 20 of the Limitation Act (XV of 1877). RAGHO v. HARI, 24 B. 619 2 Bom. L.R. 452 ... 942

(11) *S.* 20—*Payment of interest as such—Interest—Settlement of Accounts.*—To satisfy the requirements of s. 20 of the Limitation Act (XV of 1877) the payment of principal or interest, as such, need not be in money. It may be in goods or by a settlement of accounts between the parties; but the payment must be of such a nature that it would be a complete answer to a suit brought by the creditor to recover the amount.

Where a debtor consents that money due by him for interest should be credited to the account of the principal, and the interest balance reduced by that amount, such a consent is really tantamount to a payment of interest; it is as if the debtor makes the payment and the creditor advances it again. When both parties agree to such a settlement, and the accounts are so adjusted, the adjustment operates as a payment of interest under s. 20 of the Limitation Act (XV of 1877).

Plaintiffs used to lend moneys to the defendants' firm. The accounts of the dealings between the parties were settled from time to time. On the occasion of each settlement, the interest was calculated up to the date of the settlement, and the amount found due was credited to the interest account, and debited to the account of the principal in the creditor's books, and the amount so debited was thenceforward treated as principal for calculation of future interest. Corresponding entries were made in the debtors' books.

Held, that such a settlement of accounts constituted a payment of interest, as such, within the meaning of s. 20 of the Limitation Act (XV of 1877). KARIYAPPA v. RACHAPA, 24 B. 493=2 Bom. L.R. 378 ... 860

(12) S. 23.—Sch. II, art. 35—See HUSBAND AND WIFE, 23 B. 367.

(13) S. 28 and art. 123—See WILL, 23 B. 80.

(14) *Sch.* II, *art.* 14—*Land Revenue Code* (*Bom. Act* V of 1879), *ss.* 37, 39, 135—*Land presumably the property of the plaintiff—Plaintiff in uninterrupted possession—Revenue survey—Entry of the land in the register as Government waste land—Order of the Revenue Commissioner directing land to be given to defendant No.* 2—*Plaintiff's dispossession—Suit against Secretary of State and defendant No.*2—*Nature of the Revenue Commissioner's order—Setting aside of the order—Limitation—Title—Cause of action.*—A certain land which the plaintiff alleged was his property and was uninterruptedly in his possession till the 16th November, 1895, was at the introduction of the Revenue Survey in 1882 entered in the register as Government waste land. On the 12th November, 1895, the Revenue Commissioner, on appeal against the order of the Collector, ordered it to be given to defendant No. 2 on his paying the assessment due since the survey settlement. This order was communicated to the plaintiff on the 20th November, 1895. On the 16th November, 1895, the plaintiff was ousted by the order of the Collector, and defendant No. 2 was placed in possession. The plaintiff thereupon on the 15th November, 1896, filed the present suit in the District Court against the Secretary of State for India as defendant No. 1 and defendant No. 2 praying (1) to have set aside the order passed by the Revenue Commissioner, (2) to have his right to the land

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established, and (3) to obtain possession with mesne profits. Defendants contended that the suit was time-barred under art. 14, sch. II, of the Limitation Act (XV of 1877), not having been brought within one year from the 12th November, 1895, the date of the Revenue Commissioner's order.

Held, that the plaintiff could maintain a suit for the recovery of his land without having the order of the 12th November, 1895, passed by the Revenue Commissioner set aside.

Held, further, that the order of the Revenue Commissioner was not such an order as is contemplated by art. 14, sch. II, of the Limitation Act (XV of 1877), and that in itself it gave no cause of action, and needed no setting aside. The cause of action was given by the act of the Collector dispossessing the plaintiff on the 16th November, 1895, and as the suit was brought within one year of that date, it was in time. SURANNANNA v. SECRETARY OF STATE FOR INDIA, 24 B. 435 = 2 Bom. L.R. 261 ... 822

(15) Art. 47—See VENDOR AND PURCHASER, 23 B. 525.

(16) Art. 91—See SPECIFIC RELIEF ACT (I OF 1877), 23 B. 375.

(17) Arts. 113, 139 and 144—See LANDLORD AND TENANT, 23 B. 283.

(18) Arts. 118, 119 and 141—See HINDU LAW (ADOPTION), 24 B. 260.

(19) Art. 120—See KHOT, 24 B. 533.

(20) Arts. 127 and 144—See HINDU LAW (PARTITION), 23 B. 137.

(21) Art. 134—See MORTGAGE (GENERAL), 23 B. 614.

(22) *Art.* 138—*Article applicable to suits by assignees of auction-purchaser—Assignee of auction-purchaser—Limitation.*—Art. 138 of the Limitation Act (XV of 1877) is not limited to suits by the auction-purchaser himself, but applies also to suits by his assignees.

Limitation runs from the date of the sale. GOVIND v. GANGAJI, 23 B. 246 ... 163

(23) *Arts.* 139 *and* 144—*Landlord and tenant—Rent-note—Expiration of the term—Tenant holding over—Tenancy at sufferance—Want of privity, between landlora and tenant—Suit to recover possession—Limitation.*—A tenant holding over after the expiration of the term mentioned in his rent-note is a tenant by sufferance and there is no such relationship between the landlord and such tenant as is contemplated by art. 139, sch. II of the Limitation Act (XV of 1877). A tenant by sufferance is only in by the laches of the owner, so that there is no privity between them.

CANDY, J.—The possession of a tenant holding over is wrongful, and if there is no evidence from which a fresh tenancy can be inferred in the strict sense of that term, time begins to run against the landlord when the period of the fixed lease expires. CHANDRI v. DAJI, 24 B. 504 = 2 Bom. L.R. 491 ... 867

(24) Art. 163—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 414.

(25) Art. 178—See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 345.

(26) Arts. 178 and 179—See MESNE PROFITS, 24 B. 149.

(27) Art. 179—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 44—Agreement filed under section becoming a decree—Default in payment of instalments due under decree—Application to make decree absolute under s. 89 of Transfer of Property Act (IV of 1882)—See ACT XVII OF 1879—See DEKKHAN AGRICULTURISTS' RELIEF, 23 B. 644.

(28) Art. 179—Redemption—Decree for redemption—No time fixed in the decree for payment—Execution—Limitation— Mortgage—See MORTGAGE (REDEMPTION), 23 B. 592.

(29) *Art.* 179, *cl.* 4—*Step-in-aid of execution—Application for return of a copy of a decree.*—An application to the Court by a decree-holder asking for the return of the copy of a decree filed with a former darkhast is not a step-in-aid of execution within the meaning of art. 179 (4) of the Limitation Act (XV of 1877). RAJARAM v. BANAJI MAIRAL, 23 B. 311 ... 207

Limitation Act (XV of 1877)—(Concluded). PAGE

(30) *Art.* 179, *cl.* 5 —"*Date of issuing notice,*" *meaning of the words—Execution of decree—Orders in execution proceedings*—Res judicata—*Withdrawal of application for execution—Effect of such withdrawal.*—Art. 179, cl. 5, of the Limitation Act (XV of 1877) applies only where the notice under s. 248 of the Code of Civil Procedure (Act XIV of 1882) has been actually issued. If no notice is issued, time cannot be counted from the date of the order of the Court; though it may be that where a notice has been issued, the date of its issue would be the date on which the Court ordered its issue.

Orders in execution proceedings, if not appealed from, are binding on the parties to the suit in all subsequent proceedings in that suit, on principles analogous to those of *res judicata* strictly so called. It is, therefore, necessary to constitute a bar that there should be a hearing and final decision.

Where an application for execution is allowed to be withdrawn, the matters in dispute are not heard and decided. There is, therefore, no *res judicata*. HARI GANESH v. YAMUNABAI, 23 B. 35 ... 24

(31) Art. 179, Expl. I—Liability of surety in execution—Application for execution against a surety when a step-in-aid of execution against a principal—Mode of enforcing payment against a surety—Practice—Procedure—Surety—See SURETY, 23 B. 478.

Loan.

(1) Independent admission of loan—Suit on the original consideration—Admission by pleader erroneous in law—Binding effect—Dishonour—Notice—Hundi—Inadmissible in evidence for want of stamp—See HUNDI, 24 B. 360.

(2) Obtained by guardian as such—Liability for such loan—Warranty by guardian of authority to borrow—Contract Act (IX of 1872), s. 235 Misrepresentation on a point of law—Guardians' liability—Guardian—Minor—See WARRANTY, 24 B. 166.

Low-lying Ground.

See MUNICIPALITY, 24 B. 125.

Lunatic.

(1) *Guardian of the person of a lunatic not competent to sue in respect of the lunatic's estate—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 440—*Guardian—Right to sue—Practice—Procedure.*—A guardian of the person only of a lunatic has no right to bring a suit in respect of the lunatic's estate. The manager of the lunatic's estate is the only person who can institute such a suit.

The word "guardian" in s. 440 of the Civ. Pro. Code (Act XIV of 1882) as amended by Act VIII of 1890, when applied to a lunatic means the manager of his estate. Under this section a person other than the guardian of the estate can also sue with the leave of the Court. BAI DIVALI v. HIRALAL, 23 B. 403 ... 268

(2) *Suit by wife as next friend, alleging husband to be a lunatic—Husband not an adjudged lunatic—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 462—*Act* XXXV *of* 1858—*Practice—Procedure*—Where a wife alleging her husband to be of unsound mind, brought a suit as next friend, the Court ordered an inquiry (1) as to whether the husband was of unsound mind and (2) as to whether the suit was for his benefit. PRANSUKHVAM v. BAI LADKOR, 23 B. 653=1 Bom.L.R. 88 ... 496

Mahomedan Law.

1.—ALIENATION.
2.—CUSTOM.
3.—GIFT.
4.—INHERITANCE.
5.—PARTITION.
6.—PRE-EMPTION.
7.—WAKF.
8.—WILL.

Mahomedan Law—1.—Alienation. PAGE

See MAHOMEDAN LAW (WAKF), 24 B. 170.

———2.—Custom.

See EASEMENT, 23 B. 666.

———3.—Gift.

Gift if not perfected by possession is invalid—Delivery of possession—Possession—Registration.—Under the Mahomedan law a registered deed of gift is not valid if it is never perfected by possession.

The Mahomedan law requires that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession to the donee.

Registration is not equivalent to possession. ISMAL v. RAMJI, 23 B. 682=1 Bom. L. R. 177 ... 456

———4.—Inheritance.

(1) *Residuary—Sister a residuary with daughters.*—A Mahomedan lady died, leaving a husband, two daughters, a sister, and the son of her father's paternal uncle.

Held, that the sister was entitled in, preference to the paternal kinsman, to the residue of the deceased's estate after the husband and daughters had taken their shares. MEHERJAN BEGAM v. SHAJADI BEGAM, 24 B. 112=1 Bom. L. R. 549 ... 612

(2) See MAHOMEDAN LAW (PARTITION), 23 B. 188.

———5.—Partition.

Joint property—Partition—Suit for share of such property—Share allotted to defendant in same suit on payment of Court-fees—Practice—Procedure.—In the Presidency of Bombay a suit for partition of an inheritance by Mahomedans is hardly distinguishable from a partition suit by Hindus. In such a suit, if a defendant asks at the proper time to have his share divided off and allotted to him, such relief should be granted to him on payment of the necessary Court-fees. ABDUL KADAR v. BAPUBHAI, 23 B. 188 ... 124

———6.—Pre-emption.

Shaffa—Pre-emption—Right of support, "appendages of property"—Easement—"Participator in appendages of property."—The right of *shaffa* (or pre-emption) belongs first to a partner in the property sold, secondly to a participator in its appendages, and thirdly to a neighbour.

The right of support is not an appendage to property; it is merely included in the incident of neighbourhood.

A's house adjoined the house in dispute towards the east. B's house adjoined the house in dispute towards the south, and was separated from it only by a wall. B's house was subject to the easement of support in favour of the house in dispute. A's house was subject to the easement of receiving and carrying off the rain water falling from the roof of the disputed house.

Held that A as owner of the servient tenement was a "participator in the appendages" of the house in dispute, and, as such, had a preferential right to purchase the house in dispute, over B, who was a mere neighbour. RANCHODDAS v. JUGALDAS, 24 B. 414=2 Bom. L. R. 41 ... 809

———7.—Wakf.

Mutawali—Alienation of wakf property—Suit to set aside such alienation—Right to sue—Civ. Pro. Code (Act XIV of 1882), s. 539.—Plaintiffs sued to recover possession of certain lands, alleging that they had been granted in wakf to their ancestor and his lineal descendants to defray the expenses for, or connected with, the services of a certain mosque; that their father (defendant No. 3) and cousins (defendants Nos. 4 and 5), who were mutawalis in charge of the said property, had illegally alienated some of these lands, and had also ceased to render any service to the mosque, whereupon they (the plaintiffs) had been acting as mutawalis in their stead. They, therefore, claimed to be entitled, as such, to the management and enjoyment

Mahomedan Law—7.—Wakf—(*Concluded*). PAGE

of the lands in dispute. It was contended (*inter alia*) that the plaintiffs could not sue in the life-time of their father (defendant No. 3), he not having transferred his rights to them.

Held, that the plaintiffs were entitled to sue to have the alienation made by their father and cousins set aside and the wakf property restored to the service of the mosque. They were not merely beneficiaries, but members of the family of the mutawallis, and were the persons on whom, on the death of the existing mutawallis, the office of mutawalli would fall by descent, if, indeed, it had not already fallen upon them, as alleged in the plaint, by abandonment and resignation.

Wakf property cannot be alienated, and any person interested in the endowment can sue to have alienations set aside and the property restored to the trust.

Per RANADE, J.—As a suit for possession, the suit was defective in form and could not be maintained. It was a suit for partition of a moiety of the lands, and the owner of the other moiety was not a party.

The suit was, however, really a suit for a declaration that the lands were the inam property of the mosque, and, as such, was not liable to alienation for the private debts of defendants Nos. 3, 4 and 5. The plaintiffs were entitled to sue for such a declaration, although they could not obtain actual possession. They were beneficiaries and had a right to sue under s. 42 of the Specific Relief Act (I of 1877).

When a suit is brought to set aside an alienation made to a stranger, such a suit by the worshipper at a mosque or temple can be maintained and does not fall within s. 539 of the Civ Pro. Code (Act XIV of 1882). That section is only applicable where there is an alleged breach of trust created for a public, charitable, or religious purpose, and the direction of the Court is necessary for the administration of the trust. As against strangers, s. 539 does not apply. KAZI HASSAN v. SAGUN BALKRISHNA, 24 B. 170=1 Bom. L. R. 649... 651

———8.—Will.

Nuncupative will of a Mahomedan—Probate and Administration Act (V of 1881), ss. 3, 24, 25, 26, 62—Indian Succession Act (X of 1865), s. 244 and chap. IX—Probate—See PROBATE, 24 B. 8.

Makta Tenant.

See LANDLORD AND TENANT, 24 B. 426.

Mamlatdar.

(1) Jurisdiction—Mamlatdars' Act (Bom. Act III of 1876), s. 4—Disputes between riparian proprietors—See JURISDICTION, 23 B. 47.

(2) Mamlatdars' Act III of 1876—S. 4—Water—Water-course—Riparian owners, right of—See WATER, 23 B. 506.

(3) *Mamlatdar's Court—Jurisdiction of Mamlatdar over officers of Government sued in their official capacity—Act* XIV *of* 1869, *s.* 32—*Act* X *of* 1876, *s.* 15—*Bombay Irrigation Act* (*Bom.* VII *of* 1879), *s.* 48—*Leakage water—Rights of riparian proprietors—Water-course.*

A Mamlatdar has jurisdiction, under Bombay Act III of 1876, to hear and determine a suit brought against officers of Government for acts purporting to have been done by them in their official capacity.

The Irrigation Department has no power, under Bombay Act VII of 1879, to dam a stream or a water-course on the ground that it derives its supply of water by leakage from an irrigation canal. S. 48 of the Act only gives the Department the special right of charging a water-rate on land which derives benefit from the leakage.

Water which has leaked from a canal into the land of another person does not belong to the Irrigation Department, so as to give the latter the right to follow it up and claim it as their own.

If the leakage flow was such that it itself had become, in the eye of the law, a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses.

Mamlatdar—(*Concluded*). PAGE

A Mamlatdar has no power to inquire into matters not covered by the issues laid down by the Act itself. BALVANTRAO v. SPROTT, 23 B. 761=1 Bom. L. R. 414 ... 509

(4) See ACT III OF 1876 (BOMBAY MAMLATDARS' COURTS), 24 B. 251.
(5) See LANDLORD AND TENANT, 24 B. 426.
(6) See VENDOR AND PURCHASER, 23 B. 525.

Mamlatdar's Court.

(1) *Decree—Execution—Person ousted in execution no party to the decree—Suit for possession in Mamlatdar's Court by person ousted—Jurisdiction.*—A person ousted in execution of a decree of the Mamlatdar's Court to which he was no party, can himself bring a suit for possession in the Mamlatdar's Court against the person by whom he was ousted, and the defendant in such a suit cannot rely on the fact of his having obtained possession in execution of a decree against other parties as a bar to the jurisdiction of the Mamlatdar. NINGAPPA v. ADEVEPPA, 24 B. 397=2 Bom. L. R. 136 ... 797

(2) See ACT III OF 1876 (BOMBAY MAMLATDAR'S COURTS), 24 B. 251.
(3) See JURISDICTION, 23 B. 47.
(4) See LANDLORD AND TENANT, 24 B. 426.
(5) See MAMLATDAR, 23 B. 761.
(6) See MINOR, 24 B. 238.
(7) See VENDOR AND PURCHASER, 23 B. 525.

Marriage.

See PARSIS, 23 B. 279.

Master and Servant.

Indian Arms Act (XI of 1878), s. 22—Master's liability for the criminal acts of his servant—See ACT XI OF 1878 (ARMS), 24 B. 423.

Mayukh.

Adoption of an only son—Validity of such adoption in Gujarat—Hindu law—Adoption—See HINDU LAW (ADOPTION), 24 B. 367.

Mesne Profits.

(1) Civ. Pro. Code (Act XIV of 1882), ss. 211 and 331—Limitation Act (XV of 1877), sch. II, art. 178—Decree for possession with mesne profits till delivery of possession—Darkhast for execution—Obstruction—Application for removal of obstruction—Application registered as a suit—Disposal of the dharkhast—Decree in the suit—Execution—Limitation—Mesne profits for three years subsequent to the suit—See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 345.

(2) *Decree for mesne profits—Decree silent as to the time down to which mesne profits were given—Construction of such decree—Civ. Pro. Code (Act X of 1877), s. 211—Limitation—Limitation Act (XV of 1877), arts. 178 and 179—Decree—Construction—Suit for land.*—A decree, dated 3rd July, 1878, awarded possession of certain land with mesne profits to be ascertained in execution, but specified no time down to which the mesne profits were to be computed.

Held, that under s. 211 of the Code of Civil Procedure (Act X of 1877) the decree could not be construed as giving mesne profits for a period longer than three years from the date of the decree. UTTAMRAM v. KISHORDAS, 24 B. 149=1 Bom. L. R 638 ... 637

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 536.
(4) See LIMITATION ACT (XV OF 1877), 24 B. 23.

Minor.

(1) *Capacity to contract—Contract Act (IX of 1872), ss. 2, 10, 11, 247, 248—Ratification—Release by minor father of his interest in joint property to his son—Family arrangement—Voluntary conveyance by father to son—Transaction impeached by subsequent creditors. Per* FARRAN, C. J., and RANADE, J., (FULTON, J., dissenting).—In India the contract of a minor is not void but voidable only and is capable of ratification after he attains majority.

Minor—(*Continued*). PAGE

A release by a minor father of all his right and interest in the ancestral property to his son *held* to be valid if ratified by the donor after he attained majority.

Per RANADE, J.—The property sought to be protected by the release was admittedly ancestral property, and Vaman's minor son had a half share in it, of which the minor could at any time claim partition. The release was only intended to protect Vaman's one-half share against the consequences of his own improvidence. When all existing debts were paid of and settled, Vaman's right to make a voluntary conveyance of the same in his minor son's interest cannot be questioned. Such conveyances are well known in English law, and there have been cases in India also where Courts have given effect to such voluntary conveyances or gifts by a father to his son. Such transactions do not become colourable merely because in their ultimate consequences they have the effect of protecting the family property against the prospective extravagance of the settler, or because no adequate consideration is shown to have been paid by the party benefited.

Per FULTON, J.—Apart from s. 7 of the Transfer of Property Act, 1882, which was not in force in the Presidency of Bombay when the release of 1887 was executed, a conveyance depends on a preceding contract and cannot be valid unless the party making it is competent to contract. Without an antecedent agreement to give and receive, there can be no transfer at all. The power to convey must depend on the power to contract. Unless it can be held that the provisions of s. 10 of the Contract Act were not meant to be exhaustive, and it was intended to leave out of consideration agreements by minors, we must hold that a minor is incompetent to contract.

Vaman Sadashiv, a minor member of an undivided Hindu family, in 1887 executed a release of his right and interest in certain ancestral property to his minor son. In 1882 the plaintiff obtained a decree against him in respect of a debt incurred subsequently to the date of the release, and he sought to attach the released property in execution of his decree. He impeached the validity of the release.

Held (by FARRAN, C. J. and FULTON, J., (RANADE, J., dissenting) that the release was inoperative and that the plaintiff was entitled to attach the property in execution of his decree.

By FARRAN, C. J. on the ground that it had not been ratified by Vaman after he attained his majority.

By FULTON, J., on the ground that the release was absolutely void and incapable of ratification.

Per FARRAN, C.J., and RANADE, J., (FULTON, J., dissenting).—The release was voidable only at the option of the minor (Vaman) and was not void, and if it was ratified or not repudiated by him on attaining majority it was, in the absence of fraud, a valid transaction, at least as against judgment-creditors whose debts were of a subsequent date. SADASHIV v. TRIMBAK, 23 B. 146 ... 97

(2) Disposing of minor for immoral purposes—Abetment—Offence committed out of British India—Jurisdiction—Offence not triable except with the certificate of Political Agent or sanction of Government—Crim. Pro. Code (Act V of 1898), s. 188—Penal Code (Act XLV of 1860), ss. 108 A., 372—See PENAL CODE (ACT XLV OF 1860), 24 B. 287.

(3) *Guardian*—Ex-parte *decree against minor—Minor's right to sue to set aside ex-parte decree—Proof of negligence or fraud on the part of the guardian—Practice—Genuine gift by father-in-law to his widowed daughter in-law—Gift by way of affection of a small share of moveable property acquired by the donor while living in union with his sons and grandson—Gift valid—Hindu law.*—It is only where fraud or negligence is proved on the part of the guardian of a minor that the right to bring a suit to set aside the previous decision can be claimed by a minor or his administrator.

Minor—(*Concluded*). PAGE

The plaintiff, a minor represented by an administrator, sued to recover possession of two houses. With respect to one of the houses there had been previous litigation. The plaintiff was the defendant, a minor represented by his guardian, and one of the present defendants was the plaintiff in that litigation, and an *ex parte* decree was passed against the plaintiff.

Held, that the decision in the previous litigation barred the present claim with respect to the house which was the subject of that litigation, no negligence being proved on the part of the plaintiff's guardian therein.

Where there is a genuine gift by a father-in-law to his widowed daughter-in-law by way of affection, out of a small share of moveable property most of which was acquired by the donor while living in union with his sons and grandson, the gift cannot be impeached as being opposed to the principles of Hindu law. HANMANTAPA v. JIVUBAI, 24 B. 547=2 Bom. L. R. 478 ... 895

(4) *Mamlatdar's Act* (*Bom. Act* III *of* 1876), *ss.* 3, 5, 6, 7 *and* 9—*Mamlatdar's Court—Possessory suit by a minor plaintiff represented by his guardian—Plaint signed and verified by the pleader of the guardian—Right of the minor to sue.*—A minor may sue or be sued in a Mamlatdar's Court, he being represented by a properly appointed guardian.

A guardian mother having on behalf of her minor son brought a possessory suit in a Mamlatdar's Court.

Held, that the pleader appointed by her could sign and verify the plaint. SAYAD SAIFULLA v. SAYAD HAJI MIYA, 24 B. 238=1 Bom. L. R. 664 ... 695

(5) *Suit on behalf of minor—Decree—Compromise of decree by next friend—Application to set aside compromise—Modes of impeaching the decree—Practice—Procedure—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 462.—Where a decree to which a minor is a party has been compromised with leave of the Court granted under s. 462 of the Civ. Pro. Code (Act XIV of 1882), the compromise cannot be subsequently re-opened by the Court *proprio motu* on the ground that it gave the minor less property than he was entitled to under the decree. The modes in which such an order can be impeached are, at the most, two, namely, by review, or by suit. VIRUPAKSHAPPA v. SHIDAPPA, 23 B. 620=1 Bom. L. R. 82 ... 413

(6) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 23 B. 698.
(7) See BANK OF BOMBAY, 24 B. 350.
(8) See GUARDIAN, 24 B. 95.
(9) See WARRANTY, 24 B. 166.

Misdirection.

See CRIMINAL PROCEDURE, 23 B. 316.

Misrepresentation.

On a point of law—Contract Act (IX of 1872), s. 235—Guardian's liability—Warranty—Breach of warranty—Suit on warranty—Principal and agent—Guardian—Minor—Loan obtained by guardian as such—Liability for such loan—Warranty by guardian of authority to borrow—See WARRANTY, 24 B. 166.

Modh Wania Caste.

See DEFAMATION, 24 B. 13.

Mortgage.

1.—GENERAL.
2.—EQUITY OF REDEMPTION.
3.—REDEMPTION.
4.—SALE.

——— 1.—General.

(1) Guardian—Certificated guardian—Mortgage by such guardian without Court's permission—Validity of such mortgage—Sanction under

Mortgage—1.—General—(*Concluded*). PAGE

Civ. Pro. Code (Act XIV of 1882), s. 305—Guardians and Wards Act (VIII of 1890), ss. 29 and 30—Act XX of 1864—See GUARDIAN, 23 B. 287.

(2) *Money decree obtained by mortgagee—Execution—Sale of mortgaged property in execution—Purchaser at such sale—Title of such purchaser—Transfer of Property Act* (IV *of* 1882), *s.* 99.—Previous to the passing of the Transfer of Property Act (IV of 1882), a mortgagee obtained a money-decree against his mortgagor and in execution sold the mortgaged property. The son of the mortgagee bought it at the sale.

Held, that by his purchase at the execution-sale the son took an absolute title and was not liable subsequently to be redeemed at the suit of the heirs of the mortgagor.

Semble.—A third person purchasing mortgaged property *bona fide* at a sale in execution of a money-decree obtained by the mortgagee against the mortgagor obtains a good title free from the mortgage lien, unless the sale is made subject to it. HUSEIN v. SHANKARGIRI, 23 B. 119 ... 79

(3) Mortgage by co-sharer of undivided share—Partition suit subsequently brought by other co-sharer to which mortgagee not a party—Mortgaged property allotted to a sharer other than mortgagor—Right of such co-sharer—Partition re-opened—Fraud of mortgagor and mortgagee—Partition—Co-sharer—See HINDU LAW (PARTITION), 23 B. 385.

(4) *Purchaser from mortgagee—Necessity of possession in order to validate transaction as aganist original mortgagor—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 134.—A person purchasing or taking a mortgage from a mortgagee believing that he is getting a good title must have possession of the property for the statutory period in order to validate the transaction as against the original mortgagor under art. 134 of the Limitation Act (XV of 1877). RAMCHANDRA v. SHEIKH MOHIDIN, 23 B. 614=1 Bom. L. R. 102 ... 410

(5) Vatan—Restriction upon alienation by a vatandar—Mortgage valid to what extent—Regulation XVI of 1827—Act III (Bom.) of 1874—See VATAN, 24 B. 556.

——2.—Equity of Redemption.

See HINDU LAW (JOINT FAMILY), 24 B. 135.

——3.—Redemption.

(1) *Decree for redemption—No time fixed in the decree for payment—Limitation—Limitation Act* (XV *of* 1877), *art.* 179.—On the 27th June, 1885, a consent-decree was passed in a redemption suit to the following effect :—

"Plaintiffs should pay the sum of Rs. 733 to the defendants within a month of this date; in case they do not pay the money, then in the year in the month of Chaitra in which they pay the money, the defendants should give back to them possession of the land; till that time the defendants should pay the Government assessment and enjoy the produce in lieu of interest."

On the 27th June, 1897, plaintiffs applied for execution of the decree, praying for possession alone on the ground that the redemption money had been paid off by their payments of assessment, &c., on behalf of the defendants.

Held, that the application for execution was time-barred under art. 179 of the Limitation Act (XV of 1877). The words of the decree were vague and indefinite, and were to be considered as really mentioning no time for payment. The decree was, therefore, to be taken as operating from its date, and to be enforceable only within three years from that time, unless kept alive by application for execution made according to law within the prescribed periods. MARUTI v. KRISHNA, 23 B. 592=1 Bom. L. R. 31 395

Mortgage—3.—Redemption—(*Concluded*). PAGE

(2) Decree for sale of mortgaged property—Default in payment on date fixed in the decree—Redemption—Power to enlarge the time—Transfer of Property Act (IV of 1882), ss. 87, 88, 89 and 93—See TRANSFER OF PROPERTY ACT (IV OF 1882), 24, B. 300.

(3) Mortgage with possession—Mortgagee to take rent in part payment of interest—Remaining interest to be paid by mortgagor every year—Damdupat—See DAMDUPAT, 24 B. 114.

(4) Service tenure—Non-performance of service—Payment of assessment by mortgagee—Title—Change of title—Resumption—See SERVICE TENURE, 24 B. 482.

(5) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B. 321.

———4.—Sale.

(1) *Power of sale—Suit to set aside sale under power of sale—Promise by mortgagee to postpone sale—Evidence of such promise admissible—Evidence Act* (I *of* 1872), *s.* 92, *Proviso* 4—*Contract Act* (IX *of* 1872), *s.* 63—*Transfer of Property Act* (IV *of* 1882), *s.* 69—*Town of Bombay, limits of.*—The plaintiff mortgaged certain property to the first defendant on 28th December, 1895. By the mortgage-deed the mogtgage-debt was made repayable on 28th December, 1896. On the 12th May, 1897, the first defendant sold it by auction under the power of sale contained in the mortgage-deed, and the second defendant was the purchaser. The plaintiff now sued to set aside the sale and be allowed to redeem, alleging that on the day before the sale the first defendant had orally promised and agreed to postpone the sale for four days and that the second defendant had notice of this fact before he purchased the property.

Held, that evidence of such oral agreement was admissible. It was not an agreement to modify any of the terms of the mortgage; it was merely an agreement to forbear, for a period of four days, from the exercise of the power of sale given by the mortgage. It, therefore, did not fall within proviso 4 of s. 92 of the Evidence Act (I of 1872).

Held, also, that the said promise or agreement, if made by the mortgagee, was not an extension of time for the performance of the plaintiff's (mortgagor's) promise to him, which was to pay the mortgage-debt on the 28th December, 1896, but was an agreement to refrain from exercising, for a stated period, the right of sale arising from non-performance, and, therefore, s. 63 of the Contract Act (IX of 1872) did not apply.

Land situate in the district of Mahim within the island of Bombay, and within the local limits of the original jurisdiction of the High Court, is situate within the town of Bombay, in the sense in which that expression is used in s. 69 of the Transfer of Property Act (IV of 1882). TRIMBAK GANGADHAR RANADE v. BHAGWANDAS, 23 B. 348 ... 232

(2) *Suit for sale of mortgaged property—Reg.* V *of* 1827, *s.* 15, *cl.* 3—*Special agreement—Limitation.*—Plaintiff brought this suit in 1895 on a mortgage-bond, dated 1870, to recover the balance due on the mortgage by sale of the mortgaged property, or, in the alternative, for possession of the property until payment of the balance. The mortgage contained a stipulation that, on default of payment of interest by the mortgagor, the mortgagee should take possession and hold possession in lieu of interest, and that such possession should continue until the mortgagor paid the principal and interest that remained unpaid when the mortgagee took possession.

The Judge dismissed the suit, holding that the claim for possession was time-barred, and the claim for the sale of the property could not be enforced, as the mortgage-bond contained a special agreement which took the case out of cl. (3) of s. 15 of Reg. V of 1827.

On appeal, *held*, reversing the decree, that s. 15 of Reg. V of 1827 was not applicable, as the mortgagee never was in possession, and that the claim to enforce the mortgage security by sale was not barred. SIDHESVAR v. BABAJI, 23 B. 781 = 1 Bom. L. R. 461. 522

Municipal Commissioner.

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See MUNICIPALITY, 23 B. 528; 24 B. 125.

Municipality.

(1) *Bombay City Municipal Act* (*Bom. Act* III *of* 1888), *s.* 249—"*Employed*"—*Meaning of the word—Discretion vested in the Municipal Commissioner.*—The word "employed" in s. 249 of the Bombay Municipal Act (Bom. Act III of 1888) refers to employment of any kind or for any length of time. MUNICIPALITY OF BOMBAY v. AHMEDBHOY HABIBHOY, 23 B. 528=1 Bom. L. R. 12 ... 352

(2) *Bombay City Municipal Act* (*Bom. Act* III *of* 1888), *s.* 249—*Notice to construct urinals in a particular place in the owner's premises—Illegality of such notice.*—Accused was convicted and fined Rs. 50 for not complying with a notice issued by the Municipal Commissioner of Bombay under s. 249 of Bom. Act III of 1888. The notice required him to construct a urinal of six compartments in the open space inside the entrance gateway to the Cloth Market from Champawady, and a water-closet in the corner of the entrance from 1st Ganeshwady near the fire-engine station.

Held, reversing the conviction and sentence, that the notice was *ultra vires*, inasmuch as it required the accused to construct urinals in a particular place in his premises. *In re* KHIMJI JAIRAM, 24 B. 75 =1 Bom. L. R. 431 ... 587

(3) *Bombay City Municipal Act* (*Bom. Act* III *of* 1888), *s.* 381—*Low ground—Low-lying ground—Notice by Municipal Commissioner requiring owner of low-lying ground to fill it with sweet earth up to a certain level.*—Under s. 381 of the Bombay Municipal Act (Bom. Act III of 1888) the Municipal Commissioner for the City of Bombay issued a notice to the appellant as owner of certain low-lying ground. The notice stated that in the opinion of the Commissioner the ground accumulated water in the monsoon and caused nuisance to the tenants of two chawls situated on the premises. The owner was, therefore, required by the notice "to fill in the low-lying ground with sweet earth to the level of the road and slope it towards the new drain on the road side."

As the owner refused to comply with the notice, he was convicted and sentenced to pay a fine of Rs. 15 by the Presidency Magistrate under s. 471 of the Municipal Act (Bom. Act III of 1888).

Held, reversing the conviction and sentence, that the notice was illegal. The words used in s. 381 are "low ground," which is not the same as low-lying ground. And though the section gives power to the Commissioner to require the owner of low ground to cleanse and fill up the same, it does not permit him to issue an order that an indefinite extent of low-lying ground shall be filled up, much less that it shall be filled up to some particular level, or filled up with sweet earth, or that it shall be sloped in a particular direction. MUNICIPAL COMMISSIONER OF BOMBAY v. HARI DWARKOJI, 24 B. 125=1 Bom. L.R. 518 ... 622

(4) *Bombay District Municipal Act* (*Bom. Act* VI *of* 1873), *s.* 24—*Acquisition of land for widening a street—Powers of a Municipality—Civil Court's jurisdiction to interfere—Injunction.*—Where a District Municipality purchased through Government a narrow strip of land at the entrance of a private street for the purpose of widening the street in order to facilitate the effective use of fire-engines.

Held, that the acquisition of land for such a purpose was within the powers of the Municipality, as it was conducive to the promotion of public health, safety and convenience; and that the Civil Court had no jurisdiction to restrain the Municipality from exercising such powers. SHASTRI RAMCHANDRA v. AHMEDABAD MUNICIPALITY, 24 B. 600=2 Bom. L.R. 395 ... 930

(5) *Bombay District Municipal Act* (*Bom. Act* VI *of* 1873), *s.* 48—*Re-erection of a structure formerly existing not within the section.*—Section 48 of the Bombay District Municipal Act (Bom. Act VI of 1873) refers to the erection of a thing for the first time, and not to the re-erection of an old structure which had been taken down for a temporary purpose only.

Municipality—(*Concluded*). PAGE

The accused was the owner of a shop in a public street at Thana. The shop had planks attached to it in front, overhanging a public gutter. These planks had been in existence before the District Municipal Act came into operation at Thana. In April, 1897, the planks were temporarily removed under the orders of the plague authorities. The plague having ceased, the accused replaced the planks in October, 1897, without the permission of the Municipality. For this he was prosecuted and fined under s. 48 of the Bom. Act VI of 1873.

Held, reversing the conviction and sentence, that the refixing of the planks was not an "erection" within the meaning of s. 48 of the Act. KALA GOVIND v. MUNICIPALITY OF THANA, 23 B. 248 ... 164

(6) *House-tax — House valuation—Valuation made by Municipality—Magistrate's power to revise the valuation—Bombay District Municipal Act (Bom. Act VI of 1873), s. 84 as amended by Bombay Act II of 1884.*—Under the rules passed under the Bombay District Municipal Act (Bom. Act VI of 1873) as amended by Bombay Act II of 1884 the Municipality of Wai estimated the annual letting value of a house belonging to the accused at Rs. 50 and levied a house-tax of Rs. 2-8. A, a tax-prayer, applied to the managing committee for a reduction of the tax, but his application was dismissed. Default having been made in payment of the tax, A was prosecuted under s. 84 of the Act before a Second Class Magistrate. He contended that the estimate made by the Municipality was too high, and that his house would not let for more than 10 or 12 Rs. a year. The Magistrate took evidence on the point and found that the annual rental of the house would not exceed Rs. 12, and he ordered payment of 12 annas only on account of the tax.

Held, that the Magistrate had no power to go behind the estimate of value framed by the managing committee under the powers given to it by the rules. He ought to have accepted as conclusive the amount found by the managing committee to be the letting value of the house, and held the legal liability of the accused to pay the tax based on this amount to be proved.

The remedy of the accused, if he considered his house assessed too highly, was to apply to the managing committee, and no other mode of redress was open to him. MUNICIPALITY OF WAI v. KRISHNAJI, 23 B. 446 ... 296

(7) *House-tax—Municipal valuation—Civil Court's power to revise such valuation.*—A Civil Court has no power to revise the valuation of houses made by a Municipality for the purpose of imposing a house-tax. MORAR v. BORSAD TOWN MUNICIPALITY, 24 B. 607 = 2 Bom. L. R. 417 ... 934

(8) Water-works—Municipality of Bombay—Right to enter on land of Railway Company to lay pipes, &c.—Bombay Municipal Act (Bom. Act III of 1888), ss. 225, 265—Railway Act (IX of 1890), s. 12—Accommodation works—See WATER-WORKS, 23 B. 358.

Muscat.

Court of Her Majesty's Consul at Muscat—High Court's criminal revisional jurisdiction over the Consular Court—Order in Council dated 4th November, 1867—Crim. Pro. Code (Act V of 1898), s. 435—Jurisdiction.—The High Court at Bombay has no criminal revisional jurisdiction over the proceedings of Her Majesty's Consul within the dominions of the Sultan of Muscat. *In re* RATANSEE PURSHOTUM, 24 B. 471 = 1 Bom. L. R. 840 ... 845

Mutaliki Service.

See SERVICE LANDS, 23 B. 602.

Native Christians.

Law applicable to—Succession — Inheritance — Religion—Change of religion—See RELIGION, 23 B. 539.

Negligence. PAGE:

(1) Negligence of Railway Company in leaving door of railway carriage open or unfastened—Hurt caused to passenger while trying to secure door—Railway Company—See RAILWAY COMPANY, 24 B. 1.

(2) See MINOR, 24 B. 547.

Negotiable Instruments Act (XXVI of 1881).

Holder in due course—Forgery—No title through forgery—Shares, debentures, Government promissory notes having a forged endorsement—Holder has no title—Government promissory notes surrendered for renewal—Title to renewal notes—English Bills of Exchange Act (Stat. 45 and 46 Vict., c. 61)—See FORGERY, 24 B. 65.

Next Friend.

See MINOR, 23 B. 620.

Notice.

(1) To quit—Landlord and tenant—Ejectment—Disclaimer of title—See LANDLORD AND TENANT, 24 B. 426.

(2) See CONTRACT, 24 B. 97.
(3) See CRIM. PRO. CODE (ACT V OF 1898), 24 B. 527.
(4) See HUNDI, 24 B. 360.
(5) See LIMITATION ACT (XV OF 1877), 23 B. 35.
(6) See MUNICIPALITY, 24 B. 75, 125.
(7) See TRANSFER OF PROPERTY ACT (IV OF 1882), 24 B. 502.

Nuncupative Will.

See PROBATE, 24 B. 8.

Obstruction.

See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 345.

Occupancy Tenant.

See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 24 B. 489.

Offer.

See CONTRACT, 24 B. 97, 510.

Officers of Government.

Jurisdiction of Mamlatdar over officers of Government sued in their official capacity—Act XIV of 1869, s. 32—Act X of 1876, s. 15—See MAMLATDAR, 23 B. 761.

Order in Council dated 4th Nov. 1867.

See MUSCAT, 24 B. 471.

Pardon.

See CRIM. PRO. CODE (ACT V OF 1898), 23 B. 493.

Parsis.

(1) *Marriage—Husband and wife—Suit by husband for restitution of conjugal rights—Defence to such suit—Agreement for separation a good defence—Parsi Marriage and Divorce Act (XV of 1865), s. 36.*—Under s. 36 of the Parsi Marriage and Divorce Act (XV of 1865), a contract by which a husband has agreed to allow his wife to live separate is a good defence to a subsequent suit by him for restitution of conjugal rights. KAWASJI v. SIRINBAI, 23 B. 279 ... 185

(2) See ACT XV OF 1865 (PARSI MARRIAGE AND DIVORCE), 24 B. 465.
(3) See WILL, 23 B. 80.

Parties.

(1) Appearance of party—Appearance by pleader or recognized agent—Appearance only for purpose of applying for adjournmennt—Civ. Pro. Code (Act XIV of 1882), ss. 36, 37, 100, 102 and 103—Presidency Small Cause Courts Act (XV of 1882), s. 38—Dismissal for default—Remedy of plaintiff — Practice — Procedure—Decree—*Ex parte* decree—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 414.

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(2) Practice—Civ. Pro. Code (Act XIV of 1882), s. 28—Execution—Civ. Pro. Code (Act XIV of 1882), ss. 278. 83—Attachment of same property in execution of decrees obtained by different creditors—Claim made in one suit to attached property under s. 278—Order made under s. 281—Suit by claimant to establish right—All attaching creditors made defendants to suit—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 266.

(3) See HINDU LAW (JOINT FAMILY), 24 B. 135.

Partition

See ACT IV OF 1893 (PARTITION), 23 B. 77.

Partners.

(1) *Joint contract--Liability of partners--Joint liability—Judgment recovered against one partner—Judgment of a foreign Court*—Res judicata—*Civ. Pro. Code (Act XIV of* 1882), *ss.* 13 *and* 14—*Consent decree.*—The defendants were partners trading in the name of Vishnuram Gopinath and Company. On 6th July 1895, at Ahmedabad, the first defendant borowed from the plaintiff, for the purposes of the partnership business, a sum of Rs. 10,000 and passed a *khata* in the name of his firm. On 25th April, 1896, at Baroda he passed another agreement to plaintiff, under which the plaintiff was to recover the debt due to him from the partners jointly and severally.

On 2nd October 1896, plaintiff obtained a decree on an award against the first defendant in the Civil Court at Baroda for Rs. 13,909-4-0, and in execution of this decree he recovered a sum of Rs. 7,000.

In 1897 plaintiff filed this suit in the Court of the First Class Subordinate Judge at Ahmedabad to recover the balance, *viz.*, Rs. 6,909-4-0, from all the partners (defendants Nos. 1 to 8).

Defendants Nos. 6 to 8 resided in Baroda territory, the rest in British India. Defendants Nos. 2, 3 and 4 defended the suit. The rest did not appear.

The Subordinate Judge dismissed the suit holding, on the authority of *King* v. *Hoare* (1844) 13 M. & W. 494, that the judgment of the Baroda Court against one partner (the first defendant) was a bar to a fresh suit against the other partners on the same cause of action.

The plaintiff appealed to the High Court.

Held, that the principle of *King* v. *Hoare* did not apply and that the suit was not barred. The Baroda Court had no jurisdiction over the defendants, who were British subjects residing in British territory. The judgment of the Baroda Court was, therefore, no bar to the present suit under s. 14 of the Code of Civil Procedure (Act XIV of 1882).

Held, also, that the original liability of the partners being a joint liability, the first defendant had no authority, without the consent of his partners, to change the joint liability of each partner, which was the ordinary incident of the partnership, into a joint and several liability.

A judgment by consent raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. LAKSHMISHANKAR v. VISHNURAM, 24 B. 77 = 1 Bom. L.R. 534 ... 588

(2) See HINDU LAW (JOINT FAMILY), 23 B. 144.

(3) See PARTNERSHIP, 23 B. 544.

Partnership.

(1) *Death of partner—Subsequent recovery of assets by surviving partner—Suit by administrator of deceased partner against surviving partner for recovered assets—Suit for partnership account—Limitation Act* (XV *of* 1877), *ss.* 7 *and* 17.—In 1889, one Hemabai, a widow and partner in a firm carrying on business in partnership with Goculdas and Bhagwandas (defendants Nos. 1 and 2) in Sind and at Bebrin in the Persian Gulf, died, and the partnership was then dissolved. She had no children, but it was alleged that she had adopted one Purshotam, the brother of the second defendant. On the 13th February 1890, the guardian of one Kissondas, a minor (her husband's nephew), applied to the High Court of Bombay for letters of administration to her estate, alleging that Kissondas was

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her heir and next of kin. A caveat was filed by her father and others, in which they denied that Kissondas was her heir, and alleged that Purshotam had performed her funeral ceremonies. The matter came on as a suit on the 19th February 1894, when an order was made without prejudice to any of the questions raised by the issues, dismissing the application and ordering letters of administration to Hemabai's estate to issue to the Administrator-General of Bombay. Letters of administration were accordingly granted to him on the 30th March 1894.

In the meantime, however, *viz.*, on the 12th April 1893, Bhagwandas (defendant No. 2) had filed three suits in the High Court of Bombay, in the name of himself and Goculdas (defendant No. 1), as surviving partners of Hemabai's firm, to recover certain debts due to that firm. Disputes subsequently arose between Bhagwandas and Goculdas, and, by a consent order of the 22nd July 1893, it was ordered that any money recovered in the said three suits should be paid over to a receiver (defendant No. 3) to be held by him until further order. On the 1st August 1893, consent decrees were passed in the above three suits for a total sum of Rs. 28,335, which was forthwith handed over to the receiver.

On the 22nd April 1894, this suit was filed by the Administrator-General of Bombay as administrator of Hemabai appointed as above stated. He claimed to recover the whole sum paid to the receiver, alleging that the first and second defendants as her partners were largely indebted to the firm and that the money really belonged to her estate. He prayed that the receiver might be directed to pay over the money to him, and, if necessary, the partnership accounts should be taken. The second defendant (*inter alia*) pleaded that the suit was one for partnership accounts, and as such was barred by limitation, and also that the High Court of Bombay had no jurisdiction to try it.

Held by the Privy Council, affirming the decision of the High Court of Bombay, that this suit was not barred by time; the latter Court having decided on the ground that the Administrator-General having been the only person capable of suing within the meaning of s. 17 of Act XV of 1877 (Limitation), that section operated to allow the period of art. 106 to be computed from the issue of administration of this estate.

A decree was made for a general partnership account to establish what was due to the estate of the deceased in respect of her share in the partnership, and of any money of hers employed in the business continued by the survivors. BHAGWANDAS v. RIVETT CARNAC, 23 B. 544 (**P.C.**) = 3 C.W.N. 186 = 26 I.A. 32 = 7 Sar. P.C.J. 451 363

(2) Partnership suit between members of joint family—Suit by a co-parcener for an account of the profits of a joint family firm—Injunction—Exclusion of partner—Hindu Law—Joint family—Family firm—See HINDU LAW (JOINT FAMILY), 23 B. 144.

Part Payment.

See LIMITATION ACT (XV OF 1877), 24 B. 619.

Payment.

See STAMP ACT (I OF 1879). 23 B. 54.

Penal Code (Act XLV of 1860).

(1) S. 71—Crim. Pro. Code (Act V of 1898), s. 35—Conviction of several offences at one trial—One sentence only to be passed in such cases—Sentence—See CRIM. PRO. CODE (ACT V OF 1898), 23 B. 706.

(2) *Ss.* 108 *A*, 372—*Disposing of a minor for immoral purposes—Abetment—Offence committed out of British India—Jurisdiction—Offence not triable except with the certificate of Political Agent or sanction of Government—Crim. Pro. Code (Act V of* 1898), *s.* 188.—A minor girl under the age of sixteen years was taken by acoused No. 1, under the direction of accused No. 2, from Sholapur to Tuljapure (in the Nizam's territory), and there dedicated to the goddess Amba, with intent or knowing it to be likely that the minor would be used for purposes of prostitution.

Penal Code (Act XLV of 1860)—(*Concluded*). PAGE

The District Magistrate of Sholapur convicted accused No. 1 of an offence under s. 372 and accused No. 2 of abetment of the offence unders ss. 372 and 108 A of the Indian Penal Code, and sentenced them each to six months' rigorous imprisonment.

Held, that as the offence of the disposal of the minor took place out of British India, the Magistrate had no jurisdiction to try the offence in the absence of a certificate of the Political Agent or the sanction of the Local Government as required by s. 188 of the Code of Criminal Procedure (Act V of 1898).

Held, also that accused No. 2 was not guilty of abetment, and s. 108A of the Indian Penal Code had no application to the present case.

Mere intention not followed by any act cannot constitute any offence, and an indirect preparation which does not amount to an act which amounts to a commencement of the offence does not constitute either a principal offence or an attempt or abetment of the same.

The intention of either of the accused while they were staying at Sholapur did not constitute any offence and their removal with the girl to Tuljapur did not by itself constitute an abetment. QUEEN-EMPRESS v. BAKU, 24 B. 287 = 1 Bom.L.R. 678 ... 727

(3) Ss. 298, 504—See ACT IX OF 1890 (RAILWAYS), 24 B. 293.

(4) Ss. 350, 441, 447—See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 494.

(5) S. 403—See CRIM. PRO. CODE (ACT V OF 1898), 23 B. 696.

Permissive Occupation.

See LANDLORD AND TENANT, 23 B. 283.

Plaint.

See MINOR, 24 B. 238.

Plea.

See JURISDICTION, 23 B. 22.

Pleader.

(1) Appointment of a pleader to act as Presidency Magistrate—Appointment not forbidden by the Code—Crim. Pro. Code (Act V of 1898), s. 557—See CRIM. PRO. CODE (ACT V OF 1898), 23 B. 490.

(2) See HUNDI, 24 B. 360.

Pleader and Client.

Pleader's absence from Court owing to his temporary appointment as a Subordinate Judge—"Necessary cause"—Reg. II of 1827, s. 54.—On the day fixed for the hearing of a suit, neither the plaintiff nor his pleader was present; the defendant not having been served was also absent. Plaintiff's pleader, however, sent intimation to the Court in writing that he had been appointed to act as a Subordinate Judge, and as he was going that day to join his appointment, he was unable to attend the Court. He, therefore, requested that the case should be adjourned till his return, or that a notice be issued to his client to enable him to make the necessary arrangements for the conduct of his case.

Held, that the pleader, having been temporarily appointed to act as a Subordinate Judge, was unable to attend the Court in consequence of a "necessary cause" within the meaning of s. 54 of Reg. II of 1827; and as he had sent the necessary notification in writing to the Court, the suit should not be dismissed, but adjourned for a reasonable time. *In re* NARAYAN SADASHIV KALE, 23 B. 657 = 1 Bom.L.R. 92 ... 438

Pledge.

Husband and wife—Possession required for valid pledge—Contract Act (IX of 1872), s. 178.—The plaintiff sued to recover from the defendant the value of certain ornaments pledged with the defendant by the plaintiff's deceased wife. The plaintiff and his wife had lived together, and the latter, with the knowledge and consent of the plaintiff, had charge of the jewel-case containing the ornaments in question, which, however, belonged exclusively to the plaintiff. Without the knowledge or consent of the plaintiff his wife pledged these ornaments with the defendant as security for the repayment of

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certain promissory notes passed by her in favour of the defendant. After her death the defendant claimed payment of the promissory notes from the plaintiff. The plaintiff refused to pay, and sued the defendant for the value of the ornaments.

Held, that the plaintiff's wife had not in the beginning, nor did she subsequently, acquire such possession as would validate the pledge by virtue of the provisions of s. 178 of the Contract Act. To create a pledge under that section the pledgor must be in juridical possession of the goods; mere custody will not suffice. SEAGER v. HUKMA KESSA, 24 B. 458=2 Bom. L.R. 403 ... 837

Policy.

See INSURANCE, 23 B. 737.

Political Agent.

See PENAL CODE (ACT XLV OF 1860), 24 B. 287.

Possession.

(1) Hindu law—Gift—Gift of moveable property—Delivery of possession not necessary if deed of gift be registered—Transfer of Property Act (IV of 1882), ss. 123, 129—Registration—See HINDU LAW (GIFT), 23 B. 234.

(2) Mahomedan Law—Gift—Gift if not perfected by possession is invalid—Delivery of possession—Possession—Registration—See MAHOMEDAN LAW (GIFT), 23 B. 682.

(3) Suit for possession in Mamlatdar's Court by person ousted—Jurisdiction—Mamlatdar's Court—Decree—Execution—Person custed in execution no party to the decree—See MAMLATDAR'S COURT, 24 B. 397.

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 345.
(5) See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 494.
(6) See FRAUD, 23 B. 406.
(7) See HINDU LAW (PARTITION), 23 B. 137.
(8) See LANDLORD AND TENANT, 23 B. 283.
(9) See LIMITATION ACT (XV OF 1877), 24 B. 23, 435, 504.
(10) See MORTGAGE (GENERAL), 23 B. 614.
(11) See PLEDGE, 24 B. 458.
(12) See VENDOR AND PURCHASER, 23 B. 525.

Practice.

(1) Appeal—Appeal from a decree in the nature of an award—Case referred to the decision of a Court, both parties agreeing to abide by such decision—See APPEAL (GENERAL), 23 B. 752.

(2) *Appeal by defendants—Objections to decree filed by plaintiff—Subsequent withdrawal of appeal—Application by plaintiff for leave to appeal—Sufficient cause—Limitation Act (XV of 1877), s. 5—Civ. Pro. Code (Act XIV of 1882), s. 561.*—The appellants (defendants) filed an appeal against the decree passed in this case on the 30th August 1898, and on the same day gave notice thereof to the respondents (plaintiffs), who on the 28th September, 1898, filed cross-objections to the decree under s. 561 of the Civ. Pro. Code (Act XIV of 1882). On the 2nd March, 1899, the appellants gave notice to the respondents that they would not proceed with the appeal. The respondents then applied to be allowed to appeal, alleging that they had from the first intended to appeal, but had not done so only because the other side had filed an appeal. That being so, they had merely filed cross-objections.

Held, that the application should be granted. It appeared that the applicants had intended to appeal and would have appealed, but for the fact that an appeal in the suit was already on the file. Under these circumstances the applicants showed "sufficient cause" for not filing their appeal within s. 5 of the Limitation Act (XV of 1877), and were, therefore, not barred by limitation. HURGOVINDAS v. JADAVAHOO, 23 B. 692=1 Bom. L.R. 768 ... 463

Practice—(*Continued*). PAGE

(3) *Arbitration—Order of reference to arbitration—Civ. Pro. Code (Act XIV of* 1882), *s.* 506—*Jurisdiction—Absence of written authority to refer.*—By a Judge's order consented to by the plaintiff and defendant this suit was referred to arbitration on the 13th December, 1898. In the following January and February two meetings were held before the arbitrator which were attended by the defendant and managing clerk of his then attorney, and he took an active part in the proceedings. Subsequently the defendant changed his attorney and declined to proceed with the arbitration, contending that the order of reference was illegal, inasmuch as no special authority in writing was given by the parties to their attorneys to obtain the order, as required by s. 506 of Civ. Pro. Code (Act XIV of 1882). He took out a summons to set aside the order.
Held, (dismissing the summons) that the absence of written authority did not invalidate the order of reference. LUXIMIBAI v. HAJEE WIDINA CASSUM, 23 B. 629=1 Bom.L.R. 617 ... 420

(4) Civ. Pro. Code (XIV of 1882), s. 28—Parties—Small Cause Court—Jurisdiction—Declaratory decree—Civ. Pro. Code (XIV of 1882), ss. 278, 283—Attachment of same property in execution of decrees obtained by different creditors—Claim made in one suit to attached property under s. 278—Order made under s. 281—Suit by claimant to establish right—All attaching creditors made defendants to suit—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 266.

(5) Civ. Pro. Code (XIV of 1882), ss. 539, 260—Decree—Execution—Charity—Temple—Scheme of management—Failure of trustees to carry out—Mode of enforcing proper management—Removal of Trustees—See CHARITY, 24 B. 45.

(6) *Commission—Application by a defendant (caveator) to examine witnesses on commission—Civ. Pro. Code (Act* XIV *of* 1882), *Chap.* XXV.—Where a defendant (caveator) applied for the issue of a commission to examine witnesses, the Judge having regard to the circumstances of the case and to the principles laid down in *Berdan* v. *Greenwood*, (1880) 20 Ch. D., 746, (foot-note 3,) refused the application. MOWJI v. NEMCHAND, 23 B. 626=1 Bom.L.R. 384 ... 617

(7) Counter-claim—Permission to extend—See PRINCIPAL AND AGENT, 24 B. 403.

(8) Crim. Pro. Code (Act V of 1898), ss. 269, cl. 3, and 307—Jury—Trial by jury of an offence triable with the aid of assessors—See CRIM. PRO. CODE (ACT V OF 1898), 23 B. 696.

(9) Evidence—Documents not objected to in first Court—Appeal—Indian Evidence Act (I of 1872), ss. 13 and 43—Judgments—Judgments not inter partes—Admissibility of such judgments—See EVIDENCE, 24 B. 591.

(10) Minor—Guardian—Ex-parte decree against minor—Minor's right to sue to set aside ex-parte decree—Proof of negligence on the part of the guardian—See MINOR, 24 B. 547.

(11) Minor—Guardian—Guardians and Wards Act (VIII of 1890), ss. 13, 46 and 39—Duty of District Court to hear all evidence—Decision based on evidence taken by a Subordinate Court illegal—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 23 B. 698.

(12) Partition—Mahomedan law—Practice—Procedure—Joint property—Suit for share of such property—Share allotted to defendant in same suit on payment of Court-fees—See MAHOMEDAN LAW (PARTITION), 23 B. 188.

(13) Procedure—Civ. Pro. Code (Act XIV of 1882), s. 287—Execution—Sale in execution subject to mortgage—Suit to set aside sale and for re-sale of property free from mortgage—See EXECUTION OF DECREE, 23 B. 759.

(14) Procedure—Decree—Ex-parte decree—Appearance of party—Appearance by pleader or recognized agent—Appearance only for purpose of applying for adjournment—Civ. Pro. Code (Act XIV of 1882),

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ss. 36, 37, 100, 102 and 103—Presidency Small Cause Courts Act (XV of 1882), s. 38—Dismissal for default—Remedy of plaintiff—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 414.

(15) Procedure—Hindu law—Widow—Maintenance—Decree for maintenance—Suit for alterating the rate of maintenance fixed by a decree—See HINDU LAW (WIDOW), 24 B. 386.

(16) Procedure—Lunatic—Guardian of the person of a lunatic not competent to sue in respect of the lunatic's estate—Civ. Pro. Code (XIV of 1882), s. 440—Guardian—Right to sue—See LUNATIC, 23 B. 403.

(17) Procedure when suit filed in wrong Court—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 11—Civ. Pro. Code (Act XIV of 1882), s. 57) — Jurisdiction — See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B 679.

(18) *Procedure—Witness—Accused person calling as witnesses persons charged with him and awaiting a separate trial for same offence--Crim. Pro. Code (Act V of 1898), s. 342, cl. 4—Evidence Act (I of 1872), s. 132.*—The accused D, a European British subject, was charged together with others who were natives of India, under ss. 384, 385 and 389 of the Penal Code (Act XLV of 1860) with conspiring to commit extortion. D claimed to be tried by a mixed jury under s. 450 of the Crim. Pro. Code (Act V of 1898). The other accused, who were natives of India, then claimed to be tried separately under s. 452. The trial of D then proceeded, and at the close of the case for the prosecution he proposed to call as his witnesses the persons who had been charged with him and who were awaiting their trial. They objected to be called.

Held, that he was entitled to call them as witnesses and to examine them on oath.

The words "the accused" in cl. 4 of s. 342 of the Crim. Pro. Code (Act V of 1898) mean the accused then under trial and under examination by the Court. QUEEN-EMPRESS v. DURANT, 23 B. 213 ... 141

(19) *Security for cost—Infant female plaintiff—Civ. Pro. Code (Act XIV of 1882), s. 380.*—Unless in exceptional cases, neither an infant female plaintiff nor her next friend ought to be required to give security for costs. BAI POREBAI v. DEVAJI MEGHJI, 23 B. 100 ... 66

(20) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 623, 756.
(21) See CRIM. PRO. CODE (ACT V OF 1898), 23 B. 493.
(22) See DIVORCE, 23 B. 460.
(23) See EVIDENCE, 24 B. 43.
(24) See HINDU LAW (PARTITION), 23 B. 184, 597.
(25) See INJUNCTION, 23 B. 786.
(26) See INSOLVENCY, 23 B. 474.
(27) See LIMITATION, 23 B. 442.
(28) See LUNATIC, 23 B. 653.
(29) See MINOR, 23 B. 620.
(30) See SURETY, 23 B. 478.
(31) See VALUATION, 23 B. 486.

Presumption.

Death—Presumption of—Evidence—Evidence Act (I of 1872), ss. 107 and 108—Person not heard of for seven years—See EVIDENCE, 23 B. 296.

Principal and Agent.

(1) *Agent—Revocation of authority—Interest of agent in property—Exercise of authority so as to bind principal—Contract Act (IX of 1872), ss. 201, 202, 203—Counter claim—Permission to extend—Practice.*—The plaintiff received instructions by letter from the defendants to purchase cotton on their behalf. This letter was received by the plaintiff before a telegram sent by the defendants the next day revoking the order reached him. The plaintiff replied by letter stating that the telegram had arrived too late and that the purchase had already

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been made. In fact, the plaintiff had merely appropriated to the defendants a contract entered into by himself with a third party the day before the defendants' order reached him.

Held, that the telegram was a revocation of the order contained in the letter of the previous day.

Held, further, that the plaintiff had no such interest in the subject-matter of the agency as to prevent its termination; nor had he exercised his authority so as to bind his principle, no contractual relation with any third person having been created before the receipt of the telegram.

The defendants owing to their ignorance of the true facts did not include in their counter claim certain sums paid by them to the plaintiff in part payment of the alleged losses incurred in respect of the purchase and re-sale of the aforesaid cotton.

Held, that the lower Court (RUSSELL, J.) had rightly permitted the defendants to put in a supplemental written statement extending their counter claim so as to include these items. LAKHMICHAND v. CHOTOORAM, 24 B. 403=2 Bom. L.R. 778 ... 801

(2) Guardian—Minor—Loan obtained by guardian as such—Liability for such loan—Warranty by guardian of authority to borrow—Misrepresentation on a point of law—Contract Act (IX of 1872), s. 235—Guardian's liability—Warranty—Breach of warranty—Suit on warranty—See WARRANTY, 24 B. 166.

Privileged Communication.

See DEFAMATION, 24 B. 13.

Privity.

See LIMITATION ACT (XV OF 1877), 24 B. 504.

Probate.

(1) *Will—Nuncupative will of a Mahomedan—Probate and Administration Act* (V *of* 1881), *ss.* 3, 24, 25, 26, 62—*Indian Succession Act* (*X of* 1865), *s.* 244 *and Ch.* IX—Probate may be granted of a nuncupative will. *Re* MARIAMBAI, 24 B. 8=1 Bom. L. R. 715 ... 542

(2) See BANK OF BOMBAY, 24 B. 350.

Procedure.

(1) Widow—Maintenance—Decree for maintenance—Suit for altering the rate of maintenance fixed by a decree—Practice—Procedure—Hindu law—See HINDU LAW (WIDOW), 24 B. 386.

(2) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B 679.

(3) Act IV OF 1893 (PARTITION), 23 B. 77.

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 756.

(5) See DIVORCE, 23 B. 460.

(6) See EXECUTION OF DECREE, 23 B. 759.

(7) See INSOLVENCY, 23 B. 474.

(8) See LUNATIC, 23 B. 403, 653.

(9) See MAHOMEDAN LAW (PARTITION), 23 B. 188.

(10) See MINOR, 23 B. 620.

(11) See PRACTICE, 23 B. 213.

(12) See SURETY, 23 B. 478.

Promissory Notes.

Forgery—No title through forgery—Shares, debentures, Government promissory notes bearing a forged indorsement—Holder has no title—Government promissory notes surrendered for renewal—Title to renewed notes—English Bills of Exchange Act (Stat. 45 and 46 Vict. c. 61)—Negotiable Instruments Act (XXVI of 1881)—Holder in due course—See FORGERY, 24 B. 65.

Pujari.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 659.

(2) See JURISDICTION, 23 B. 122.

Railway.

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Railways Act (IX of 1890), s. 12—Accommodation works—Water-works—Municipality of Bombay—Right to enter on land of Railway Company to lay pipes, &c.—Bombay Municipal Act (Bombay Act III of 1888), ss. 222, 65—See WATER-WORKS, 23 B. 358.

Railway Company.

Negligence—Negligence of Railway Company in leaving door of railway carriage open or unfastened—Hurt caused to passenger while trying to secure door.—Leaving the door of a railway carriage open or unfastened amounts to negligence on the part of a railway company, and the company is liable for any injury caused thereby to a passenger.

If any inconvenience or danger is caused by the negligence of the company, a passenger may lawfully attempt to get rid of such inconvenience or danger, provided that in doing so he runs no obvious risk disproportionate to the inconvenience or danger, and is not himself guilty of any negligence; and, if in such attempt he is injured, the company is liable in damages.

The door of a railway carriage attached to a train running from Poona to Bombay was left open or unfastened when the train left the Khandala station. The plaintiff was then asleep in the carriage. He subsequently awoke when the train was passing through a tunnel and found that the whole of the door, which opened outwards, had been torn away from its hinges, except the upper part or sunshade, which was flapping backwards and forwards against the side of the tunnel and the door-post of the carriage. In attempting to secure it, the top of the plaintiff's finger was torn away and the bone of one of his fingers fractured.

Held, that the injuries were caused by the negligence of the Railway Company and that the plaintiff was entitled to damages. BROMLEY v. G. I. P. RAILWAY COMPANY, 24 B. 1=1 Bom. L.R. 254 ... 537

Ratification.

See MINOR, 23 B. 146.

Receipt.

(1) See REGISTRATION, 24 B. 609.
(2) See STAMP ACT (I OF 1879), 23 B. 54.

Receiver.

(1) *Subordinate Judge, power of, to appoint—Appeal from order of refusal of Subordinate Judge—Jurisdiction—Civ. Pro. Code (Act XIV of 1882), ss. 503 and 505.*—A Subordinate Judge, when considering the expediency of the appointment of a receiver, is acting under s. 503 of the Civ. Pro. Code (Act XIV of 1882) as explained by s. 505. When he does appoint, his order is passed under s. 503, and when he refuses to take the necessary step preliminary to appointment, his order is also made under that section. An appeal lies from such an order made by a Subordinate Judge. Circumstances under which a receiver is appointed, considered. SANGAPPA v. SHIVBASAWA, 24 B. 38=1 Bom. L.R. 502 ... 562

(2) See CHARITY, 24 B. 50.

Reference.

See SMALL CAUSE COURT, 24 B. 310.

Registration.

(1) *Receipt—Receipt by mortgagee setting forth settlement of mortgage accounts—Evidence Act (I of 1872), s. 92, cl. 4—Registration Act (III of 1877), s. 17, cl. (b), Exception (n).*

In 1875 certain lands were mortgaged for Rs. 675. The mortgage bond provided that the mortgagee was to enjoy the rents and profits in lieu of interest on Rs. 475, and that the remaining Rs. 200 were to carry interest at 6 per cent. per annum.

In 1880 a receipt was passed by the mortgagee to the mortgagor reciting that on taking accounts Rs. 525 were due on account of the mortgage, that Rs. 100 were paid on the day of the receipt, that a further

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sum of Rs. 100 was to be paid in a month and a half, and that the rents and profits of the property were in future to be taken for interest on the balance of Rs. 325 only.

In 1896, the mortgagor sued for redemption, and relied on the receipt in support of his case.

Held that the receipt did not require registration. It purported to be a mere settlement of accounts and was not intended to modify or supersede the original mortgage contract. Clause 4, s. 92, of the Indian Evidence Act (I of 1872) had therefore, no application to the case. LAKSHMAN v. DAMODAR, 24 B. 609=2 Com .L.R. 422. 936

(2) *Registration Act* (III *of* 1877), *s.* 17, *cl.* (*b*)—*Assignment—Assignment of a right to recover assessment.*—A passed to B a document by which he assigned his *inam* rights over certain lands held by *mirasi* tenants, including the right to recover the assessment fixed on them at Rs. 40 a year and also the right of succession to the full ownership of the lands, should the *mirasi* tenure on which they were held come to an end.

Held, that the document purported to assign a right, title and interest in immoveable property of the value of more than Rs. 100, and, as such, required registration under cl. (*b*) of s. 17 of the Registration Act (III of 1877). ANANDRAO v. JOTI, 24 B. 615=2 Bom. L. R 427. 940

(3) See HINDU LAW (GIFT), 23 B. 234.

(4) See MAHOMEDAN LAW (GIFT), 23 B. 682.

Registration Act (XX of 1866).

S. 3—See TREES, 24 B. 31.

Registration Act (III of 1877).

(1) S. 17 (*b*)—See REGISTRATION, 24 B. 615.

(2) S. 17, cl. (*b*), Excep. (*n*)—See REGISTRATION, 24 B. 609.

Regulation II of 1827 (Bombay, Caste-questions, Pleaders).

(1) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 23 B. 693.

(2) S. 21—See JURISDICTION, 23 B. 122.

(3) S. 54—See PLEADER AND CLIENT, 23 B. 657.

Regulation IV of 1827 (Bombay, Civil Courts Law to be Observed).

S. 26—See EASEMENT, 23 B. 666.

Regulation V of 1827 (Bombay Acknowledgment of Debts, Interest, Mortgages).

S. 15, cl. 3—See MORTGAGE (SALE), 23 B. 781.

Regulation XVI of 1827 (Bombay, Collection of Land Revenue).

See VATAN, 24 B. 484, 556.

Release.

See MINOR, 23 B. 146.

Relief.

See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 756.

Religion.

Native Christians—Change of religion—Law applicable to converts—Succession—Inheritance.—Where, in consequence of the conversion of a person from one form of religion to another, the question arises as to the law to be applied to such person, that question is to be determined not by ascertaining the law which was applicable to such person prior to the conversion, but by ascertaining the law or custom of the class to which such person attached himself after conversion and by which he preferred that his succession should be governed. LASTINGS v. GONSALVES, 23 B. 539=1 Bom. L.R. 53. 359

Remand.

See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 32.

Re-marriage. PAGE

Widow Re-marriage Act (XV of 1856), ss. 2 and 3—Hindu law—Adoption —Gift of a son in adoption by a widow after her re-marriage—See HINDU LAW (ADOPTION), 24 B. 89 ...

Remuneration.

See GUARDIAN, 24 B. 95.

Rent.

(1) See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 24 B. 489.
(2) See LANDLORD AND TENANT, 23 B. 15, 510.
(3) See STAMP, 24 B. 257.

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See LIMITATION ACT (XV OF 1877), 24 B. 504.

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See MAHOMEDAN LAW (INHERITANCE), 24 B. 112.

Res-Judicata.

(1) Civ. Pro. Code (Act XIV of 1882), s. 13—Court of competent jurisdiction—See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 456.

(2) Civ. Pro. Code (Act XIV of 1882), ss. 13 and 14—Consent decree—Partners—Joint contract—Liability of partners—Joint liability—Judgment recovered against one partner—Judgment of a foreign Court—See PARTNERS, 24 B. 77.

(3) Execution—Orders in execution proceedings—Withdrawal of application for execution—Effect of such withdrawal—"Date of issuing notice", meaning of the words—Execution of decree—Limitation Act (XV of 1877), art. 179, cl. 5—See LIMITATION ACT (XV OF 1877). 23 B. 35.

(4) Former decree in favour of plaintiff, but issue as to adoption found against him—See EVIDENCE, 23 B. 296.

(5) Possessory suit in Mamlatdar's Court—Dismissal of suit by Mamlatdar on the merits—Subsequent suit in Civil Court under s. 9 of the Specific Relief Act (I of 1877)—Mamlatdars' Act (Bom. Act III of 1876), s. 18—Specific Relief Act (I of 1877), s. 9—See ACT III OF 1876 (BOMBAY MAMLATDARS' COURT), 24 B. 251 ...

(6) Suit by C for mesne profits as devisee of land under will of A—Will held valid and C's claim allowed — Application by C as legal representative of A for execution of decree obtained by A—Question of validity of will again raised—Civ. Pro. Code (Act XIV of 1882), s. 244—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 536.

(7) See MINOR, 24 B. 547.

Restitution of Conjugal Rights.

(1) Husband and wife—Maintenance order obtained by a wife against husband—Subsequent decree for restitution of conjugal rights obtained by husband—Effect of such decree on previous order of maintenance—Crim. Pro. Code (Act X of 1882), s. 488—Maintenance —See HINDU LAW, MAINTENANCE, 23 B. 484.

(2) Husband and wife—Suit for possession of wife—Wife herself defendant —Limitation—Limitation Act (XV of 1877), sch. II, art. 35—Demand and refusal—Continuing cause of action—Limitation Act (XV of 1877), s. 23—See HUSBAND AND WIFE, 23 B. 307.

(3) See PARSIS, 23 B. 279.

Restraint of Trade.

Contract Act (IX of 1872), s. 27—Injunction—Contract in Zanzibar—Contract for personal service—Contract not to practise as physician —Construction—See INJUNCTION, 23 B. 103.

Resumption.

(1) Service lands—Mere non-performance of service does not make the holding adverse—Adverse possession—Limitation—See SERVICE LANDS, 23 B. 602.

(2) See SERVICE TENURE, 24 B. 482.

Revenue Commissioner.

See LIMITATION ACT (XV OF 1877), 24 B. 435.

Revenue Survey.

See LIMITATION ACT (XV OF 1877), 24 B. 435.

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(1) See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 50.
(2 See MINOR, 23 B. 620.

Revision.

See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 50.

Right of Way.

(1) Right of way enjoyed for agricultural purpose—Change of use—Increase of servitude—Injunction—Easement—Easements Act (V of 1882)—See EASEMENT, 24 B. 188.
(2) See EASEMENT, 23 B. 595.
(3) See EVIDENCE, 24 B. 43.
(4) See SPECIFIC RELIEF ACT (I OF 1877), 23 B. 673.

Right to sue.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 659.
(2) See HINDU LAW (JOINT FAMILY), 24 B. 123.
(3) See LUNATIC, 23 B. 403.
(4) See MAHOMEDAN LAW (WAKF), 24 B. 170.
(5) See MINOR, 24 B. 238, 547.

Riparian Owners.

(1) Rights of—Mamlatdar—Jurisdiction—Mamlatdars' Act (Bom. Act III of 1876), s. 4—Water—Water-course—See WATER, 23 B. 506.
(2) Rights of—Water-course—Bombay Irrigation Act (Bom. Act VII of 1879), s. 48—Leakage water—See MAMLATDAR, 23 B. 751.

Riparian Proprietors.

See JURISDICTION, 23 B. 47.

Sadavart.

See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 659.

Sale.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 181, 723.
(2) See LIMITATION ACT (XV OF 1877), 23 B. 246.
(3) See VENDOR AND PURCHASER, 23 B. 525.

Sale Certificate.

See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 120.

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See ACT II OF 1890 (BOMBAY, SALT), 23 B. 788.

Salvage.

Amount of salvage awarded—Mode of estimating salvage services—Allocation of salvage amongst officers and crew—Costs—Bail—Shipping—See SHIPPING, 24 B. 55.

Sanction to Prosecute.

See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 50.

Satta Transactions.

See WAGER, 24 B. 227.

Scheme.

See CHARITY, 24 B. 45, 50.

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See LIMITATION ACT (XV OF 1877), 24 B. 435.

Security.

See PRACTICE, 23 B. 100.

Security to keep peace. PAGE

See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 32.

Sentence.

(1) Alteration of sentence—Crim. Pro. Code (Act X of 1882), s. 423—Appellate Court—Powers of appellate Court to enhance sentence—See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 439.

(2) Indian Penal Code (Act XLV of 1860) s. 71—Crim. Pro. Code (Act V of 1898), s. 35—Conviction of several offences at one trial—one sentence only to be passed in such cases. See CRIM. PRO. CODE (ACT V OF 1898), 23 B. 706.

Service.

See CRIM. PRO. CODE (ACT V OF 1898), 24 B. 527.

Service Lands.

Mere non-performance of service does not make the holding adverse—Adverse possession—Limitation—Resumption.—Where lands are held as remuneration for services, the fact that no services have been performed does not of itself make the holding adverse. To make the holding adverse there must be a refusal to perform service or a claim to hold the lands free of service. KOMARGOWDA v. BHIMAJI, 23 B. 602=1 Bom. L.R. 61 ... 402

Service Tenure.

Land Tenure—Service tenure—Non-performance of service—Payment of assessment by mortgagee—Change of title—Redemption--Resumption.—Plaintiff was the holder of certain inam lands, which were exempted from payment of assessment in consideration of his rendering certain services to Government.

In 1873 the lands were mortgaged to defendant, on condition that he was to enjoy the usufruct in lieu of interest.

In the famine of 1876 plaintiff left the village, and as no service was rendered, Government appointed another person to perform the service and demanded payment of the full assessment from defendant. Defendant paid the assessment and continued in possession. But Government did not forfeit the holding, and the lands continued, as before, in plaintiff's name in the vatan register.

In 1896 plaintiff filed a suit to redeem the lands.

Held, that, in the absence of a declaration of forfeiture of the holding, the steps which Government took to recover the assessment in lieu of service had not the effect of creating any change of title, and that the plaintiff was, therefore, entitled to redeem. BHIMA v. RAGHAVENDRACHARYA, 24 B. 482=2 Bom. L. R. 211 ... 852

Servitude.

See EASEMENT, 23 B. 595.

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Shares.

(1) Registration and transfer of shares—Rights of surviving co-parceners—Necessity of probate or letters of administration—Presidency Banks Act (XI of 1876), ss. 20, 22 and 23—Bank of Bombay—See BANK OF BOMBAY, 24 B. 350

(2) See COMPANY, 23 B. 685.

(3) See FORGERY, 24 B. 65.

Ship.

(1) See INSURANCE, 23 B. 737.

(2) See SHIPPING, 23 B. 551.

Shipper.

See SHIPPING, 23 B. 551.

Shipping. PAGE

(1) *Charter-party—Bill of lading—Freight—Rate of freight in charter-party—Contract by sub-charterer with shipper for freight at lower rate—Refusal by captain to sign bills of lading at lower rate than rate in charter-party—Payment by shipper of difference under protest.*—On 3rd March 1898, Karámsi Dharsi and Co., a firm of freight jobbers in Bombay, contracted to provide the plaintiffs with freight for 3,000 tons of cargo to Liverpool at 16*s.* 6*d.* per ton in a steamer to be subsequently named, and on the same day handed to the plaintiffs three shipping orders addressed to the captain of the ship, the name of which was to be afterwards inserted. In these shipping orders the higher and lower rate clause was as follows:—"Bill of lading if required at lower or higher rate, difference payable here as customary." This clause the plaintiffs struck out from each of the shipping orders according to their usual practice. On 11th May 1898, the defendants chartered the steamship "Paddington" of which they were also the owners' agents in Bombay, and on the 12th May assigned a half share of their interest under the charter-party to Karamsi Dharsi and Co. By the charter-party a full and complete cargo was to be loaded, and the freight was to be £1-10 per ton. The captain, however, was authorized to sign clean bills of lading at any rate of freight required by the charterers without prejudice to the charter-party, but at not less than the chartered rate, unless the difference was paid in cash before sailing.

Karamsi Dharsi and Co. having thus sub-chartered the "Paddington" declared that steamer to the plaintiffs for 2,747 tons of cargo under their contract of the 3rd March 1898, and the name of the steamer was then entered in the shipping orders for that amount of cargo. The plaintiffs thereupon commenced to load a cargo of wheat. By the 21st June, 2,100 tons had been put on board; mate's receipts were given to the plaintiffs and bills of lading were prepared by them, stating the rate of freight to be 16*s.* 6*d.* per ton as per the shipping orders, and were presented for signature to the captain. He refused to sign them unless the difference between 16*s.* 6*d.* and the chartered rate, *viz.*, £1-10, was paid to him as provided in the charter-party. The plaintiffs thereupon refused to ship any more cargo and demanded the return of the cargo already shipped on board the "Paddington." On the 24th June the "Paddington" sailed from Bombay, the captain having previously authorized the defendants to sign bills of lading for him after his departure provided they were in accordance with the charter-party. After some delay the plaintiffs on the 29th June accepted bills of lading for the 2,100 tons at £1-10 and paid under protest the difference between that rate and their contract rate (16*s.* 6*d.*) and certain other sums for which the defendants as agents for the owners claimed a lien. The plaintiffs now sued to recover from the defendants the amount so paid under protest. The defendants contended that as agents for owners they were justified in refusing to give bills of lading until the sums due and for which they claimed a lien were paid.

Held, that the defendants had no lien for the sums paid and that the plaintiffs were entitled to recover the amount claimed.

Per CANDY, J.—The plaintiffs were entitled upon demand to have the said 2,100 tons re-delivered to them by the captain. On 29th June the plaintiffs were entitled to clean bills of lading at 30*s.*, and the sum paid by them under protest in order to obtain such bills of lading was recoverable by them. Under the circumstances the defendants had no lien for freight and demurrage.

Per STARLING, J.—The captain was justified in refusing to re-deliver the said 2,100 tons. The plaintiffs were entitled to clean bills of lading at 30*s.*, and there was no lien for freight and demurrage in respect of which the plaintiffs had paid under protest the sum claimed by defendants. RALLI BROTHERS v. CHABILDAS LALLUBHAI, 23 B. 551 = 1 Bom. L.R. 319 ... 367

(2) *Salvage—Amount of salvage awarded—Mode of estimating salvage services—Allocation of salvage amongst officers and crew—Bail—Costs.*—On the 13th August 1898, the S.S. "Cashmere," being (as found

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by the Court) in a position of risk and hazard, which by a change in the weather might have at once become one of danger, was in need of assistance which the "Naseri" afforded her. The services, however, rendered by the "Naseri" were not of an extraordinary or protracted character. The owners of the "Naseri" sued claiming Rs. 1,00,000 for salvage services and the master and crew of the "Naseri" filed a second suit claiming Rs. 50,000. The defendant ship paid into Court Rs. 5,000 for the owners of the "Naseri" in the first suit, and Rs. 2,257 for the crew in the second suit. The value of the S.S. "Cashmere" was Rs. 78,000 and that of the cargo on board was Rs. 56,510.

Held, that the amount paid into Court by the defendant ship was sufficient for the salvage services rendered.

Held, also, that the cargo was liable in the same proportion.

Principles regarding (*a*) salvage generally, (*b*) allocation of salvage amongst officer and crew, (*c*) costs, and (*d*) bail discussed. BOMBAY AND PERSIA STEAM NAVIGATION COMPANY v. S.S. "CASHMERE," 24 B. 55=1 Bom. L.R. 557 ... 574

Small Cause Court.

(1) Jurisdiction—Declaratory decree—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 266.

(2) *Small Cause Courts Act, Provincial* (IX *of* 1887), *s.* 25—*Civ. Pro. Code* (*Act XIV of* 1882), *s.* 203—*Decree not according to law—Substantial failure of justice—Interference under extraordinary jurisdiction.*—The plaintiff, a Hindu widow, sued for Rs. 74-4-0, being the balance due on an account. She called six witnesses to prove her claim. The defendant did not appear to defend the suit. The Judge, however, dismissed the suit, the only judgment recorded by him being as follows:—"Claim not proved. Claim rejected with costs." The plaintiff thereupon applied to the High Court under its extraordinary jurisdiction, and the above decree was set aside, and a decree passed for the plaintiff with costs.

Held, that the decree being founded on a judgment not in accordance with s. 203 of the Civ. Pro. Code (Act XIV of 1882), was not according to law, and, therefore, the High Court under s. 25 of the Provincial Small Cause Courts Act (IX of 1887) had jurisdiction to pass such order in the matter as it thought fit.

Per FARRAN, C.J.—In a case where there is nothing to excite suspicion, and where the plaintiff had given such proof of her claim as the law requires, the plaintiff is entitled, and this Court is entitled, to have some indication from the Judge of the point upon which he dismisses the suit, to show that he is not acting from mere caprice or in ignorance of the rules of law which regulate the proof requisite to establish a plaintiff's claim.

Per FULTON, J.—The ground on which I would base our decision is that the error under s. 203 brings the case within our jurisdiction, and that the case being thus before us we are entitled, on being convinced that a failure of justice has occurred, to pass an order which will rectify the mistake. BAI JASODA v. BAMANSHA, 23 B. 334 ... 222

(3) *Small Cause Courts Act, Provincial* (IX *of* 1887), *ss.* 27 *and* 33—*Decree passed by a Subordinate Judge invested with the jurisdiction of a Small Cause Court—Finality of such decree—Appeal—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 622 *and* 646-*A—Reference.*—A Subordinate Judge, invested with the jurisdiction of a Court of Small Causes, tried a suit under his Small Cause Court powers, and passed a decree in plaintiff's favour. The defendant appealed against the decree, and the appellate Court, being of opinion that the suit was not of a nature cognizable by a Court of Small Causes, reversed the decree and remanded the case to the Subordinate Judge for trial under his ordinary jurisdiction. Thereupon the Subordinate Judge made a reference to the High Court under s. 646-A of the Code of Civil Procedure (Act XIV of 1882).

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Held, that the reference was not authorized by the provisions of s. 646-A of the Code, as it applied to a case before judgment. The High Court could, however, deal with the matter under s. 622 of the Code.

Held, also, that the suit having been tried by the Subordinate Judge n the exercise of his jurisdiction as a Judge of a Court of Small Causes, the decree was final, and not appealable to the District Court. The only remedy open to the aggrieved party was to apply to the High Court under s. 25 of Act IX of 1887. DIWALIBAI v. SADASHIVDAS, 24 B. 310=1 Bom. L. R. 836 ... 742

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 382, 716.

Smoking.

Indian Railways Act (IX of 1890), s. 110—"Compartment," meaning of the word—See ACT IX OF 1890 (RAILWAYS), 24 B. 293.

Special Judge.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B. 321.

Specific Relief Act (I of 1877).

(1) S. 9—*Res judicata*—Possessory suit in Mamlatdar's Court—Dismissal of suit by Mamlatdar on the merits—Subsequent suit in Civil Court under s. 9 of the Specific Relief Act (I of 1877)—Mamlatdars' Act (Bom. Act III of 1876), s. 18—See ACT III OF 1876 (BOMBAY MAMLATDARS' COURTS), 24 B. 251.

(2) *S.* 9—*Right of way—Immoveable property—Right of way is not immoveable property within the meaning of s 9 of the Act.*—A right of way is not "immoveable property" within the meaning of s. 9 of the Specific Relief Act (I of 1877). MANGALDAS v. JEWANRAM, 23 B. 673=1 Bom. L. R. 167 ... 449

(3) *S.* 39—*Limitation Act* (XV *of* 1877), *sch.* II, *art.* 91—*Suit to cancel a void or voidable instrument—Reasonable apprehension of serious injury—Limitation.*—Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it cancelled. The test is "reasonable apprehension of serious injury." Whether that exists or not, depends upon the circumstances of each case. It cannot be laid down, as a rule of law, that in no case can a man, who has parted with the property in respect of which a void or voidable instrument exists, sue to have such instrument cancelled. KOTRABASSAPPAYA v. CHENVIRAPPAYA, 23 B. 375 ... 249

(4) Ss. 39, 42—See FRAUD, 23 B. 406.
(5) S. 42—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 266.
(6) S. 42—See HINDU LAW (ADOPTION), 24 B. 260.
(7) S. 42—See MAHOMEDAN LAW (WAKF), 24 B. 170.
(8) S. 57—See INJUNCTION, 23 B. 103.

Stake-holder.

See LIMITATION ACT (XV OF 1877), 24 B. 23.

Stamp.

(1) *Sale of leasehold property—Rent reserved not liable to* ad valorem *duty—Stamp duty leviable only on the actual consideration money—Stamp Act* (II *of* 1899), *ss.* 24, 25, *sch. I, art.* 63.—Certain leasehold property demised by the Secretary of State for India to the original lessee for a term of 999 years at the yearly rent of Rs. 39-11-0 was assigned to the trustees of a charity for the sum of Rs. 1,02,000, the trustees covenanting on their part to pay the rent reserved by the original lease. The deed bore a stamp of the value of Rs. 1,020; Rs. 1,02,000 having been assumed to be the consideration for the transfer. The Collector of Bombay referred to the High Court the question whether, under s. 24 of the Stamp Act (Act II of 1899), the payment of the rent reserved by the deed

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should not be taken as part of the 'consideration' in respect whereof the transfer was chargeable with *ad valorem* duty.

Held, that the *ad valorem* duty was only payable on the consideration actually mentioned in the conveyance (*viz.*, the amount of the purchase money). *In re* INDIAN STAMP ACT, 1899, s. 57, 24 B. 257=2 Bom. L. R. 401 ... 707

(2) See HUNDI, 24 B. 360.

(3) See STAMP ACT (I OF 1879), 23 B. 54.

Stamp Act (I of 1879).

S. 3 (17)—*Receipt—Memorandum of payment—Document containing no acknowledgment of payment not a receipt—No stamp necessary for such document*—A made a payment of Rs. 22 to B. At A's request C made a memorandum in writing to the following effect:—"B has received Rs 22," but affixed no stamp to it. He was charged and convicted, under s. 61 of the Indian Stamp Act (I of 1879), for not affixing a receipt stamp to the memorandum.

Held (reversing the conviction) that the memorandum was not a receipt. To constitute a receipt within the meaning of s. 3 (17) of the Stamp Act, there must be an acknowledgment, either express or implied, of the receipt, and not a mere statement that money was received. *In re* JAMNADAS HARINARAN, 23 B. 54 ... 36

Stamp Act (II of 1899).

Ss. 24, 25, and art. 63, sch. I—See STAMP, 24 B. 257.

Statute 14, Geo. III, C. 48.

See INSURANCE, 23 B. 191.

Statute 3 & 4 Vict., C. 27.

S. 25—See MORTGAGE (GENERAL), 23 B. 614.

Statute 8 & 9 Vict., C. 106.

See INSURANCE, 23 B. 191.

Statute 8 & 9 Vict., C. 207.

Ss. 68 and 71—See WATER-WORKS, 23 B. 358.

Statute 11 & 12 Vic., C. 21.

Ss. 47, 56—See INSOLVENCY, 23 B. 474.

Statute 20 & 21 Vict., C. 85.

(1) S. 32—See ACT XV OF 1865 (PARSI MARRIAGE AND DIVORCE), 24 B. 465.

(2) S. 55—See DIVORCE, 23 B. 460.

Statute 21 & 22 Vic., C. 108.

S. 17—See DIVORCE, 23 B. 460.

Statute 23 & 24 Vic., C. 144.

S. 7—See DIVORCE, 23 B. 460.

Statute 29 & 30 Vic., C. 32.

S. 3—See DIVORCE, 23 B. 460.

Statute 35 & 36 Vict., C. 94.

S. 16, sub s. 2—See ACT XI OF 1878 (ARMS), 24 B. 423.

Statute 45 & 46 Vic., C. 61.

See FORGERY, 24 B. 65.

Step-in-aid of Execution.

(1) Execution—Surety—Limitation Act (XV of 1877), sch. II, art. 179, Expl. I—Liability of surety in execution—Application for execution against a surety when a step-in-aid of execution against a principal—Mode of enforcing payment against a surety—Practice—Procedure—See SURETY, 23 B. 479.

(2) See LIMITATION ACT (XV OF 1877), 23 B. 311.

Succession. PAGE

Inheritance—Religion—Native Christians—Change of religion—Law applicable to converts—See RELIGION, 23 B. 539.

Succession Act (X of 1865).

(1) See MINOR, 23 B. 146.
(2) See RELIGION, 23 B. 539.
(3) S. 93—See WILL, 23 B. 80.
(4) S. 244 and Ch. IX—See PROBATE, 24 B. 8.

Succession Certificate Act (VII of 1889).

S. 4—See PROBATE, 24 B. 8.

Summary Settlement.

See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 23 B. 39.

Surety.

(1) Father's liability as surety—Liability of his sons for the debt for which he was surety—Hindu law—Joint family—See HINDU LAW (JOINT FAMILY), 23 B. 454.

(2) *Limitation Act* (XV *of* 1877), *sch.* II, *art.* 179, *Expl.* 1—*Liability of surety in execution—Application for execution against a surety when a step in aid of execution against a principal—Mode of enforcing payment against a surety—Practice—Procedure.*—Vinayak Ramchandra was awarded the sum of Rs. 4,951-13-11 by the District Judge as compensation for land taken up by the Collector under the Land Acquisition Act, 1870. The money was ordered to be paid over to him on his giving security for its refund in case the appellate Court so ordered. Damodar Viziarangam thereupon became his surety and executed a bond binding himself to pay into Court the said sum of Rs. 4,951-13-11, if ordered by the Court. On the 25th September, 1893, the High Court varied the order of the District Court and awarded Rs. 4,204-7-11 (part of the Rs 4,951-13-11) to another claimant Kusaji Ramji (the appellant). On 17th February 1894, Kusaji applied for execution of this order against the surety Damodar and claimed also interest (Rs. 1,635-10-0) and costs (Rs. 550-15-4). Damodar objected to pay interest or costs, and the High Court held that, as surety, he was liable only for the principal sum, but not to interest or costs. Subsequently, *viz.*, on the 16th February 1897, Kusaji applied for execution against the principal debtor Vinayak of the order of the 25th September 1893, in respect of the interest and costs, contending that his application of the 17th February 1894, against the surety was a step-in aid of the execution of the order under art. 179 of the Limitation Act (XV of 1877) and prevented limitation.

Held, that his application was barred by limitation. The application for execution against the surety would not operate to keep alive the order as against the principal debtor unless it was made to enforce a liability which was common to both under the order. But under the order the surety was not liable for interests or costs. His liability was expressly confined by his bond to the principal sum, and it was only as to that sum that he was jointly liable with Vinayak. The previous application, therefore, for execution against the surety for money for which he was not liable under the order, could not be regarded as a step in aid of execution against the principal debtor Vinayak.

The mode of enforcing payment against a surety is by summary process in execution and not by separate suit. KUSAJI v. VINAYAK, 23 B. 478 ... 318

Survey.

See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 23 B. 39; 24 B. 539.

Survey Officer.

(1) See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 24 B. 489.
(2) See KHOT, 24 B. 533.
(3) See LANDLORD AND TENANT, 24 B. 426.

Survivorship.

See BANK OF BOMBAY, 24 B. 350.

Temple.

(1) Scheme of management—Failure of trustees to carry out—Mode of enforcing proper management—Removal of trustees—Practice—Civ. Pro. Code (Act XIV of 1882), ss. 539 and 260—Decree—Execution—Charity—See CHARITY, 24 B. 45.

(2) Trustee—Constructive trustee—His liability—Right to sue—Limitation—Civ. Pro. Code (Act XIV of 1882), s. 539—Public, religious and charitable trust—Charity—Hindu temple, with a dharmashala and sadavart attached to it—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 659.

(3) See CHARITY, 24 B. 50.

(4) See CRIM. PRO. CODE (ACT V OF 1898), 24 B. 527.

Tenancy at Sufferance.

See LIMITATION ACT (XV OF 1877), 24 B. 504.

Tenant holding over.

See LIMITATION ACT (XV OF 1877), 24 B. 504.

Timber.

Standing timber—Mango tree—Mango tree may be standing timber according to the custom of a locality—Registration Act (XX of 1866), s. 3—Trees—See TREES, 24 B. 31.

Time.

See LIMITATION, 23 B. 442.

Title.

(1) See FORGERY, 24 B. 65.

(2) See JURISDICTION, 24 B. 407.

(3) See LIMITATION ACT (XV OF 1877), 24 B. 435.

(4) See MORTGAGE (GENERAL), 23 B. 119.

Transfer.

(1) See COMPANY, 23 B. 685.

(2) See TRANSFER OF PROPERTY ACT (IV OF 1882), 24 B. 502.

(3) See VENDOR AND PURCHASER, 24 B. 400.

Transfer of Property Act (IV of 1882).

(1) See LANDLORD AND TENANT, 23 B. 510.

(2) See MORTGAGE (SALE), 23 B. 781.

(3) S. 7—See MINOR, 23 B. 146.

(4) S. 39—See HINDU LAW (WIDOW), 23 B. 342.

(5) Ss. 40, 54, 55 (6) (*b*)—Trusts Act (II of 1882), s. 91—Contract of sale—Delivery of possession—Payment of the whole of purchase-money—Registered conveyance not executed—Transfer—Attachment—Vendor having no attachable interest—See VENDOR AND PURCHASER, 24 B. 400.

(6) S. 53—See WILL, 23 B. 1.

(7) S. 54—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 181.

(8) S. 58—See LICENSE, 23 B. 397.

(9) S. 69—Town of Bombay, Limits of—See MORTGAGE (SALE), 23 B. 348.

(10) S. 85—See GUARDIAN, 23 B. 287.

(11) *Ss. 87, 88, 89 and 93—Mortgage—Decree for sale of mortgaged property—Default in payment on the date fixed in the decree—Redemption—Power to enlarge the time.*—In a suit brought by a mortgagee for sale of the mortgaged property, a decree was passed on 27th July 1895, directing that the mortgagor should pay the mortgage debt within six months, and that in default his right of redemption should be foreclosed and the mortgagee should be at liberty to sell the property.

On the 27th July, 1898, the mortgagee applied for an order absolute for sale.

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On the 11th October 1898, the mortgagor applied for permission to pay into Court the amount of the decree.

Held, that the application could not be granted. The case fell within ss. 88 and 89, and not within s. 87 or 93, of the Transfer of Property Act (IV of 1882). The money not having been paid within the appointed time the Court was bound to pass an order absolute for sale; it had no power to enlarge the time for payment. TANIRAM v. GAJANAN, 24 B. 300=1 Bom. L. R. 821 ... 735

(12) S. 89—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 44—Agreement filed under section and becoming a decree—Default in payment of instalments due under decree—Application to make decree absolute under s. 89 of Transfer of Property Act (IV of 1882)—Limitation Act (XV of 1877), sch. II, art. 179—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 23 B. 644.

(13) S. 99—See MORTGAGE (GENERAL), 23 B. 119.

(14) S. 108, cl. (*e*)—Contract Act (IX of 1872), s. 65—Landlord and tenant—Lease for a year—Whole rent paid in advance—Destruction of premises before expiration of lease—Right of tenant to a refund paid in advance—Apportionment—See LANDLORD AND TENANT, 23 B. 15.

(15) Ss. 123, 129—See HINDU LAW (GIFT), 23 B. 234.

(16) *S.* 131—"*Debt*"—*Transfer of a debt—Decree not a debt—Assignment of decree—Notice of assignment—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 232.—A decree is not a "*debt*" within the meaning of that word as used in s. 131 of the Transfer of Property Act (IV of 1882), so as to make a transfer thereof void without express notice.

When a decree is assigned, a notice given under s. 232 of the Civ. Pro. Code (Act XIV of 1882) is sufficient. DAGDU v. VANJI, 24 B. 502=2 Bom. L.R. 414 ... 866

Trees.

(1) *Right to cut trees*—Khoti khasgi *land in the Ratnagiri District—Dunlop's Proclamation — Construction — Crown grant—Right to rescind khoti.*—Defendants were *khots* of the village of Ojharkhol in the Ratnagiri District, of which certain plot (Survey No. 52) was their *khoti khasgi* land. In 1894 they cut down a large number of teak trees growing on this land. Thereupon the Secretary of State for India in Council sued to recover their value, alleging that they were the property of Government.

Defendants pleaded that they were the absolute owners of the trees, and relied in support of their title on a proclamation issued by Government in 1824, known as Mr. Dunlop's Proclamation. This proclamation had been subsequently rescinded by Government in 1851. The material part of Mr. Dunlop's Proclamation was in the following terms:

"Upon the teak and other trees that may be on any person's land, Government has no design. He whose trees may now exist, or be whose trees may hereafter grow, may make such use of them as he pleases. Government will not offer the slightest obstruction."

Held, that this proclamation was not a mere promise, but an actual grant or gift of the teak trees to the persons on whose lands they were then actually growing, or might thereafter grow, and that the gift could not be revoked.

Held, also, that by reason of this proclamation Government had no right to the teak trees growing on the land in question. SECRETARY OF STATE FOR INDIA v. SITARAM SHIVRAM, 23 B. 518=1 Bom. L. R. 19 ... 345

(2) *Timber—Standing timber—Mango tree—Mango tree may be standing timber according to the custom of a locality—Registration Act* XX *of* 1866), *s.* 3.—By the term "timber" is meant properly such trees only as are fit to be used in building and repairing houses.

A mango tree, which is primarily a fruit tree, might not always come within the term "standing timber" used in the definition of immoveable property in s. 3 of the Indian Registration Act (XX of 1866). But it may be classed as a timber tree where according to the custom of a locality its wood is used in building houses. KRISHNARAO v. BABAJI, 24 B. 31=1 Bom. L. R. 489 ... 557

Trust.

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Decree, form of—Account to be taken first—Matters to be considered in framing scheme—Charitable trust—See CHARITY. 24 B. 50.

Trustees.

(1) Removal of—Practice—Civ. Pro. Code (Act XIV of 1882), ss. 539 and 260—Decree—Execution—Charity—Temple—Scheme of management—Failure of trustees to carry out—Mode of enforcing proper management—See CHARITY, 24 B. 45.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 659.

(3) See VENDOR AND PURCHASER, 24 B. 400.

University.

University of Bombay—Act XXII *of* 1857, *s.* 12—*Construction—Candidate for a degree.*—The words "candidate for a degree" in s. 12 of the Act (XXII of 1857) to establish the University of Bombay mean a candidate for the final examination, the passing of which entitles him to a degree. They do not mean a candidate for a degree at any stage of his University career. Students, therefore, presenting themselves for the Previous Examination prescribed by the Senate of the Bombay University need not present the certificate required by that section. *In the matter of* DARASHA RUSTOMJI COLABAWALLA, 23 B. 465 ... 305

Vadilki Rights.

See REGISTRATION, 24 B. 615.

Valuation.

(1) *Court Fees Act* (VII *of* 1870), *s.* 7, *cl.* 10 (*a*), *cl.* 4 (*c*), (*d*), *s.* 12—*Class to which a suit belongs—Decision as to such class—Appeal—Practice.*—An appeal lies against a decision as to the class to which a suit belongs although it does not lie against a decision as to the valuation of the suit in that class. A decision of the lower Court, holding that a suit is one for specific performance of a contract of sale and to be valued according to the amount of the consideration money, is appealable. DADA v. NAGESH, 23 B. 486 ... 323

(2) House tax—Municipal valuation—Civil Court's power to revise such valuation—Municipality—See MUNICIPALITY, 24 B. 607.

(3) See MUNICIPALITY, 23 B. 446.

Varshasan Allowance.

See ACT XXIII OF 1871 (PENSIONS), 23 B. 676.

Vatan.

(1) *Daughter of a vatandar not a vatandar of the same vatan during her father's lifetime—Bombay Act* III *of* 1874, *s.* 5—*Bombay Act* V *of* 1886.—The daughter of a Hindu vatandar is not during the lifetime of her father a vatandar of the same vatan within the meaning of s. 5 of Bombay Act III of 1874, as amended by Bombay Act V of 1886. MUKTABAI v. ANTAJI, 23 B. 715=1 Bom. L. R 206 478

(2) *Restriction upon alienation by a vatandar—Mortgage invalid to what extent — Reg.* XVI *of* 1827—*Act* III (*Bombay*) *of* 1874.— An alienation by way of mortgage of vatan property, or any part of it, executed when Reg. XVI of 1827 was yet in force, had no operation beyond the life of the vatandar who mortgaged. The mortgage was in its inception void against the heir of the vatandar, and had not become validated against the heir by reason of the repeal of the sections in Reg. XVI of 1827, relating to this subject, by (Bombay) Act III of 1874.

The childless widow of a vatandar, deceased in 1847, was the recognised vatandar in possession in 1865. She mortgaged two villages of the vatan to the father of the respondents. The latter two, after litigation, retained possession in 1886, by order of the Commissioner in the Revenue Department, until there should be a decree of Court to the contrary. The widow, according to the judgment below, had held the vatan adversely to her late husband's son, the plaintiff, who was born in 1848 of her co-widow, and he was the true heir, entitled

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from his birth. But the High Court gave effect to the adverse possession of the widow for the period of limitation supporting the mortgage. The plaintiff was the sole heir of the widow, his step-mother, who died in 1877.

The appellant contended that the vatan as inherited by him was free from the mortgage encumbrance, and that he was entitled to possession.

Held (reversing the decree of the High Court), that the mortgage was void against the heir, and had no force beyond the life of the vatandar who had executed it. The decree of the Subordinate Judge to that effect, and for possession, was maintained. PADAPA v SWAMIRAO, 24 B. 556 (P C) = 2 Bom L.R. 548 = 4 C.W.N. 517 = 27 I.A. 86 = 7 Sar P.C.J. 170. ... 901

(3) *Succession to a vatan—Bombay Act* V *of* 1886, *s.* 2—*Widow—Rights of succession of a widow other than the widow of the last holder—Adoption by such widow—Collateral male member.*—Under s. 2 of Bombay Act V of 1886, if there is a male member of a vatandar family, the succession goes to him in preference to a female member, and on his death the succession will go to his heirs with a similar provision. Where there is a male member qualified to inherit vatan property he inherits, and a widow other than the widow of the last male member acquires no right to the vatan by succession or inheritance, and consequently she cannot create, transfer or revive any rights by adoption.

A kulkarni vatan was owned by two brothers A and B. B died first and A became the last male holder. A died in 1881 leaving a widow who held the vatan until her death in 1892. On her death, B's widow took a son in adoption. The adopted son filed a suit to establish his title to the vatan against the defendant, who was a male member of the family and had been registered by the Revenue authorities as the vatandar on the death of A's widow.

Held, that the plaintiff could not succeed, the defendant having a better title to the vatan than the plaintiff or his adoptive mother, under s. 2 of Bombay Act V of 1886. KRISHNAJI v. TARAWA, 24 B 484 = 2 Bom L R. 276. ... 854

Vatandar.

See VATAN, 23 B. 715; 24 B. 556.

Vendor and Purchaser.

(1) *Contract of sale—Delivery of possession—Payment of the whole of the purchase-money—Registered conveyance not executed—Transfer—Attachment—Vendor having no attachable interest—Transfer of Property Act* (IV *of* 1882), *ss.* 40, 54, 55 (6) (*b*)—*Trusts Act* (II *of* 1882), *s.* 91.—Under a contract of sale with respect to certain fields, possession was delivered to the vendee, and the whole of the purchase-money was paid to the vendor, but the transfer was not affected, as the necessary registered conveyance had not been executed. Subsequently a judgment-creditor of the vendor sought for a declaration that the fields were liable to be attached and sold as the property of the judgment debtor. Before the case was decided by the Court of first instance, a registered conveyance had been executed

Held, that the judgment-debtor was nothing more than a bare trustee and had no attachable interest in the property. KARALIA NANUBHAI v. MANSUKHRAM, 24 B. 400 = 2 Bom. L.R. 220 ... 799

(2) *Contract of sale—Non-payment of purchase-money—Suit for possession by vendee who has not paid the purchase money—Remedy of vendor—Limitation—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 47.—The plaintiffs owned certain land on which the defendant, with the plaintiffs' leave, built a house. Disputes arose between plaintiffs and defendant, and in February 1893, the defendant obtained an order from the Mamlatdar in a possessory suit against the plaintiff directing the plaintiffs to give up possession of the property to him. In August 1893, an agreement was made between them, in pursuance of which the defendant executed a rent-note to the plaintiffs

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promising to give up the property to the plaintiffs at the end of four months on payment by the plaintiffs of Rs. 100. On the 25th November 1896, the plaintiffs brought this suit for possession, alleging that the defendant refused to give up the property. The District Judge dismissed the suit, finding that the plaintiffs had not paid the Rs. 100, and holding that the defendant was, therefore, justified in putting an end to the contract contained in the rent-note. He further held that the suit was barred by limitation not having been brought within three years from the date of the Mamlatdar's order of 28th February 1893 (see Limitation Act, XV of 1877, sch. II, art. 47).

Held (reversing the decree) that the evidence showed the transaction to be a sale of the property by the defendant to the plaintiff for Rs. 100, possession being given to the plaintiff under the lease for four months; that the sale was a completed transaction although the Rs. 100 had not been paid, and that the only remedy of the defendant was to sue for the amount.

Held, also, that the contract between the parties dissolved the order of the Mamlatdar in the possessory suit and rendered it unnecessary for the plaintiffs to sue to set it aside. The present suit, which was based on the contract of sale, was, therefore, not barred by art. 47 of the Limitation Act. SAGAJI v. NAMDEV, 23 B. 525=1 Bom. L.R. 5 ... 349

(3) *Deposit—Right of purchaser to return of deposit—Lien of purchaser for the part of the purchase-money paid by him*—A purchaser of land who has paid part of the purchase-money by way of deposit, but who afterwards unjustifiably repudiates the contract of purchase, or is guilty of any default by reason of which the sale is not carried out is not entitled to recover the deposit from the vendor.

The vendor is not necessarily entitled to retain the deposit merely because under the circumstances, the Court refuses to grant specific performance against him.

From the moment part of the purchase-money is paid, the purchaser has a lien upon the property to that extent, which lien can only be lost to him by reason of his failing to carrying out his part of the contract. BALVANTA v. BIRA, 23 B. 56 ... 37

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 181.

Vested Remainder.

See HINDU LAW (WILL), 24 B. 420.

Village Officer.

See EVIDENCE, 24 B. 43.

Voluntary Conveyance.

See MINOR, 23 B. 146.

Vritti.

(1) See HINDU LAW (GIFT), 23 B. 131.
(2) See HINDU LAW (PARTITION), 23 B. 597.
(3) See MAINTENANCE, 23 B. 291.

Wager.

(1) *Wagering contracts—Satta transactions - Suit to recover brokerage in respect of satta transactions—Bombay Act* III *of* 1865—*Contract Act* (IX *of* 1872), s. 30.—Plaintiff was employed by defendants to enter into cotton transactions on their behalf at Dholera. The contracts for the sale and purchase of cotton were made on terms contained in a printed form which incorporated the rules framed by the cotton merchants of Dholera. These rules expressly provided for the delivery of cotton in every case and forbade all gambling in differences. In spite of these rules, and the express terms of the contracts, the course of dealings was such that none of the contracts were ever completed except by payment of differences between the contract price and the market price in Bombay on the *Vaida* day. The plaintiff entered into numerous transactions of this kind on the defendant's behalf. He now sued to recover from them the balance due to him on account of brokerage, commission and losses incurred in the said transactions.

Wager—(*Concluded*). PAGE

Held, that the transactions were a mere gambling for differences, and no suit would lie, under Bombay Act III of 1865, to recover any of the items connected with such transactions.

In order to determine whether a contract is a wagering contract, the Court will not only look at the terms of the written contract, but also probe among the surrounding circumstances to find out the true intentions of the parties. DOSHI TALAKSHI V. SHAH UJAMSI VELSI, 24 B. 227 = 1 Bom. L.R. 786 ... 688

(2) See INSURANCE, 23 B. 191.

Wagering Contract.

See WAGER, 24 B. 227.

Walikar Service.

See SERVICE TENURE, 24 B. 482.

Warranty.

Breach of warranty—Suit on warranty—Principal and agent — Guardian —Minor—Loan obtained by guardian as such—Liability for such loan—Warranty by guardian of authority to borrow—Misrepresentation on a point of law—Contract Act (IX of 1872), s. 235—Guardian's liability.—Plaintiff, having lent a sum of money to one Rupaliba as guardian of her minor son Ranmalsangji, brought a suit against the minor, represented by his guardian, to recover it. In that suit a consent decree was passed, which directed the amount due to him to be recovered out of the minor's estate. On Ranmalsangji's coming of age he got the consent decree set aside, and the plaintiff had to refund the sum which he had recovered under it. Thereupon the plaintiff sued Rupaliba to recover the amount as damages for breach of warranty, alleging that she had represented to him that she had authority to incur the debt on behalf of the minor and to bind his estate, whereas she had really no such authority.

Held, that the plaintiff could not recover, there having been no such misrepresentation as would support an action for a breach of warranty.

Assuming that there was a representation, the only possible representation, if the case be treated as coming within s. 235 of the Contract Act (IX of 1872), was that the defendant represented that she was the agent of her son. But as the plaintiff knew that the son was an infant, he must have been aware that any representation that defendant was her infant son's duly authorized agent was incorrect, for an infant cannot appoint an agent, and consequently no warranty, such as would support a suit, could arise out of such a representation.

Even if it were conceded that there was a representation by Rupaliba, as to her power to bind the minor's estate, it was one on a point of law, and as such, it was incapable of supporting the suit. SHET MANIBHAI v. BAI RUPALIBA, 24 B. 166 = 1 Bom. L.R. 166 ... 648

Waste Land.

See LIMITATION ACT (XV OF 1877), 24 B. 435.

Water.

Water-course—Riparian owners, rights of—Mamlatdar—Jurisdiction—Mamlatdar's Act (Bom. Act III of 1876), s. 4.—The law as to riparian owners is the same in India as in England, and is stated in illustration (*h*) of s. 7 of the Easements Act (V of 1882). Each proprietor has a right to a reasonable use of the water as it passes his land, but, in the absence of some special custom, he has no right to dam it back, or exhaust it, so as to deprive other riparian owners of like use.

What would constitute an unreasonable diversion of water such as to disturb the use of the lower riparian owners, is a question of fact which the Legislature has given a Mamlatdar jurisdiction to decide. NARAYAN v. KESHAV, 23 B. 506 ... 337

Water-course. PAGE

(1) Bombay Irrigation Act (Bom. VII of 1879), s. 48—Leakage water—Rights of riparian proprietors—See MAMLATDAR, 23 B. 761.

(2) See WATER, 23 B. 506.

Water-works.

Municipality of Bombay—Right to enter on land of Railway Company to lay pipes, &c.—Bombay Municipal Act (Bom. Act III of 1888), ss. 222, 265—Railways Act (IX of 1890), s. 12—Accommodation works.—Under the Bombay Municipal Act (Bom. Act III of 1888) the Corporation of Bombay has the right, for the purpose of supplying the city with water, to enter upon land belonging to other owners to make connections between the mains and to lay the pipes forming the connections through or under such lands without the owners' permission, though not without giving them reasonable notice in writing.

Held, also, that s. 12 of the Railways Act (IX of 1890) does not exclude the above right of the Corporation of Bombay to enter on land belonging to the G.I.P. Railway Company for the said purposes. G.I.P. RAILWAY COMPANY v. MUNICIPAL CORPORATION OF BOMBAY, 23 B. 358 ... 238

Will.

(1) *Construction—Bequest to wife with obligation of maintaining and educating children—Interest taken under such bequest—Decree against wife—Attachment of interest under will—Civ. Pro. Code (Act XIV of 1882), s. 274—Fraudulent conveyance—Transfer of Property Act (IV of 1882), s. 53.*—Bomanji Darasha Captain died in 1891, leaving a widow Dhunbaiji (defendant No. 1) and two sons, Perozsha and Darasha (defendants Nos. 4 and 5). By his will he bequeathed the residue of his property to trustees (of whom Dhunbaiji was one) in trust to pay the rents and income thereof to his wife Dhunbaiji for life, "she thereout maintaining, educating, and bringing up" his children in a manner suitable to their degree in life. After his death the property, moveable and immoveable, was to be divided among his sons equally when Darasha should attain the age of twenty-five. He attained majority in October, 1895. At the date of suit, Darasha was eighteen years old and Perozsha was twenty-five. It was contended that Dhunbaiji was only a trustee of the rents for the benefit of her sons Perozsha and Darasha.

Held, that under the will Dhunbaiji took a life-interest in the rents subject to the obligation of maintaining, educating and bringing up the children. The only two surviving children (Perozsha and Darasha), having attained majority and having received property under the will of an uncle, were now no longer in need of being maintained by Dhunbaiji. The obligation imposed upon her, therefore, by her husband's will was discharged, and she was now entitled to a life-interest free from all further obligation to maintain his children.

On the 13th June, 1895, the plaintiffs obtained a decree for Rs. 3,976-10-10 against Dhunbaiji and her son Perozsha. In execution of that decree they attached under an order dated 2nd July, 1895, the immoveable properties which had belonged to the testator's estate on the ground that both Dhunbaiji and Perozsha had an interest in them. The attachment was issued under s. 274 of the Civ. Pro. Code (Act XIV of 1882). The defendants contended that Dhunbaiji had no attachable interest at all in the said properties, she being under the will merely a trustee as above-mentioned for her sons, and that, if she had, it was an interest in moveable property, which should have been attached under s. 268 of the Code, and that the attachment under s. 274 was ineffectual and inoperative. They further alleged that by an assignment dated the 20th February, 1896, Dhunbaiji had assigned and surrendered her life-interest to her son Darasha, and that such interest was, therefore, not available to satisfy the plaintiff's decree against her. As to Perozsha's interest, the defendants alleged that by a deed of settlement dated the 9th February, 1895, it was validly settled for the benefit of himself and his family and that, therefore, he had no interest in him which could be attached under the order of the 2nd July, 1895.

Will—(*Concluded*). PAGE

Held (1) that Dhunbaiji had an attachable interest in the property.
(2) That her interest was an interest in immoveable property and was validly attached under s. 274 of the Civ. Pro. Code.
(3) That her assignment of the 20th February, 1896, was invalid as against the plaintiffs under s. 276 of the Civ. Pro. Code.
(4) That even independently of the attachment, her assignment to her own son Darasha was invalid as against the plaintiffs under s. 53 of the Transfer of Property Act (IV of 1882). The object of that assignment was to protect the property from the creditors, and it was designed to defeat the plaintiffs' decree, and it was, therefore, fraudulent and void as against the plaintiffs.
(5) That the deed of settlement by Perozsha of the 9th February, 1895, was void as against the plaintiffs under s. 53 of the Transfer of Property Act (IV of 1882).
(6) That the plaintiffs were entitled to realize the shares and interest both of Dhunbaiji and of Perozsha so far as might be necessary to satisfy their decree of 13th June, 1895. NATHA KERRA v. DHUNBAIJI, 23 B. 1 ... 1

(2) *Parsis—Construction—Bequest of power of management to widow and daughter for life—Life estate—Gift to two persons as joint tenants or tenants in common—Intestacy—Non claim by persons entitled to shares—Limitation.*—Jehangirji Nusserwanji Wadia, a Parsi, died in 1843 leaving a widow (Manekbai) and a daughter (Motlibai) and two grandsons (sons of Motlibai) him surviving. By his will (written in the Gujarati language) he directed that during her life his widow and daughter were "to agree together and to manage the affairs with unanimity" and after Manekbai's death he gave the whole power over his estate to his daughter Motlibai "and so long as Motlibai enjoys her natural life, everything is to remain with her." The will then continued: "After the death of Motlibai—Motlibai has two sons, namely, Bhai Navroji and Bhai Nusserwanji—these two boys are the owners of whatever property and estate there may be belonging to me. They are considered as my children. No one is to offer them any hindrance or impediment. I have presented all to my wife and to my daughter, Motlibai.
Held (confirming Fulton, J.) that Manekbai and Motlibai took only a life-interest in the estate
(2) (Varying the decree of Fulton, J.) that Motlibai's two sons took the estate as joint tenants subject to the life interests of Manekbai and Motlibai and not as tenants in common
One Manockji Navroji Wadia died intestate in 1837 leaving a widow (Motlibai) and two sons, *viz.*, Nusserwanji and Navroji. Motlibai obtained letters of administration and until her death in 1897 remained in sole possession and enjoyment of her husband's estate, although by law entitled only to a widow's share, the two sons being entitled to the remainder. In this suit filed in 1897 by the widow of Nusserwanji, one of the sons:
Held, that the right of both sons to recover the shares to which they were originally entitled was barred by limitation (art. 123 of the Limitation Act XV of 1877) and their right to such shares was extinguished under s. 28 of the Limitation Act. Manockjis' estate had, therefore, become merged in Motlibai's estate. NAVROJI MANOCKJI WADIA v. PEROZBAI, 23 B. 80 ... 53

Witness.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 318
(2) See PRACTICE, 23 B. 213.

Words and Phrases.

(1) "Accommodation works"—See WATER-WORKS, 23 B. 358.
(2) "Administrator"—See BANK OF BOMBAY, 24 B. 350.
(3) "Agreements by way of wager"—See INSURANCE, 23 B. 191.
(4) "Alankar puja"—See CRIM. PRO. CODE (ACT V OF 1898), 24 B. 527.
(5) "A man of business"—See EVIDENCE, 23 B. 63.
(6) "Anantarah Sapindadyah"—See HINDU LAW (INHERITANCE), 24 B. 317.

Words and Phrases—(*Continued*). PAGE

(7) "Ancestral property"—See HINDU LAW (MAINTENANCE), 23 B. 608.
(8) "Ante litem Motam"—See EVIDENCE, 23 B. 63.
(9) "Appendage to property"—See MAHOMEDAN LAW (PRE-EMPTION), 24 B. 414.
(10) "Appear"—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 414.
(11) "Appearing"—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 414.
(12) "Apratishthita"—See HINDU LAW (INHERITANCE), 23 B. 229.
(13) "Average"—See CONTRACT, 24 B. 97.
(14) "Badves"—See CRIM. PRO. CODE (ACT V OF 1898), 24 B. 527.
(15) "Bandhawas"—See HINDU LAW (INHERITANCE), 24 B. 563.
(16) "Benares"—See CRIM. PRO. CODE (ACT V OF 1898), 24 B. 527.
(17) "Bhratarah"—See HINDU LAW (INHERITANCE), 24 B. 563.
(18) "Candidate for a Degree"—See UNIVERSITY, 23 B. 465.
(19) "Chakravridhi"—See HINDU LAW (GENERAL), 24 B. 305.
(20) "Codicil"—See PROBATE, 24 B 8.
(21) "Compartment"—See ACT IX OF 1890 (RAILWAYS), 24 B. 293.
(22) "Contract"—See MINOR, 23 B. 146.
(23) "Course of business"—See EVIDENCE, 23 B. 63.
(24) "Court of competent jurisdiction"—See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 456.
(25) "Court of competent jurisdiction"—See FOREIGN JUDGMENT, 24 B. 86.
(26) "Court of Small Causes"—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 382.
(27) "Dadyat"—See HINDU LAW (ADOPTION), 24 B. 367.
(28) "Date of issuing notice"—See LIMITATION ACT (XV OF 1877), 23 B. 35.
(29) "Datta lai janoi didhelu"—See HINDU LAW (ADOPTION), 24 B. 473.
(30) "Dattvidhan"—See HINDU LAW (WILL), 23 B. 271.
(31) "Debt"—See TRANSFER OF PROPERTY ACT (IV OF 1882), 24 B. 502.
(32) "Defendant"—See MINOR, 24 B. 238.
(33) "Dharam"—See HINDU LAW (WILL), 23 B. 725.
(34) "Dharmashala"—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 659.
(35) "Duhitri"—See HINDU LAW (INHERITANCE), 24 B. 563.
(36) "Employed"—See MUNICIPALITY, 23 B. 529.
(37) "Erect"—See MUNICIPALITY, 23 B. 248.
(38) "Erection"—See MUNICIPALITY, 23 B. 248.
(39) "Further accommodation works"—See WATER-WORKS, 23 B. 358.
(40) "Gotraja sapinda"—See HINDU LAW (INHERITANCE), 24 B. 563.
(41) "Guardian"—See LUNATIC, 23 B. 403.
(42) "Heirs"—See WILL, 23 B. 80.
(43) "Holder"—See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 24 B. 539.
(44) "Include"—See SPECIFIC RELIEF ACT (I OF 1877), 23 B. 673.
(45) "In the ordinary course of business"—See EVIDENCE, 23 B. 63.
(46) "Kartavyam"—See HINDU LAW (ADOPTION), 24 B. 367.
(47) "Khalit"—See MAHOMEDAN LAW (PRE-EMPTION), 24 B. 414.
(48) "Khot"—See KHOT, 24 B. 533.
(49) "Khotki"—See KHOT, 24 B. 533.
(50) "Land"—See MUNICIPALITY, 24 B. 600.
(51) "Lawful"—See PARSIS, 23 B. 279.
(52) "License"—See LICENSE, 23 B. 397.
(53) "Low ground"—See MUNICIPALITY, 24 B. 125.
(54) "Malak"—See HINDU LAW (WILL), 24 B. 420.
(55) "Matri-Sannikarshat"—See HINDU LAW (INHERITANCE), 24 B. 317.
(56) "Maximum quantity"—See CONTRACT, 24 B. 97.
(57) "Mirasi"—See LANDLORD AND TENANT, 24 B. 426.
(58) "Necessary cause"—See PLEADER AND CLIENT, 23 B. 657.
(59) "Nirdhan"—See HINDU LAW (INHERITANCE), 23 B. 229.
(60) "Offence attended by criminal force"—See CRIM. PRO. CODE (ACT X OF 1882), 23 B. 494.

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(61) "Or of the original suit"—See CIV. PRO. CODE (ACT XIV OF 1882), 24 B. 314.
(62) "Ordinary"—See HINDU LAW (SUCCESSION), 23 B 257.
(63) "Person whose immoveable property has been sold"—See CIV. PRO. CODE (ACT XIV OF 1882), 23 B. 450.
(64) "Pitrarjit"—See HINDU LAW (MAINTENANCE), 23 B. 608.
(65) "Plaintiff"—See MINOR. 24 B. 238.
(66) "Porwad"—See HINDU LAW (SUCCESSION), 23 B. 257.
(67) "Private business"—See EVIDENCE. 23 B. 63.
(68) "Probate"—See BANK OF BOMBAY, 24 B. 350
(69) "Provided for"—See HINDU LAW (INHERITANCE), 23 B. 229.
(70) "Putra"—See HINDU LAW (INHERITANCE), 24 B. 563.
(71) "Putradanam"—See HINDU LAW (ADOPTION), 24 B. 367.
(72) "Registered"—See BANK OF BOMBAY. 24 B. 350.
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(74) "Sadavart"—See CIV. PRO. CODE (ACT XIV OF 1882). 23 B. 659.
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(76) "Sadrasha"—See HINDU LAW (ADOPTION), 24 B. 367.
(77) "Sakulyas"—See HINDU LAW (INHERITANCE), 24 B. 563.
(78) "Self-acquired property"—See HINDU LAW (MAINTENANCE), 23 B. 608.
(79) "Shaffa"—See MAHOMEDAN LAW (PRE-EMPTION), 24 B. 414.
(80) "Share-holders"—See BANK OF BOMBAY. 24 B. 350.
(81) "Shevadbaris"—See CRIM. PRO. CODE (ACT V OF 1898), 24 B. 527.
(82) "Standing timber"—See TREES, 24 B. 31.
(83) "Street"—See MUNICIPALITY, 24 B. 600.
(84) "Swarjit"—See HINDU LAW (MAINTENANCE), 23 B. 608.
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(88) "Timber"—See TREES, 24 B. 31.
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(90) "Town of Bombay"—See MORTGAGE (SALE), 23 B. 348.
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(94) "Viprakarshat"—See HINDU LAW (INHERITANCE), 24 B. 317.
(95) "Wager"—See INSURANCE, 23 B. 191.
(96) "Waras"—See HINDU LAW (WILL), 24 B. 420.
(97) "Wheel-interest"—See HINDU LAW (GENERAL), 24 B. 305.
(98) "Will"—See PROBATE, 24 B. 8.
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(100) "Written instrument"—See ACT XVII OF 1879 (DEKKHAN AGRICULTURIST'S RELIEF), 24 B. 394.

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